

**MEETING OF THE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF
THE STATE BAR OF MICHIGAN**

**September 21, 2013
Lansing, Michigan**

Minutes

I. Call to Order

The Chair of the Section, Thomas F. Sweeney, called the meeting to order at 10:36 a.m.

II. Attendance

A. The following officers and members of the Council were in attendance:

Sweeney, Thomas F.	Clark-Kreuer, Rhonda M.
Morrissey, Amy N.	Lucas, David P.
Imami, Shaheen I.	Marquardt, Michele C.
Steward, James B.	Murkowski, Hon. David M.
Teahan, Marlaine C.	New, Lorraine F.
Ard, W. Josh	Skidmore, David L.J.M.
Ballard, Christopher A.	Spica, James P.
Brigman, Constance L.	Vernon, Geoffrey R.

A total of 16 council members and officers were present representing a quorum.

B. The following officers and members of the Council were absent with excuse:

Allen, Susan M.	Ouellette, Patricia M.
Bearup, George F.	Taylor, Robert M.
Kerr, J. David	Welber, Nancy H.
Lentz, Marguerite M.	

C. The following officers and members were absent without excuse:

None.

D. The following ex-officio members of the Council were in attendance:

Brower, Jr., Robert D.	Harder, Mark K.
Gregory, George W.	Harter, Hon. Phillip E.

E. Others in attendance:

Jill Goodell	W. Jerry Byrd
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John Lindley
Joe Viviano
Neal Nusholtz
Julie Paquette
Rick Mills
Jeanne Murphy
Carol M. Hogan
Chris Caldwell
Mark-Andre Timinsky

Bradley A. Vauter
Raymond A. Harris
Kenneth F. Silver
Daniel E. Cogan
Michael Lichterman
Amy R. Tripp
Loukas P. Kalliantasis
Nazneen H. Syed
Katie Lynwood

III. **Minutes of the June 8, 2013, Meeting of the Council**

Shaheen I. Imami presented the minutes of the June 8, 2013, Council meeting. Amy N. Morrissey moved for approval with support from Rhonda M. Clark-Kreuer. The motion was approved on a voice-vote with no nays or abstentions.

IV. **Treasurer's Report**

Outgoing-Treasurer James B. Steward presented the Treasurer's report. Receipts and expenditures remain on track with the budget, with a possibility that support for the Annual Probate Institute may have gone a little higher than the budgeted amount.

V. **Chairperson's Report – Thomas F. Sweeney**

Incoming-Chairperson, Thomas F. Sweeney, presented the Chairperson's report:

- Mark K. Harder was thanked for his tenure on the Counsel and his leadership as Chairperson. Mr. Harder's contributions over the years went far beyond the MTC.
- Recognition and thanks were given to the Hon. Darlene O'Brien and Rebecca Schnelz as their final terms on the Council expired.
- Constance L. Brigman's contributions to Guardianship, Conservatorship, and End of Life Committee were specifically noted. Although Ms. Brigman is stepping aside as chair of the committee, she is staying on to guide transition as Rhonda M. Clark-Kreuer and Katie Lynwood take over as co-chairs. Ms. Brigman will now chair the Citizens Outreach committee.
- Marguerite M. Lentz is the new chair of the Committee on Special Projects – taking over for Marlaine C. Teahan.
- Otherwise, he believes all chairs are set and he will circulate an updated list.
- The October 2013 meeting will be on October 12, 2013, at The Townsend Hotel in Birmingham. The rest of the meeting schedule is in the materials.
- The biennial work plan was reviewed and the discussion of MCL 211.27a will move to P1. Constance L. Brigman moved for approval with support from Rhonda M. Clark-

Kreuer. The motion was approved on a voice-vote with no nays or abstentions. Voice vote, no nays.

VI. Report of the Committee on Special Projects – Marguerite M. Lentz

Marlaine C. Teahan, the outgoing chair, presented the following report for CSP:

- Recommended that the Council oppose amendments to HB 4382-4384 which are contrary to the public policy position previously adopted by the Council and would create a “meaningful communication” requirement within EPIC related to do-not-resuscitate orders approved by guardians. Ms. Teahan next moved for a formal position opposing the proposed amendments to HB 4382-4384, with support from the Hon. David M. Murkowski. The motion was approved on a Council vote of 16-0, with no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.
- Recommended that the Council support legislation and court rules that would direct all appeals from the Probate Courts to the Michigan Court of Appeals, rather than the bifurcated appellate process that currently splits appeals between the Circuit Courts and the Michigan Court of Appeals based on the subject matter. Specifically, MCL 600.308 would be amended to clarify that all appeals from the Probate Courts would go to the Michigan Court of Appeals, while maintaining that final orders would be appealable as a matter of right and interlocutory orders appealable by leave. MCL 600.861 and MCL 600.863 would be repealed. The Court Rules Committee will continue looking at the proposed revisions to MCR 5.801 regarding the contents of the “laundry list” of items that are considered “final” orders. Ms. Teahan moved for formal position to amend MCL 600.308 and repeal and MCL 600.861 and MCL 600.863, with support from the Shaheen I. Imami. The motion was approved on a Council vote of 16-0, with no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.
- Recommended that the Council support legislation and court rules that would modify the automatic-stay provisions in MCL 600.867 and MCR 5.802 (and other affected court rules) after an appeal is claimed. The goal is to more closely align the process related to stays in probate appeals to those in circuit court appeals. Specifically, MCL 600.867 would be amended to provide that an appeal of right would trigger a 21-day automatic stay to permit the appellant to then file a motion for stay with the probate court. The process is analogous to that in circuit courts under MCR 2.614. MCR 5.802(C) would be amended to clarify that the automatic-stay provision does not apply to an order that removes or appoints a fiduciary (current version omits “appoints” and some practitioners have taken this to mean that the portion of an order that appoints a fiduciary after removing a prior fiduciary is stayed), while MCR 7.208 and MCR 7.209 would be amended to be consistent with the other changes. Ms. Teahan moved for formal position to amend MCL 600.867, MCR 5.802, MCR 7.208, and MCR 7.209, with support from Shaheen I. Imami. The motion was approved on a Council vote of 16-0, with no abstentions. This is a PUBLIC POLICY POSITION to be reported to the SBM.

- The Court Rules Committee will present proposed amendments to Parts 1 and 2 of Chapter 7 of the Michigan Court Rules to reflect the changes to the appeals and stay processes.
- George F. Bearup reported to CSP that the real estate committee will continue work on uncapping legislation (2012 PA 497).

VII. **Standing Committee Reports**

A. **Internal Governance**

1. Budget – Shaheen I. Imami

Shaheen I. Imami and James B. Steward reported that the 2013-2014 budget will be presented at October meeting, but very few, if any, changes are expected.

2. Bylaws – Nancy H. Welber

Christopher A. Ballard reported on the possibility of allowing non-attorney members to the Section. Thomas F. Sweeney mentioned the possibility of streamlining the Section's mission statement.

3. Awards – Douglas A. Mielock

Amy N. Morrissey reported on the status of the selection process for the George Cooney Society Award and the Michael Irish Award. Former-Chairperson Michael S. McClory will be receiving the Michael Irish Award.

4. Planning – Amy N. Morrissey

No report.

5. Nominating – Harold G. Schuitmaker

No report.

6. Annual Meeting – Amy N. Morrissey

No report.

B. **Education and Advocacy Services for Section Members**

1. *Amicus Curiae* – David L.J.M. Skidmore

David L.J.M. Skidmore reported that the committee filed its amicus brief in *Ducharme*. Mr. Skidmore reported that the issue briefed is whether MCL 700.7905 provides the exclusive statute of limitation for a beneficiary to proceed against a trustee for a breach.

Mr. Skidmore also reported that there is another amicus request pending.

2. Probate Institute – Shaheen I. Imami

Shaheen I. Imami reported that planning for the 2014 Probate Institute is proceeding, but there are not yet any firm commitments from speakers.

3. State Bar and Section Journals – Amy N. Morrissey

No report.

4. Citizens Outreach – Constance L. Brigman

No report.

5. Electronic Communications – William J. Ard

No report.

C. Legislation and Lobbying

1. Legislation – Christopher A. Ballard

Christopher A. Ballard reported that SB 465-466 should be introduced this month. Mr. Ballard also discussed the mental health court legislation (HB 4694-4697) introduced in May 2013 (primarily related to criminal matters). He also contacted Henry Woloson related to the status of the proposed burial arrangement legislation. Finally, there was some discussion related to SB 309 which would require an affidavit of merit for malpractice claim against architects and engineers, and whether the same should be pursued for attorneys. The committee will look at all proposals.

2. Updating Michigan Law – Marguerite Munson Lentz

Rick Mills reported that the primary projects before the committee are digital assets and directed trusts legislation. James P. Spica described the directed trusts by first suggesting it is a misnomer - an attempt to allow a settlor to make a formal election to partition a trusteeship to create legal title to property, but not accepting an appointment as a trustee under the trust instrument for purposes of fiduciary duty. The thrust is to divide liability in conjunction with the scope of the duties to the particular trustee.

Mark K. Harder reported the status of the domestic asset protection trust (“DAPT”) legislation. Mr. Harder noted that discussions with the commercial side of the general counsel arm of the banks varied from those in the trust administration arm of the banks. Specifically, there are some concerns about how it might affect the lending side of the banks' business.

3. Insurance Committee – Thomas F. Sweeney

Thomas F. Sweeney reported on SB 31-32 regarding insurable interests. The legislation is through the Senate, but waiting for a hearing in the House insurance committee.

James P. Spica asked whether the Council will look at proposed legislation to exempt trustees from having to analyze and manage insurance policies under the rubric of the prudent investor rule. Thomas F. Sweeney suggested that it is legislation that the banks want and, therefore, they should draft it.

4. Artificial Reproductive Technology – Nancy H. Welber

Christopher A. Ballard reported that committee has been reviewing the 2008 UPC amendments. The goal is to have something to review in late-fall or early-winter.

D. Ethics and Professional Standards

1. Ethics – J. David Kerr

No report.

2. Unauthorized Practice of Law & Multidisciplinary Practice – Robert M. Taylor

No report.

3. Specialization and Certification – James B. Steward

James B. Steward spoke to Janet Welch and Lynn Chard regarding the concept of specialization and certification. Specifically, he notes issues related to: the CLE component; testing and the drafting of tests; costs; and the reaction by other SBM sections. He noted that the issue is not on the radar of any other section. He will work on getting information about the proposal to other sections to promote discussion on the topic.

E. Administration of Justice

1. Court Rules, Procedures and Forms – Michele C. Marquardt

No report.

2. Fiduciary Exception to Attorney Client Privilege – George F. Bearup

No report.

F. Areas of Practice

1. Real Estate – George F. Bearup

No report.

2. Transfer Tax Committee – Nancy H. Welber

No report.

3. Charitable and Exempt Organization – Christopher A. Ballard

No report.

4. Guardianship, Conservatorship, and End of Life Committee – Rhonda M. Clark-Kreuer

Constance L. Brigman reported on the status of uniform guardianship legislation (she referenced a recent Michigan Lawyer's Weekly article). Ms. Brigman noted that proposed changes will affect jurisdictional determinations and increase the administrative burden on the courts. She also stated that the emergency provisions also are different from what currently exists in EPIC. Ultimately, the question is whether the burden is worth it given that the proposal addresses issues that rarely arise.

There was also some discussion on the status of legislation that addresses petitioning for the appointment of guardian for child prior to turning 18 years-old, which is still sitting in committee.

Mark K. Harder discussed status of the Project Wildcat disputes. He noted that HCAM does not like it either. Unfortunately, a meeting with Michael Gadola, Sarah Slocum, Carrie Sederberg, Rebecca Beckler (the Section's lobbyist), and Mr. Harder was not seen as very productive. Some questions exist whether there is an interest by the executive branch in reigning Brad Geller in and addressing the seriousness of his actions. There appears to be a denial that Project Wildcat is really a "policy" document. Mr. Harder objected to the intimation that the Section participated in the drafting of the revisions to Project Wildcat disseminated by Mr. Geller. There was a discussion regarding options in going forward. Ms. Brigman has been working on a draft of a document from the Section's perspective and will pass it to Rhonda M. Clark-Kreuer.

G. Liaisons

1. Alternative Dispute Resolution Section Liaison – Sharri L. Rolland Phillips

No report.

2. Business Law Section Liaison – John R. Dresser

No report.

3. Elder Law Section Liaison – Amy R. Tripp

Amy R. Tripp reported on the status of HB 4013 on pooled-account trusts. Apparently, the bill was "pulled" by Governor Snyder - apparently CMA Director Havaman thinks that the feds will penalize the State if HB 4013 is adopted. There is an effort to get it back on track by working with the Governor Snyder's lobbyist.

4. Family Law Section Liaison – Patricia M. Ouellette

No report.

5. ICLE Liaison – Jeanne Murphy

Jeanne Murphy noted the growth in the ICLE Community.

6. Law Schools Liaison – William J. Ard

No report.

7. Michigan Bankers Association Liaison – Susan Allan

No report.

8. Michigan Probate Judges Association Liaison – Hon. Judge David M. Murkowski/Hon. Darlene O'Brien

No report.

9. Probate Registers Liaison – Rebecca A. Schnelz

No report.

10. SCAO Liaisons – Marlaine C. Teahan

Marlaine C. Teahan reported that the workgroup committee met and will probably tweak the petition and order for assignment form based on changes to the calculation of the inventory fee. Ms. Teahan noted changes to the petition and order for complete estate settlement form and the petition and order for sale of real estate form. There is a new ADM related to technical corrections to MCR 5.208(F). There is a hearing set for our other proposed changes in the fall and may be moved to the top of the list.

11. Solutions on Self-Help Task Force Liaison – Rebecca A. Schnelz

No report.

12. State Bar Liaison – David R. Brake

No report.

13. Taxation Section Liaison – Frederick H. Hoops, III

No report.

VIII. **Other Business**

Thomas F. Sweeney reported that the Section is looking to moving to an all-electronic version of Probate Journal by end of 2014.

IX. Hot Topics

None.

X. Adjournment

Meeting adjourned by Thomas F. Sweeney at 11:59 a.m.

ATTACHMENT 1

Probate and Estate Planning Council
Treasurer's Report
for 9-21-2013

Income/Expense Report

Attached is the income and expense reports for May, June and July 2013 (unaudited). The dues revenue at the end of July 2013 is about \$1,585 higher than through July 2012, and our total revenue is just slightly more than \$2,000 over the total revenue budgeted for this year. Our entire total revenue for last year was higher due to additional items included under the "other" income category.

Our total expense payments at present are about \$10,000 more than this time last year. About \$4,300 of this is due to an additional Probate Journal publication expense payment that was made in July this year, that was made later last year. We remain on target for the Journal expense payments – we have slightly under \$10,000 of our budget left for the Journal expense, and at present, the cost per issue is running about \$7,750 (\$3,750 for ICLE's work, and just under \$4,000 per issue for printing and mailing costs). The cost to create the searchable on-line archive data base was also charged to the journal budget. Therefore, we are very much on target with the projected revenue as shown in the budget. However, I do not know if there will be ongoing charges to update the archive.

Another \$2,500 of the extra expense paid to date, compared to last year, is one additional lobbying payment included on this July report. This expense item remains on budget.

Also, last year the total support for the Annual Institute at this time came to \$11,557 (which was the total for the year); whereas, this year our total is \$13,688. Which is slightly more than \$2,000 over last year, and \$688 over budget. For this year. We should consider amending the budget to cover this additional expense (I doubt that there will be any more bills coming in for the Annual Institute, but I do not know that for sure.) I believe that one primary reason for the higher expense this year was a reduction in sponsor participation.

Overall, we remain within budget, even with the overage for the Institute, because several other items are coming in under budget. But, as some have suggested, we may need to discuss how we handle the support for the annual institute, including how we budget for it.

Expense Reimbursement Requests

Please keep in mind that the State Bar prefers that all expenses submitted to the State Bar of Michigan within 30 days of when the expense was incurred. As we near the end of the fiscal year, you will need to get our reimbursement expense vouchers in to me as quickly as reasonably possible after the September meeting, so we can be sure to have them included in this year's expense report.

Also, as previously noted, the Bar has revised the expense reimbursement form to include the new mileage rate on some of the lines. This is available on the State Bar website at:

<http://www.michbar.org/generalinfo/pdfs/sectexp.pdf>

Again this month, I've also attached a blank (non fillable) pdf copy of the expense reimbursement form at the end of this report which can be printed off directly and filled out manually

Hearts and Flowers Fund:

In late August, George Bearup was injured in a bicycling accident resulting in a fractured pelvis. We sent a card and flowers (from our Hearts & Flowers fund) wishing him a speedy recovery and to let him know we are thinking of him.

Jim Steward
Council Treasurer

**Probate and Estate Planning Section
Treasurer's Report as of May 31, 2013**

	March	April	May	FY to Date Actual	Budget 2012-13	Variance	Year to Date Percentage
Revenue							
Membership Dues	\$ 175	\$ 105	\$ 140	\$ 116,410	\$115,000	\$ 1,410	101%
Publishing Agreements				\$ -	\$350	\$ (350)	0%
Other				\$ -	\$350	\$ (350)	0%
Total Receipts	\$175	\$105	\$140	\$ 116,410	\$115,700	\$ 710	101%
Disbursements							
Journal		\$ 75	\$ 3,750	\$ 13,964	\$27,500	\$ (13,536)	51%
Chairperson's Dinner				\$ 4,406	\$6,500	\$ (2,094)	68%
Travel	\$ 1,350	\$ 983	\$ 2,571	\$ 13,657	\$18,000	\$ (4,343)	76%
Lobbying	\$ 5,000		\$ 5,000	\$ 22,500	\$30,000	\$ (7,500)	75%
Meetings	\$ 1,015		\$ 1,945	\$ 5,374	\$12,000	\$ (6,626)	45%
Long-range Planning				\$ -	\$1,000	\$ (1,000)	0%
Publishing Agreements				\$ -	\$0	\$ -	0%
Support for Annual Institute		\$ 1,140	\$ 6,504	\$ 13,020	\$13,000	\$ 20	100%
Amicus Briefs				\$ -	\$10,000	\$ (10,000)	0%
Electronic Communications*	\$ 75	\$ 75	\$ 75	\$ 525	\$1,400	\$ (875)	38%
Postage	\$ 1			\$ 1	\$100	\$ (99)	1%
Telephone	\$ 13	\$ 37	\$ 14	\$ 143	\$250	\$ (107)	57%
Other**	\$ 100	\$ 155	\$ 425	\$ 905	\$1,000	\$ (95)	90%
Total Disbursements	\$7,554	\$2,465	\$20,284	\$74,494	\$120,750	\$ (46,256)	62%
Net Increase (Decrease)				\$41,916	\$ (5,050)	\$ 46,966	

Additional Information

Fund Balance \$ 242,921

*includes e-blast & other electronic communications to members

**includes copying costs; budget for this line increased to \$1,000 & now includes \$750 for Young Lawyers' Summit

***includes \$25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount

**Probate and Estate Planning Section
Treasurer's Report as of June 30, 2013**

	April	May	June	FY to Date Actual	Budget 2012-13	Variance	Year to Date Percentage
Revenue							
Membership Dues	\$ 105	\$ 140	\$ 70	\$ 116,480	\$115,000	\$ 1,480	101%
Publishing Agreements			\$ 500	\$ 500	\$350	\$ 150	143%
Other			\$ 620	\$ 620	\$350	\$ 270	177%
Total Receipts	\$105	\$140	\$1,190	\$ 117,600	\$115,700	\$ 1,900	102%
Disbursements							
Journal	\$ 75	\$ 3,750		\$ 13,964	\$27,500	\$ (13,536)	51%
Chairperson's Dinner				\$ 4,406	\$6,500	\$ (2,094)	68%
Travel	\$ 983	\$ 2,571	\$ 2,233	\$ 15,890	\$18,000	\$ (2,110)	88%
Lobbying		\$ 5,000		\$ 22,500	\$30,000	\$ (7,500)	75%
Meetings		\$ 1,945		\$ 5,374	\$12,000	\$ (6,626)	45%
Long-range Planning				\$ -	\$1,000	\$ (1,000)	0%
Publishing Agreements				\$ -	\$0	\$ -	0%
Support for Annual Institute	\$ 1,140	\$ 6,504	\$ 669	\$ 13,688	\$13,000	\$ 688	105%
Amicus Briefs				\$ -	\$10,000	\$ (10,000)	0%
Electronic Communications*	\$ 75	\$ 75	\$ 75	\$ 600	\$1,400	\$ (800)	43%
Postage				\$ 1	\$100	\$ (99)	1%
Telephone	\$ 37	\$ 14		\$ 143	\$250	\$ (107)	57%
Other**	\$ 155	\$ 425		\$ 905	\$1,000	\$ (95)	90%
Total Disbursements	\$2,465	\$20,284	\$2,977	\$77,471	\$120,750	\$ (43,279)	64%
Net Increase (Decrease)				\$40,129	\$ (5,050)	\$ 45,179	

Additional Information

Fund Balance \$ 241,134

*includes e-blast & other electronic communications to members

**includes copying costs; budget for this line increased to \$1,000 & now includes \$750 for Young Lawyers' Summit

***includes \$25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount

**Probate and Estate Planning Section
Treasurer's Report as of July 31, 2013**

	May	June	July	FY to Date Actual	Budget 2012-13	Variance	Year to Date Percentage
Revenue							
Membership Dues	\$ 140	\$ 70	\$ 105	\$ 116,585	\$115,000	\$ 1,585	101%
Publishing Agreements		\$ 500		\$ 500	\$350	\$ 150	143%
Other		\$ 620		\$ 620	\$350	\$ 270	177%
Total Receipts	\$140	\$1,190	\$105	\$ 117,705	\$115,700	\$ 2,005	102%
Disbursements							
Journal	\$ 3,750		\$ 3,998	\$ 17,962	\$27,500	\$ (9,538)	65%
Chairperson's Dinner				\$ 4,406	\$6,500	\$ (2,094)	68%
Travel	\$ 2,571	\$ 2,233		\$ 15,890	\$18,000	\$ (2,110)	88%
Lobbying	\$ 5,000		\$ 5,000	\$ 27,500	\$30,000	\$ (2,500)	92%
Meetings	\$ 1,945			\$ 5,374	\$12,000	\$ (6,626)	45%
Long-range Planning				\$ -	\$1,000	\$ (1,000)	0%
Publishing Agreements				\$ -	\$0	\$ -	0%
Support for Annual Institute	\$ 6,504	\$ 669		\$ 13,688	\$13,000	\$ 688	105%
Amicus Briefs				\$ -	\$10,000	\$ (10,000)	0%
Electronic Communications*	\$ 75	\$ 75	\$ 75	\$ 675	\$1,400	\$ (725)	48%
Postage				\$ 1	\$100	\$ (99)	1%
Telephone	\$ 14			\$ 143	\$250	\$ (107)	57%
Other**	\$ 425			\$ 905	\$1,000	\$ (95)	90%
Total Disbursements	\$20,284	\$2,977	\$9,073	\$86,544	\$120,750	\$ (34,206)	72%
Net Increase (Decrease)				\$31,161	\$ (5,050)	\$ 36,211	

Additional Information

Fund Balance \$ 232,166

*includes e-blast & other electronic communications to members

**includes copying costs; budget for this line increased to \$1,000 & now includes \$750 for Young Lawyers' Summit

***includes \$25,000 allocated to "Amicus Fund" for extra amicus brief expenses in excess of current budget amount

Section Expense Reimbursement Policies and Procedures

General Policies

1. Requests for reimbursement of individual expenses should be submitted as soon as possible following the event and no later than two weeks following the close of the fiscal year in which the expense is incurred so that the books for that year can be closed and audited.
2. All out of pocket expenses must be itemized.
3. Detailed receipts are recommended for all expenses but required for expenses over \$25.
4. Meal receipts for more than one person must indicate names of all those in attendance unless the function is a section council meeting where the minutes of that meeting indicate the names of those present. Seminar meal functions should indicate the number guaranteed and those in attendance, if different.
5. Spouse expenses are generally not reimbursable.
6. Mileage is reimbursed at the current IRS approved rate for business mileage. Reimbursement of mileage or travel expenses is limited to actual distance traveled; not distance from domicile to the meeting site.
7. Receipts for lodging expenses must be supported by a copy of the itemized bill showing the per night charge, meal expenses and all other charges, not simply a credit card receipt, for the total paid.
8. Airline tickets should be purchased as far in advance as possible to take advantage of any cost saving plans available.
 - A. Tickets should be at the best rate available for as direct a path as possible.

- B. First class tickets will not be reimbursed in full but will only be reimbursed up to the amount of the best or average coach class ticket available for that trip.
- C. Increased costs incurred due to side trips for the private benefit of the individual will be deducted.
- D. A copy of the ticket receipt showing the itinerary must be attached to the reimbursement request.

9. Reimbursement for car, bus or train will be limited to the maximum reimbursable air fare if airline service to the location is available.

10. Outside speakers should be advised in advance of the need for receipts and the above requirements.

11. Bills for copying done by a firm should include the numbers of copies made, the cost per page and general purpose (committee or section meeting notice, seminar materials, etc.).

12. Bills for reimbursement of phone expenses should be supported by copies of the actual phone bills. If that is not possible, the party called and the purpose of the call should be provided.

13. The State Bar of Michigan is Sales tax exempt. Suppliers of goods and services should be advised that the State Bar of Michigan is the purchaser and that tax should not be charged.

14. Refunds from professional organizations (Example: ABA/NABE) for registration fees and travel must be made payable to the State Bar of Michigan and sent to the attention of the Finance Department. If the State Bar of Michigan is

paying your expenses or reimbursing you for a conference and you are aware you will receive a refund, please notify the finance department staff at the time you submit your request for payment.

15. Reimbursement will in all instances be limited to reasonable and necessary expenses.

Specific Policies

1. Sections may not exceed their fund balance in any year without express authorization of the Board of Commissioners.

2. Individuals seeking reimbursement for expenditures of funds must have their request approved by the chairperson or treasurer. Chairpersons must have their expenses approved by the treasurer and vice versa.

3. Requests for reimbursement of expenses which require council approval must be accompanied by a copy of the minutes of the meeting showing approval granted.

ATTACHMENT 2

STATUTORY/ LEGISLATIVE INITIATIVES	COURT RULES, PROCEDURES AND FORMS	COUNCIL ORGANIZATION AND INTERNAL PROCEDURES	PROFESSIONAL RESPONSIBILITY	EDUCATION AND SERVICE TO THE PUBLIC
AP Guardian hear < age 18 SB177 Amend. to 211.27(a(7)(s)) AP				
P1 Asset Protection	P1 Pr. Appeals-Ct. Rules	P1 Bylaw and Mission Update		P1 Communications to Members
P1 Probate App. Legislation		P1 listserve Etiquette		P1 Response to Project Wildcat
P1 Insurable Interest SB 31 and 32				P1 Transition to digital journal by 12/14
P1 Digital Assets SB 293				P1 Opportunities with ICLE
P1 Def: trans of ownership HB 4440				
P1 Guardian DNR HB 4382 and 4384				
P2 EPIC/ MTC Updates	P2 Guardianship Hearings		P2 Specialization	P2 Social Media and Websites
P2 Tenancy by Entireties Trusts				
P2 ILIT Trustee Liability Protection				
P2 ADR Revision				
P2 Property tax on trust property				
P2 Principal Residence Exemption				
TBD Possible Mental Hlth Code Update			TBD Inventory Lawyer	
TBD Directed Investment Trusts				
TBD Possible Neglect legislation				
TBD Possible Directed Inv Acct Legis.				
TBD Possible Accrued Rights Legis.				
TBD Uncapping re LLCs HB 4347				

AP = Action Pending and little work required
P1 = Priority items in year 1
P2 = Secondary Priority
TBD = Priority to be determined in future

ATTACHMENT 3

PROBATE & ESTATE PLANNING SECTION
Respectfully submits the following position on:

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Ducharme v. Ducharme, COA #314736

*

The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 23. The number who voted in favor to this position was 21. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:

Probate & Estate Planning Section

Contact person:

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Regarding:

Ducharme v. Ducharme, COA #314736

Date position was adopted:

July 2, 2013

Process used to take the ideological position:

Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:

23

Number who voted in favor and opposed to the position:

21 Voted for position

0 Voted against position

0 Abstained from vote

2 Did not vote

Position:

The Probate & Estate Planning Section voted to file an amicus brief in Ducharme v Ducharme, COA #314736 (Eaton County Probate Court, File No. 12-49110-CZ). The due date for the amicus brief is July 16, 2013.

Explanation of the position, including any recommended amendments:

To support the position that Section 7905(1) of the MTC (MCL 700.7905(1)) sets forth the exclusive limitations period for a beneficiary's claims against the trustee arising from a violation of the trustee's duties to the beneficiary, provided that the conditions of Section 7905(1) are satisfied.

ATTACHMENT 4

STATE OF MICHIGAN
IN THE COURT OF APPEALS

DONN R. DUCHARME,

Plaintiff/Appellant,

v

MICHELLE K. DUCHARME,

Defendant/Appellee.

Case No. 314736

Eaton County Probate Court

Case No. 12-49110-CZ

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**BRIEF OF *AMICUS CURIAE* THE PROBATE COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE STATE BAR OF MICHIGAN**

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BASIS OF JURISDICTION

Amicus curiae the Probate Council of the Probate and Estate Planning Section of the State Bar of Michigan agrees with the parties' statements of the basis of jurisdiction.

QUESTION PRESENTED

Whether Section 7905 of the Michigan Trust Code, MCL 700.7905, provides the exclusive period of limitations for a trust beneficiary to commence a proceeding against a trustee for a violation by the trustee of a duty the trustee owes to a trust beneficiary?

Appellant-Plaintiff answers: no.

Appellee-Defendant answers: yes.

The probate court answered: yes.

Amicus curiae answers: yes.

INTRODUCTION AND STATEMENT OF INTEREST

Amicus curiae the Probate Council of the Probate and Estate Planning Section of the State Bar of Michigan (the “Probate Council”) acts to further the purposes of the Probate and Estate Planning Section (the “Probate Section”). The Section is composed of nearly 5,000 members. Membership in the Section is open to active, inactive, law student, affiliate, and emeritus members of the State Bar of Michigan.

The purpose of the Probate Section is to enhance and improve the practice and administration of law pertaining to probate and estate planning, in connection with advancing the proper preparation of wills, trusts, tax returns, and other documents; the efficient administration of trusts as well as estates of decedents, minors, incompetents, and missing persons; and the advance planning for the orderly disposition of property, minimization of taxes, and well-being of persons. These purposes are furthered by such means as: the study of statutes, cases, and procedures; the consideration, drafting, and active support or opposition of proposed legislation; and the providing of advice to courts during the course of pending litigation.

During the fall of 2003, the Probate Council authorized the formation of the Michigan Trust Code Committee (the “MTC Committee”) of the Probate Section to study the Uniform Trust Code (“UTC”), promulgated in 2000. In a comprehensive undertaking, spanning a period of five years, the MTC Committee of the Probate Section, in close connection with the Michigan Bankers Association’s Trust Counsel Committee, prepared draft provisions of a state version of the UTC. After making edits to the proposed draft, the Legislature enacted the Michigan Trust Code (“MTC”), MCL 700.7101, *et seq.*, which became effective on April 1, 2010.

The Probate Council is keenly interested in the Court’s determination of the question of law presented in this case, which involves the interpretation and application of the MTC. On

August 12, 2013, this Court granted the Probate Council's motion for leave to file an *amicus curiae* brief in this matter.

BACKGROUND

History of Statutes of Limitation for Breach of Trust: 1979-Present

A. Revised Probate Code Section 819: 1979-2000

From 1979 to 2000, Michigan trust and estate law was primarily governed by the Revised Probate Code of 1978 ("RPC"), 642 PA 1978. Under Section 819 of the RPC, MCL 700.819, trust beneficiaries were "barred from action within six months after receipt of the final account or statement if the trustee fully disclosed all relevant documents, or within three years if the trustee did not disclose all documents but acted in good faith." *In re Barnes*, 2000 WL 33418069, at *3 (Mich Ct App, June 27, 2000). Specifically, MCL 700.819 provided:

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for **breach of trust** is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary.

MCL 700.819 ("Limitations on proceedings against trustee after final account") (emphasis added); (repealed by 386 PA 1998 § 8102, Eff. April 1, 2000).

"[A] final account or other statement fully disclosing the matter and showing termination of the trust relationship" was required to trigger the six-month period of limitation pursuant to

MCL 700.819. *In re Ervin Testamentary Trust*, 2005 WL 433573, at *6 (Mich Ct App, Feb 24, 2005). If a trustee did not comply with the procedure for invoking the six-month statutory period, then a trust beneficiary's complaint for breach of fiduciary duty was timely filed within the three-year statutory period. *LaFave v Jacobson*, 1999 WL 33326822, at *3 (Mich Ct App, Dec 21, 1999).

B. Estates and Protected Individuals Code Section 7307: 2000-2010

In 1998, the Legislature enacted the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101, *et seq*, effective April 1, 2000.

1. April 1, 2000-August 31, 2004

Subsection 7307(1) of EPIC originally provided:

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for **breach of trust** is barred unless a proceeding to assert the claim is commenced within 1 year after receipt of an annual or final account as to each beneficiary who receives the annual or final account.

MCL 700.7307(1) (emphasis added).

2. September 1, 2004-April 1, 2010

Effective September 1, 2004, the Michigan Legislature amended subsection 7307(1) of EPIC:

A beneficiary is barred from commencing a proceeding against a trustee for **breach of trust** if the proceeding is not commenced within 1 year after the date the beneficiary or a representative of the beneficiary is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the time allowed for commencing a proceeding. A beneficiary may also be barred from commencing a proceeding against a trustee for breach of trust by adjudication, consent, ratification, estoppel, or other limitation.

MCL 700.7307(1) (repealed by 2009 PA 46) (emphasis added).

The 2004 amendment of EPIC also added subsection (4) to Section 7307. See *In re Jervis C Webb Trust*, 2006 WL 173172, at *3 (Mich Ct App, Jan 24, 2006). Subsection (4) provides a five-year period of limitation for breach of trust if subsection (1) does not apply. Specifically:

If subsection (1) does not apply, a proceeding by a beneficiary against a trustee for breach of trust shall be commenced within 5 years of the first of the following to occur:

- (a) The removal, resignation, or death of the trustee.
- (b) The termination of the beneficiary's interest in the trust.
- (c) The termination of the trust.

MCL 700.7307(4) (repealed by 2009 PA 46).

C. Michigan Trust Code Section 7905: 2010-Present

The Michigan Trust Code (“MTC”), MCL 700.7101, *et seq.*, effective April 1, 2010, displaced the existing provisions of Article VII of EPIC. The MTC consists of 11 parts and is intended to be Michigan’s comprehensive codification of the law of trusts. Mark K. Harder, *The Michigan Trust Code: An Overview*, (2009) available at http://www.michbar.org/probate/pdfs/MTCstatusreport_0906.pdf.

Part 9 of the MTC addresses the liability of trustees and beneficiaries’ rights upon a breach of trust. *Id.* Section 7905 establishes a period of limitations for claims for breaches of trust. *Id.* In general, the rule requires that claims be filed within one year after a report that would put the recipient on notice of the claim is sent to the beneficiary. *Id.* Otherwise, claims must be brought within five years of the removal, resignation, or death of a trustee; or

termination of the beneficiary's interest; or termination of the trust; whichever is first to occur.

Id.

MCL 700.7905 provides in its entirety as follows:

(1) The following limitations on commencing proceedings apply in addition to other limitations provided by law:

(a) A trust beneficiary shall not commence a proceeding against a trustee for breach of trust more than 1 year after the date the trust beneficiary or a representative of the trust beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding.

(b) A trust beneficiary who has waived the right to receive reports pursuant to section 7814(5) shall not commence a proceeding for a breach of trust more than 1 year after the end of the calendar year in which the alleged breach occurred.

(2) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the trust beneficiary or representative knows of the potential claim or should have inquired into the potential claim's existence.

(3) If subsection (1) does not apply, a judicial proceeding by a trust beneficiary against a trustee for breach of trust shall be commenced within 5 years after the first of the following to occur:

(a) The removal, resignation, or death of the trustee.

(b) The termination of the trust beneficiary's interest in the trust.

(c) The termination of the trust.

MCL 700.7905.

Current MTC Section 7905 repealed EPIC Section 7307. The MTC added an additional provision, subsection 7905(1)(b) to prevent beneficiaries from effectively gaining an extended period of limitations as a result of their own waiver of the right to receive a report. Harder, *supra*.

STANDARD OF REVIEW

The interpretation and application of a statute of limitations is a question of law that is reviewed de novo. *Miller-Davis Co v Ahrens Const, Inc*, 489 Mich 355, 361; 802 NW2d 33 (2011).

ARGUMENT

- I. **Section 7905 provides the exclusive period of limitations for a trust beneficiary sue a trustee for the trustee's violation of a duty the trustee owes to the trust beneficiary**
 - A. **The Michigan Trust Code is a comprehensive statute that contains certain mandatory provisions.**

The MTC, MCL 700.7101, *et seq.*, is Michigan's first comprehensive statute concerning the creation, administration, modification, and termination of trusts. The MTC also represents a continuation of the modernization of Michigan's laws governing trusts and estates, which began with the enactment of EPIC, MCL 700.1101 *et seq.*, effective April 1, 2000. The MTC, effective April 1, 2010, displaced the then-existing provisions of Article VII of EPIC. Although the MTC relies on the structure and provisions of the Uniform Trust Code ("UTC") as the starting point for many provisions, the MTC is a uniquely Michigan document that draws from both the UTC and existing Michigan law to preserve long-established procedures, practices, and principles of Michigan trust law while also filling the numerous gaps that have existed in such body of law. Harder, *supra*.

Generally, the MTC is a set of default rules that apply to the extent not addressed or varied by the terms of the trust agreement. Trust agreements may be drafted to override all of the MTC provisions except for certain mandatory provision set forth in the MTC. Such

mandatory provisions include the MTC's limitation periods for commencing proceedings. See MCL 700.7105.

The periods of limitation under Section 7905, for a trust beneficiary to commence a proceeding against a trustee for breach of trust, are mandatory and cannot be overridden by the terms of a trust agreement. Harder, *supra*. Section 7105 provides that: "The terms of a trust prevail over any provisions of this article except ... [p]eriods of limitation under this article for commencing a judicial proceeding." MCL 700.7105(2)(m). "The duty of a trustee to administer a trust in accordance with section 7801" also cannot be overridden. MCL 700.7105(2)(b).

The MTC applies to all trusts. MCL 700.8206(1)(a); *In re Tiffany Smith Trust*, No 303128, 2012 WL 5290282, at *2 (Mich Ct App, Oct 25, 2012). Further, the MTC applies "to all judicial proceedings concerning trusts commenced on or after [April 1, 2010]." MCL 700.8206(1)(b). This litigation began on October 31, 2012. Thus, the MTC applies to this case.

B. Section 7905 governs all claims concerning a violation by a trustee of the trustee's duties to a trust beneficiary

The MTC expressly provides that: "A violation by a trustee of a duty the trustee owes to a trust beneficiary is a breach of trust." MCL 700.7901(1). In other words, "[a]ccording to the Michigan Trust Code, any violation of a duty owed to the beneficiary by the trustee is considered a 'breach of trust.'" *In re Tiffany Smith Trust*, 2012 WL 5290282, at *2 (citing MCL 700.7901(1)). *Accord* Restatement (Third) of Trusts §93 (2012) ("A breach of trust is a failure by the trustee to comply with any duty that the trustee owes, as trustee, to the beneficiaries, or to further the charitable purpose, of the trust.").

The duties a trustee owes to trust beneficiaries are "determined by consideration of the trust, the relevant probate statutes and the relevant case law." *In re Green Charitable Trust*, 172 Mich App 298, 312; 431 NW2d 492 (1988). Part 8 of the MTC codifies certain duties the trustee

owes to a trust beneficiary, the violation of which is a breach of trust. Section 7801 of the MTC provides that “the trustee shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries, and in accordance with this article.” MCL 700.7801 (“Administration of trust; duties of trustee.”).

Section 7802(1) provides that “[a] trustee shall administer the trust solely in the interests of the trust beneficiaries.” See MCL 700.7802 (“Duty of loyalty.”). Section 7803 imposes upon the trustee the duty of impartiality, and the duty to follow the standards of the Michigan Prudent Investor Rule. MCL 700.7803. Section 7811 provides that “[a] trustee shall keep adequate records of the administration of the trust” and that “[a] trustee shall keep trust property separate from the trustee’s own property.” MCL 700.7811(1)-(2). Section 7813 imposes upon the trustee the duty to locate trust property and compel delivery. MCL 700.7813(1) (“A trustee shall take reasonable steps to locate trust property and to compel a former trustee or other person to deliver trust property to the trustee.”). Section 7814(1) provides that “[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.” See MCL 700.7814 (“Duty to inform and report.”).

Further, under EPIC, a trustee, is by definition, a “fiduciary.” MCL 700.1104(e) (“‘Fiduciary’ includes ... trustee ...”). Regarding the “Fiduciary Relationship,” EPIC provides in pertinent part:

A fiduciary stands in a position of confidence and trust with respect to each ... beneficiary ... for whom the person is a fiduciary. A fiduciary shall observe the standard of care described in section 7803 and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and

beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity

MCL 700.1212(1) (“Fiduciary relationship.”) Thus, a violation of a fiduciary duty the trustee owes a trust beneficiary is a breach of trust. MCL 700.7901(1).

A “breach of trust” is not a separate cause of action, much less a new statutory cause of action created by the MTC. (Contra Appellant’s Br at 15, 17-18, 19.) Rather, a breach of fiduciary duty claim is a claim for breach of trust. The phrases “breach of trust” and “breach of fiduciary duty” are synonymous in the trust context.

The periods of limitation for commencing a claim against a trustee for breach of trust, pursuant to MCL 700.7905’s predecessor statutes under EPIC and the RPC, have been applied to claims alleging breach of fiduciary duty. E.g., *In re Estate of Ewbank Trust*, 2007 WL 704982, at *3 (Mich Ct App Mar 8, 2007) (determining MCL 700.7307 applicable to actions for breach of fiduciary duties); *In re Barnes*, 2000 WL 33418069 at *3 (concluding plaintiffs are barred from action for breach of fiduciary duty against trustee pursuant to MCL 700.819). Conversely, in cases applying the three-year limitations period under the general tort statute of limitations, this Court has equated claims of breach of fiduciary duty with claims of breach of trust. E.g., *Prentis Family Found v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 47; 698 NW2d 900 (2005) (quoting *Bay Mills Indian Cmty v Michigan*, 244 Mich App 739, 751; 626 NW2d 169 (2001) (“A claim of breach of fiduciary duty *or breach of trust* accrues when the beneficiary knew or should have known of the breach” (emphasis added))).

When a trust beneficiary brings suit against a trustee for breach of duty in administering the trust, the beneficiary’s claims can bear many different labels, even though they all arise from the trustee’s breach of duties owed to the beneficiary by virtue of the trustee-beneficiary relationship. At the general level, the beneficiary may state a cause of action for “breach of

fiduciary duty” or “breach of trust.” At a more particular level, the beneficiary may label his claims by reference to particular duties that the trustee is alleged to have violated (e.g., breach of the duty of loyalty, the duty of impartiality, the duty to account, the duty to provide information, the Prudent Investor Rule, etc.). If the beneficiary alleges that the trustee has taken trust property to which the trustee is not entitled, in breach of the trustee’s duty of loyalty to the beneficiary’s interests, then the beneficiary may frame the claim as one for conversion or misappropriation. Furthermore, it is common for a beneficiary to label a claim for breach of fiduciary duty by reference to the type of relief sought from the probate court:

- Claim for accounting, when the beneficiary wants the probate court to order the trustee to prepare and serve an accounting, in order to remedy the trustee’s breach of the duty to account.
- Claim for surcharge, when the beneficiary wants the probate court to order the trustee personally to reimburse the trust for damages caused by the trustee’s breach of duty.
- Claim to compel return of trust property, when the beneficiary wants the probate court to order the trustee to return converted or misappropriated assets to the trust, taken in violation of the trustee’s duty of loyalty to the beneficiaries.

Appellant-Plaintiff’s “breach of fiduciary duty” claim is based on alleged violations by the trustee of duties the trustee owes a trust beneficiary, and therefore it constitutes a claim for breach of trust. MCL 700.7901(1) (“A violation by a trustee of a duty the trustee owes to a trust beneficiary is a breach of trust.”). Specifically, Appellant-Plaintiff alleged that Appellee-Defendant, as the trustee, breached her fiduciary duties by converting trust property, failing “to produce accurate accountings which were understandable, and failing to keep trust property in good repair. (Compl ¶¶ 27-42.)

To the extent the other counts in Appellant-Plaintiff's complaint, regardless of the labels, are based on the trustee's alleged violation of duties owed to a trust beneficiary, they also constitute a breach of trust. MCL 700.7901(1). Count II of Appellant-Plaintiff's complaint, labeled as "Conversion of Assets," even expressly alleges that the trustee breached a duty under Section 7813(4) of the MTC. (Compl ¶ 53.) The remainder of the counts in Appellant-Plaintiff's complaint all appear to allege breaches of various duties that are codified in the MTC. For instance, Count III alleges that the trustee commingled trust assets, which would be in violation of the duty set forth in Section 7811 of the MTC, requiring that "[a] trustee shall keep trust property separate from the trustee's own property." MCL 700.7811 (2).

Further, the remedies in Appellant-Plaintiff's request for relief are entirely consistent with the "[r]emedies for breach of trust" set forth in the MTC. See MCL 700.7901 ("Remedies for breach of trust."). Specifically, Section 7901(2) provides that "[t]o remedy a breach of trust that has occurred or may occur, the court may do any of the following:"

- (a) Compel the trustee to perform the trustee's duties.
- (b) Enjoin the trustee from committing a breach of trust.
- (c) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means.
- (d) Order a trustee to account.
- (e) Appoint a special fiduciary to take possession of the trust property and administer the trust.
- (f) Suspend the trustee.
- (g) Remove the Trustee as provided in section 7706.
- (h) Reduce or deny compensation to the trustee.
- (i) Subject to section 7912, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds.

(j) Order any other appropriate relief.

MCL 700.7901(2)(a)-(j).

Appellant-Plaintiff requests remedies including, that the probate court: provide for the proper administration of the trust estate; order an accounting; compel the trustee to file a bond in order to protect trust property; and compel the trustee to indemnify Appellant-Plaintiff for the disposal and misappropriation of trust property. (See Compl at 20-21.) The relief sought all falls within that which the probate court may grant for breach of trust. *Id.*

II. A specific statute of limitation controls over a general statute of limitations

Under the general rules of statutory construction, “[w]hen two statutory provisions appear to be in conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails.” *Allen v Farm Bureau Ins Co*, 210 Mich App 591, 596; 534 NW2d 177 (1995). “[A] specific statute of limitations controls over a general statute of limitations.” *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 13; 687 NW2d 309 (2004).

MCL 700.7905 is a specific statute of limitations. Specifically, MCL 700.7905(1)(a) “provides a limitations period of one year to claim breach of trust where the trustee ‘sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding.’” *In re Ilene G. Barron Revocable Trust*, 2013 WL 275913, at *6 (Mich Ct App Jan 24, 2013), citing MCL 700.7905(1)(a). MCL 700.7905(3) provides a limitations period of five years where subsection (1) does not apply. MCL 700.7905(3).

MCL 600.5805 is a general statute of limitations. “MCL 600.5805 is entitled ‘Injuries to persons or property.’ It is commonly known as the general tort statute of limitations[.]” *Miller-Davis Co*, 489 Mich at 363. Under MCL 600.5805(10): “Except as otherwise provided in this

section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property.” MCL 600.5805(10).

There is no specific statute of limitations for a breach of fiduciary duty claim. (Contra Appellant’s Br at 18.) Rather, “this Court has applied the general three-year period of limitation for tort actions to breaches of fiduciary duty.” *In re Ervin Testamentary Trust*, 2005 WL 433573 at *6 .

In *In re Ervin Testamentary Trust*, this Court determined that the probate court had erred in determining that a trust beneficiary’s claims were barred by the statute of limitations pursuant to Section 7307(1) of EPIC, because the claims had accrued before EPIC’s effective date, and thus the statute, which was not given retroactive effect, did not apply. *Id.* at *5-*6. However, this Court noted that assuming that EPIC applied, petitioner’s claim was arguably barred, because petitioner did not assert her claim against the trustee within one year after the last account was filed, on March 2, 2000. *Id.* at *5. The trust beneficiary did not file her provision for order on supervision and appointment of a successor trustee until August 31, 2001. *Id.*

This Court concluded that the predecessor statute of limitations under the RPC, governing “a claim against a trustee for breach of trust,” was also not applicable because the beneficiary did not receive “a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary,” which this Court noted was required to trigger the period of limitations under MCL 700.819. *Id.* at *5. And because MCL 700.819 was not applicable, this Court applied the general three-year period of limitation for tort actions pursuant to MCL 600.5805(10). *Id.* at *6.

Notably, the Legislature amended Section 7307 of EPIC in 2004, adding subsection (4), which provides:

If subsection (1) does not apply, a proceeding by a beneficiary against a trustee for breach of trust shall be commenced within 5 years of the first of the following to occur:

- (a) The removal, resignation, or death of the trustee.
- (b) The termination of the beneficiary's interest in the trust.
- (c) The termination of the trust.

MCL 700.7307(4) (repealed by 2009 PA 46). See *In re Jervis C Webb Trust*, 2006 WL 173172 at *3 (rejecting petitioner's reliance on MCL 700.7304(4) for the proposition that he had five years to file his breach of fiduciary duty claims because "[s]ubsection (4) of that statute was not added until the statute was amended, effective September 1, 2004").

Section 7307(4) was replaced by a nearly identical provision of the MTC. MCL 700.7905(3). It provides:

If subsection (1) does not apply, a judicial proceeding by a trust beneficiary against a trustee for breach of trust shall be commenced within 5 years after the first of the following to occur:

- (a) The removal, resignation, or death of the trustee.
- (b) The termination of the trust beneficiary's interest in the trust.
- (c) The termination of the trust.

MCL 700.7905(3).

The enactment of MCL 700.7307(4), subsequently replaced by MCL 700.7905(3), evinces a legislative intent to abrogate the applicability of the general tort statute of limitations for a trust beneficiary's claims against a trustee for breach of fiduciary duty. See *Ostroth*, 263 Mich App at 14 (recognizing that by enacting certain statutes, "the Legislature knowingly and

necessarily abrogated the applicability of the general statute of limitations” for certain claims). Whereas prior to the 2004 amendment of EPIC Section 7307, if the period of limitations for breach of trust was not triggered, the general tort statute of limitation applied, the inclusion of EPIC subsection 7307(4) and MTC subsection 7905(3) provides a comprehensive statute of limitations for a trust beneficiary to commence a proceeding against a trustee for breach of trust. The promulgation of MCL 700.7307(4), and subsequently MCL 700.7905(3), means that the Legislature intended for the general tort statute of limitations to no longer apply in actions for breach of trust by a trust beneficiary against a trustee. “The Legislature is presumed to be familiar with the rules of statutory construction and to have considered the effect of a new law on existing laws.” *Ostroth*, 263 Mich App at 14. By its express terms, “[i]f subsection (1) does not apply,” the period of limitations for a trust beneficiary to commence a proceeding against a trustee for breach of trust is governed by subsection (3). MCL 700.7905(3). The fact that claims are subject to a longer 5-year limitations period under MCL 700.7905(3) than the 3-year limitations period under MCL 600.5805(10) further confirms that MCL 700.7905 is intended to be the exclusive period of limitations for a trust beneficiary’s breach of fiduciary duty claims against a trustee.

Moreover, whether or not a trust beneficiary’s claim against a trustee “sounds in tort” is not the relevant inquiry for determining whether the one-year limitation period in MCL 700.7905(1)(a) may be invoked. Appellant-Plaintiff misplaces reliance on this Court’s statement in *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977), which indicated: “Plaintiffs’ action is premised upon a breach of fiduciary duty, which sounds in tort, and therefore their action was timely filed under the general statute of limitations contained in [MCL 600.5805(10).]” *Id.* at 313.

In *Magline*, this Court held that the statute of limitations contained in the General Corporation Act in effect at the time, did not bar an action by minority shareholders to compel payment of dividends. *Id.* at 312-13. This Court held that the specific statute of limitations did not apply, not because the action “sounds in tort,” but because in order “[f]or the statute to apply, the wrongs alleged must have injured or damaged the corporation.” *Id.* at 313. “Plaintiffs have not alleged that defendants’ refusal to declare a dividend constitutes a violation of defendants’ duties ‘whereby the corporation has been or will be injured or damaged, or its property lost, or wasted, or transferred to one or more of them’, nor do plaintiffs seek to enjoin or set aside an unlawful transfer of the corporate property.” *Id.* at 312-13, quoting MCL 450.47 (repealed by 1972 PA 284). “Plaintiffs claim only that defendants have breached their fiduciary duty to the stockholders by refusing to declare a dividend out of the supplies being retained by the corporation.” *Id.*

An action where the specific corporation statute applied also “sounds in tort,” as the statute provides the period of limitations for actions “for the violation of, or failure to perform, the duties above prescribed or any duties prescribed by this act.” See MCL 450.47 (repealed by 1972 PA 284). In *Magline*, the relevance of noting that “Plaintiff’s action is premised upon a breach of fiduciary duty, which sounds in tort,” was to explain the applicability of the general tort statute of limitations. See *Magline*, 76 Mich App at 313. It was not to indicate, as Appellant-Plaintiff suggests, that the general tort statute of limitations should apply to a claim which “sounds in tort,” in lieu of an otherwise applicable specific statute of limitations. Cf *Miller-Davis Co*, 489 Mich at 364 (as between whether a claim is subject to the general tort statute of limitations, or the general contract statute of limitations, “the nature and origin of a cause of action determine[s] which limitations period applies”).

CONCLUSION

Amicus curiae the Probate Council of the Probate and Estate Planning Section of the State Bar of Michigan respectfully requests that this Court conclude that Section 7905 of the Michigan Trust Code provides the exclusive limitations period for a trust beneficiary to commence a proceeding against the trustee for a violation by the trustee of a duty the trustee owes to a trust beneficiary.

WARNER NORCROSS & JUDD LLP

Dated: September 3, 2013

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UNPUBLISHED
CASES

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 (Cite as: 2000 WL 33418069 (Mich.App.))

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UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

Court of Appeals of Michigan.

In the Matter of the Estate of James T. BARNES, Sr.,
 Deceased, and the James T. Barnes, Sr., Revocable
 Trust Agreement under date of May 26, 1978.

Barbara Barnes MANNING, Jay David Manning,
 Shannon Manning Kruger, Melissa Manning Persons,
 and Rachel Christine Manning, Plaintiffs-Appellants,
 v.

James Thomas BARNES, Jr., and Honigman Miller
 Schwartz & Cohn, Defendants-Appellees,
 and

Richard A. POLK, Marcus Plotkin, Peter M. Alter,
 Leslie Smith Moulton, and Plotkin, Yolles, Siegel,
 Schultz & Polk, Defendants.

No. 211968.
 June 27, 2000.

Before: GRIFFIN, P.J., HOLBROOK, Jr., and J.B.
 SULLIVAN^{FN*}, JJ.

^{FN*} Former Court of Appeals judge, sitting
 on the Court of Appeals by assignment.

PER CURIAM.

*1 Plaintiffs appeal as of right from the probate court's order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10). Plaintiffs argue the probate court incorrectly held that plaintiffs' claims were barred by res judicata and the statute of limitations and that there was not an attorney-client relationship between plain-

tiff Barbara Barnes Manning and the defendant law firm. We affirm.

This case was brought by plaintiffs in an attempt to upset two separate, but related, probate court rulings entered in 1980 and 1986 regarding the trust and estate of James Thomas Barnes, Sr. (hereinafter "decedent" or "Barnes, Sr."). Plaintiffs include Barbara Barnes Manning ("plaintiff Manning"), decedent's daughter and Jay David Manning, Shannon Manning Kruger, Melissa Manning Persons, and Rachel Christine Manning, decedent's grandchildren. Defendants include James Thomas Barnes, Jr. (hereinafter "Barnes, Jr."), decedent's son and successor co-trustee of the James T. Barnes, Sr., Revocable Trust Agreement Under Date of May 26, 1978 (hereinafter "trust"), and the law firm of Honigman, Miller, Schwartz & Cohn.

The probate court succinctly set forth the extensive facts of this case in its opinion granting defendants' motion for summary disposition. We adopt that statement as our own for purposes of this appeal, without the need for reiteration, and proceed directly to consideration of plaintiffs' issues raised on appeal.

The gravamen of plaintiffs' complaint is that Barnes, Jr., breached his fiduciary duty to them in connection with the settlement agreements pertaining to the decedent's trust and estate approved by the probate court in its orders of June 26, 1980, and August 18, 1986. Plaintiffs claim defendant Honigman also breached attorney and fiduciary duties to them in the same transactions. Specifically, plaintiffs argue Barnes, Jr., with the help of defendant law firm, fraudulently breached his fiduciary duty to the trust and the beneficiaries by improperly utilizing trust assets, rather than his own and those by Midland Mortgage Company ("Midland"), to settle the debts of the trust and estate. Plaintiffs further contend, contrary to the probate court's determination, that defendants'

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fraud tolled the otherwise applicable statute of limitations and precluded applicability of the doctrine of res judicata. Thus, we must determine as a preliminary matter whether Barnes, Jr.'s actions as a trustee constituted fraud.

Pursuant to the 1980 agreement approved by the probate court, decedent's trust and estate were the sole debtors to Manufacturers National Bank of Detroit and Detroit Bank & Trust Company. The proceeds the trust could potentially receive from the redemption of its Midland stock was capped at \$66.28 pursuant to a 1972 recapitalization agreement. Although Midland seemingly may have benefited from the lion's share of the proceeds after the unrelated sale of the Peoples Bank of Port Huron, it was Midland's success that ultimately gave full value to the trust of its Midland stock. Moreover, plaintiff Manning's signature was on every relevant document. Therefore, we agree with the probate court's ruling that all of the relevant documents and transactions were disclosed to plaintiff Manning; thus, there was no genuine issue of material fact regarding whether fraud occurred. Quinto v. Cross & Peters Co., 451 Mich. 358, 362; 547 NW2d 314 (1996).

*2 Res judicata bars a plaintiff from relitigating a prior action between the same parties when the evidence or essential facts are identical. Dart v. Dart, 460 Mich. 573, 586; 597 NW2d 82 (1999). The Dart Court outlined the following prerequisites to the application of res judicata: (1) the first action must have been decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. Id.; Eaton Co Bd of Co Rd Comm'rs v Schultz, 205 Mich.App 371, 375-376; 521 NW2d 847 (1994). Moreover, the Dart Court stated that "Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Id.; Sprague

v. Buhagiar, 213 Mich.App 310, 313; 539 NW2d 587 (1995).

Addressing the first prerequisite, probate court orders are final orders and have the same res judicata effect as those of any other court. Prawdzik v. Heidema Bros, Inc., 352 Mich. 102, 110; 89 NW2d 523 (1958); In re Humphrey Estate, 141 Mich.App 412, 429; 367 NW2d 873 (1985). Furthermore, it is not necessary that plaintiffs did not raise the claims that are the subject of the instant action as long as they could have been raised in the previous action. Sprague, supra at 313. Here, the probate court decided on the merits that the proposed 1980 settlement agreement was in the best interest of the estate and trust. Additionally, the court later approved the 1986 petition authorizing the redemption of the Midland stock. Accordingly, we hold that both probate court orders authorized the settlement agreements on the merits.

Addressing the second prerequisite, plaintiffs' claims could have been brought in either of the two prior probate court decisions. Plaintiff Manning had an opportunity to raise the issues she now asserts. Plaintiff Manning signed the 1980 settlement agreement as both a director and a shareholder of Midland, received the petition for the probate court order authorizing the settlement with the banks and notice of the hearing, and received a copy of the order authorizing the settlement.

With respect to the 1986 agreement, plaintiff Manning received a letter outlining the potential redemption; she signed a consent to the redemption of the stock as a director of Midland; she signed an agreement authorizing the termination of Barnes, Jr., and his issue's interest in the trust; she received a petition to the probate court detailing the transaction; and she received the notice of hearing for the closure of the estate and the resulting order. Plaintiff Manning could have claimed that the trust should not have had to pay the entire debt to the banks at the time the redemption was authorized by the probate court.

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Addressing the third prerequisite, plaintiffs concede on appeal that the parties involved are the same. This Court therefore concludes that the three prerequisites for the application of res judicata are present. Plaintiffs nonetheless argue that misrepresentation or fraud creates an exception to the application of the res judicata doctrine. *Sprague, supra* at 313. However, given our holding that defendants did not act fraudulently, plaintiffs' argument is without merit.

*3 Plaintiffs next contend the fraudulent concealment statute, M.C.L. § 600.5855; MSA 27A.5855, applies where, as alleged here, the one perpetrating the fraud conceals the existence of the claim from the harmed party. As noted *supra*, we hold defendants' actions did not constitute fraud. Absent an allegation of fraud, there are two statute of limitations that could arguably be applied to the facts of the instant case. First, if a general breach of a fiduciary duty is alleged, M.C.L. § 600.5805; MSA 27A.5805 provides in pertinent part:

A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

(8) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

Second, if a specific allegation is made against the trustee, M.C.L. § 700.819; MSA 27.5819,^{FN1} provides:

FN1. The text of this section was repealed effective April 1, 2000, under the provisions of M.C.L. § 700.8102; MSA 27.18102.

However, the statute is nonetheless applicable to the instant matter. See M.C.L. § 700.8101(2)(d); MSA 27.18101(2)(d).

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary.

Thus, under M.C.L. § 600.5805; MSA 27A.5805, plaintiffs' action would have been barred three years after the injury, in this case three years after the August 20, 1986, redemption of the stock or possibly three years after the probate court issued the March 25, 1987, order closing the estate. By either date, the statute would have barred any action by plaintiffs as of 1990, four years before plaintiffs filed suit. Under M.C.L. § 700.819; MSA 27.5819, plaintiffs are barred from action within six months after receipt of the final account or statement if the trustee fully disclosed all relevant documents, or within three years if the trustee did not fully disclose all documents but acted in good faith. Thus, under either statute of limitations, plaintiffs claims were time barred in 1990. Accordingly, res judicata and the statute of limitations each barred plaintiffs' suit against defendant Barnes, Jr. We therefore conclude the probate court did not err in dismissing the claims against Barnes, Jr., pursuant to MCR 2.116(C)(7). *Horace v. City of Pontiac*, 456

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Mich. 744, 749; 575 NW2d 762 (1998).

*4 Finally, plaintiffs contend the probate court incorrectly held that no attorney-client relationship existed between the defendant law firm and plaintiff Manning. In order to maintain an action for legal malpractice, plaintiffs have the burden of proving all of the following elements: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and the extent of the injury. Barrow v. Pritchard, 235 Mich.App 478, 483-484; 597 NW2d 853 (1999). Plaintiffs argue defendant law firm held itself out as the legal representative for the beneficiaries. On the basis of plaintiff Manning's own admissions in her affidavit, the probate court held plaintiffs could not meet the burden of establishing the existence of an attorney-client relationship.

In her affidavit, plaintiff Manning stated the following with respect to John E. Amerman, attorney from defendant Honigman:

13. That I did not know that John Amerman was acting as my legal counsel on any of the transactions that I signed.

14. That John Amerman never indicated to me he was acting on my behalf as legal counsel.

15. That John Amerman never advised me one way of the other, and never advised me, period, regarding any of the transactions which I entered into. Further, that John Amerman never advised me to seek independent legal counsel regarding the trust.

Based on the positive assertions in plaintiff Manning's affidavit that Amerman did not act as her attorney, we agree with the probate court and hold an attorney-client relationship did not exist between

Honigman (through Amerman) and plaintiff Manning.

Plaintiffs allege that two documents containing general recitations to the effect defendant Honigman was representing the trust, estate, and the beneficiaries created an attorney-client relationship between the defendant law firm and plaintiff Manning. Plaintiff Manning, however, did not allege in her affidavit that she relied on either of these documents or believed she had retained defendants to act as her counsel. We therefore hold plaintiffs' claims in this regard are without merit.

In the alternative, plaintiffs argue that, even if the probate court was correct that an attorney-client relationship did not exist, under Michigan law an attorney may have a duty to a third party under certain circumstances. Plaintiffs argue pursuant to the Michigan Supreme Court's decision in Mieras v. DeBona, 452 Mich. 278; 550 NW2d 202 (1996), a lawyer owes a duty to the intended and specifically identifiable beneficiaries of a testator, to effectuate the intent of the testator as expressed in the will. In Mieras, the Court carefully restricted its holding to state that identified beneficiaries of a will may sue the attorney who drafted the will for negligent breach of the standard of care owed to a third-party beneficiary. *Id.* at 290 (opinion by Levin, J.). The Court reasoned that the personal representative in the above situation is the client and the representative's interest is necessarily limited to the disposition of the estate. If the attorney who drafted the will negligently carried out the testator's intent and the testator's beneficiaries were subsequently harmed, the representative likely does not have an interest in who obtains the money to be distributed and thus would have no incentive to sue the attorney. *Id.* Accordingly, in this limited situation, the Court held the intended beneficiaries of the will must be able to maintain an action. *Id.*

*5 In the instant case, the client is the trustee. If the attorney for the trustee commits malpractice in detriment to the trust, then the trustee is under an

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obligation to sue the attorney. If the trustee fails to bring a suit, the beneficiaries may have a cause of action against the trustee. Moreover, in *Mieras*, there was no actual or potential conflict between the interest of the testator and the beneficiary because the interests are the same. *Mieras, supra* at 302 (opinion by Boyle, J.). Here, on the other hand, the client's sole interest is in the administration of the trust and might be in conflict with the interests of the individual beneficiaries. In fact, that is exactly what has happened in the instant case. The trustee, by and through his attorneys, administered the estate in order to give benefit to the trust. Now, plaintiffs attempt to claim the attorneys were negligent in their administration. We conclude that the limited holding in *Mieras* does not apply to the instant case. Cf. *Beaty v. Hertzberg & Golden, PC*, 456 Mich. 247, 259-262; 571 NW2d 716 (1997).

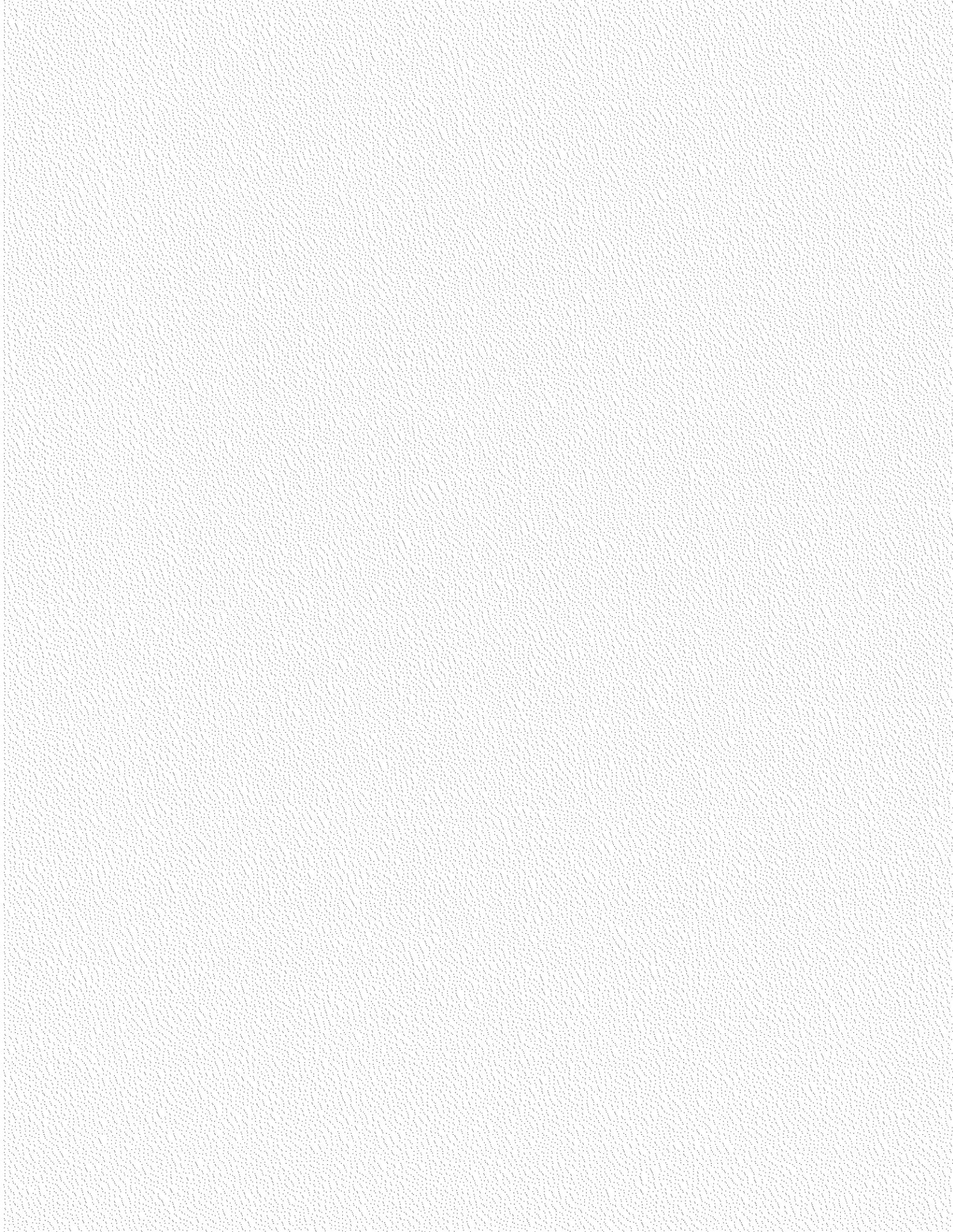
Affirmed.

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In re Barnes

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
In re ILENE G. BARRON REVOCABLE TRUST.
Michael Scullen, Trustee, Appellant,
v.
Richard Barron, Marjorie Schneider, and Kathleen
Barron, Appellees.

Docket No. 307713.
Jan. 24, 2013.

Wayne Probate Court; LC No.2008-730919-TV.

Before: RONAYNE KRAUSE, P.J., and
CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

*1 Appellant, successor trustee of the Ilene G. Barron Revocable Trust, appeals as of right the probate court's order reducing his hourly rate for his fiduciary fees to \$100 per hour.^{FN1} We affirm the probate court's determination of a reasonable fiduciary fee rate; however, we conclude that certain of appellees' objections to appellant's fees are barred by the doctrine of res judicata, and we remand for consideration of whether appellees' objections are otherwise barred by the language of the trust agreement or the statute of limitations.

FN1. Appellees are the trust's beneficiaries. Only appellees Richard Barron and Marjorie Schneider were petitioners in the probate court.

I. PROBATE COURT'S FEE EVALUATION

Appellees, beneficiaries of the Ilene G. Barron Revocable Trust, were unsatisfied with appellant's performance as successor trustee of the trust, and

filed numerous objections with the probate court concerning this administration. The probate court held an evidentiary hearing regarding appellees' various petitions. Relevant to this appeal, appellees testified that appellant charged the trust approximately \$150,000 in total fees during his over three-year administration; these fees included fiduciary fees and fees for legal work, including legal assistant fees. Appellant testified that his current hourly rate as an attorney is \$195 and he typically does not charge a different fee for acting as a fiduciary in administering a trust, but charges his regular attorney fee. Further, testimony from a trust beneficiary established that appellant charged the trust \$185 to \$195 per hour for his services throughout his administration of the trust, and additionally charged \$75 per hour for legal assistant fees. The probate court found appellant's fee to be excessive relative to the custom in the community and reduced his hourly rate for his fiduciary services to \$100 per hour.

Appellant first claims that the probate court abused its discretion in reducing his hourly rate for his fiduciary services because there was no evidence to support the court's ruling and the court failed to consider the appropriate factors in evaluating the reasonableness of a trustee's fees. We disagree. In *In re Temple Marital Trust*, 278 Mich.App 122, 128; 748 NW2d 265 (2008) this Court set forth the standard of review for probate court decisions as follows:

Issues of statutory construction present questions of law that this Court reviews de novo. But appeals from a probate court decision are on the record, not de novo. The trial court's factual findings are reviewed for clear error, while the court's dispositional rulings are reviewed for an abuse of discretion. The trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. [Citations omitted.]

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Under the Michigan Estates and Protected Individuals Code (“EPIC”), “[i]f the terms of a trust, do not specify the trustee’s compensation, a trustee is entitled to compensation that is reasonable under the circumstances.” MCL 700.7708. In *Comerica v. Adrian*, 179 Mich.App 712, 724–725; 446 NW2d 553 (1989), this Court enumerated several factors that probate courts may utilize in determining the reasonableness of a trustee fee, including:

*2 (1) the size of the trust, (2) the responsibility involved, (3) the character of the work involved, (4) the results achieved, (5) the knowledge, skill, and judgment required and used, (6) the time and services required, (7) the manner and promptness in performing its duties and responsibilities, (8) any unusual skill or experience of the trustee, (9) the fidelity or disloyalty of the trustee, (10), the amount of risk, (11) the custom in the community for allowances, and (12) any estimate of the trustee of the value of his services.

However, “[t]he weight to be given any factor and the determination of reasonable compensation is within the probate court’s discretion.” *Id.* at 724; see also *In re Thacker Estate*, 137 Mich.App 253, 258; 358 NW2d 342 (1984). The probate court has the “broadest discretion” in evaluating “the worth of services rendered in light of its experience and knowledge of such matters” and in determining “[t]he weight to be given any factor.” *Comerica*, 179 Mich.App at 724; *Thacker*, 137 Mich.App at 258. Further, when evaluating a petition for review of the trustee’s fees, the probate court must review the requested fees for reasonableness with “an eye toward preservation of the estate’s assets for the beneficiaries.” *In re Sloan Estate*, 212 Mich.App 357, 364; 538 NW2d 47 (1995).

Although the expert testimony presented on the excessiveness of appellant’s fee was found inadmissible ^{FN2} and the billing statements and accountings were not admitted into evidence, we conclude that the evidence, in light of the probate court’s extensive experience and knowledge in evaluating the reasonableness of trustee fees, supported

the court’s reduction in appellant’s hourly rate for his fiduciary services. *Comerica*, 179 Mich.App at 724; *Thacker*, 137 Mich.App at 258. It is evident from testimony at the evidentiary hearing, as well as the numerous petitions before the court concerning the administration of the trust, that the court was keenly aware of the factors pertinent to the probate court’s determination of the reasonableness of a trustee’s fee under Michigan law. Notably, testimony revealed the value, complexity, and composition of the assets comprising the trust, appellant’s specific actions in administering the trust, specific issues that arose during the administration, appellant’s level of experience in the practice of trust administration, and the adversarial nature of the relationship between two of the appellees and appellant. We believe, on this record, the probate court could adequately evaluate the reasonableness of appellant’s fiduciary fee in accordance with the pertinent factors enumerated in *Comerica*, 179 Mich.App at 724, especially in light of the court’s extensive experience and knowledge in evaluating such matters. *Thacker*, 137 Mich.App at 258.

FN2. The probate court excluded the expert testimony from evidence, finding that the testimony was not properly admitted in accordance with MRE 703.

We also believe the probate court properly relied on its own personal knowledge and extensive experience in reviewing trustee fees, in light of the testimony regarding the trust’s administration, in determining a reasonable rate for appellant’s fiduciary services. In fact, this Court has recognized that the probate court is encouraged to rely upon personal knowledge in determining the reasonableness of an attorney fee. *Thacker*, 137 Mich.App at 258; citing *Becht v. Miller*, 279 Mich. 629, 640–641; 273 NW 294 (1937). It was also proper, in light of the court’s experience, knowledge, and broad discretion in evaluating the worth of trustee services, to place significant weight on the customary fee charged in the community for fiduciary services, especially in light of the testimony indicating

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a lack of any specialized skill or experience on the part of appellant in trust administration. *Comerica*, 179 Mich.App at 724; *Thacker*, 137 Mich.App at 258. On this record, we believe the probate court's decision reducing appellant's fiduciary fee to \$100 per hour was within the range of reasonable and principled outcomes, and thus, did not constitute an abuse of discretion. *Temple*, 278 Mich.App at 128.

*3 Appellant asserts that the probate court did not reference the factors enumerated in *Comerica*, 179 Mich.App at 724, to be used in evaluating the reasonableness of a trustee's fees in its opinion. Instead, the court referenced the factors enumerated under Michigan Rule of Professional Conduct (MRPC) 1.5(a) for use in evaluating the reasonableness of attorney fees. Many of those factors are similar to the factors used to evaluate the reasonableness of trustee fees identified in *Comerica*, i.e., the skill and time involved, the customary fee, the amount in question or size of the trust or estate, and the experience of the attorney/trustee. Accordingly, we do not believe the court's reference to the factors enumerated under MRPC 1.5(a), instead of the factors enumerated in case law, constituted reversible error, especially considering the probate court's broad discretion in this arena. *Comerica*, 179 Mich.App at 724; *Thacker*, 137 Mich.App at 258. It is evident that the court placed significant weight on the customary fee for trustee services in the community in evaluating the reasonableness of appellant's fee, a factor identified as pertinent to the reasonableness of both an attorney's and a trustee's fee. Furthermore, the court did reference *Comerica* in a prior opinion, wherein the court indicated that in determining whether the trust accountings contain excessive trustee fees, it considers, among other factors, the factors enumerated in *Comerica*, which indicates that the court was, in fact, aware of the factors pertinent to evaluating the reasonableness of a trustee's fee.

We also disagree with appellant's contention that the probate court improperly considered the trust's accountings and his billing statements in

reaching its decision. To support his argument, appellant claims that the court's reference in its opinion to \$29,288.61 in "trustee administration fees" shows that the court impermissibly "went outside the record" and based its reasoning on its own review and analysis of the interim trust accountings and/or appellant's billing statements, which were not admitted into evidence. However, it is apparent that the court obtained the amount from appellant's proposed plan of distribution, which was filed with the court and properly admitted at the evidentiary hearing and represents the estimated additional expenses of administering the trust. Therefore, contrary to appellant's argument, the probate court's reference to the \$29,288.61 amount does not necessarily indicate that the court improperly considered evidence not admitted at the evidentiary hearing. In fact, it is uncontested that appellant's total fees throughout the administration of the trust approximated \$150,000; this amount was reflected in the federal estate tax return introduced by appellant at the evidentiary hearing.

We conclude that the trial court did not abuse its discretion in determining a reasonable fee for fiduciary services. We note that the order of the probate court specifies that appellant's "fiduciary fees shall be billed to the Trust at a rate of \$100 per hour." (Emphasis added). We do not read the probate court's order as imposing a reduced rate for attorney fees charged to the trust by appellant for legal services. According to the record before this Court, these two fees appear to have been invoiced separately in the interim accountings provided to appellees by appellant.

II. APPELLEES' OBJECTIONS TO THE APRIL 14, 2008 ACCOUNTING ARE BARRED BY RES JUDICATA

*4 We note that appellant's accounting for the period ending April 14, 2008, had been filed with the probate court at the time appellees filed a petition in October 2008 objecting to appellant's allegedly improper payment of a claim against the trust. Appellees did not object to the payment of ap-

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pellant's trustee fees in the 2008 petition. We agree with appellant that the doctrine of res judicata bars appellees from objecting to that accounting on the basis that appellant's fees were excessive, because they could have raised that objection in their earlier petition. "Michigan courts have broadly applied the doctrine of res judicata" and "have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart v. Dart*, 460 Mich. 573, 586; 597 NW2d 82 (1999); see also, *Washington v. Sinai Hosp. of Greater Detroit*, 478 Mich. 412, 418; 733 NW2d 755 (2007); *Begin v. Mich. Bell Tel. Co.*, 284 Mich.App 581, 600; 773 NW2d 271 (2009). Res judicata applies "when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Sewell v. Clean Cut Management, Inc.*, 463 Mich. 569, 575; 621 NW2d 222 (2001); *Limbach v. Oakland Co. Rd. Comm.*, 226 Mich.App 389, 395; 573 NW2d 336 (1997).

There is no dispute that both of the petitions at issue involve the same exact parties, i.e., the appellees Richard Barron and Marjorie Schneider and appellant. Further, the earlier petition was decided on the merits for purposes of res judicata by the probate court's entry of a stipulated order resolving appellees' objection to the trust accounting for the period ending April 14, 2008. *Sewell*, 463 Mich. at 575. "Probate court orders are final orders and have the force and effect of judgments in courts of record and are res judicata of the matters disposed of therein." *Banks v. Billups*, 351 Mich. 628, 634; 88 NW2d 255 (1958). Finally, the "matter contested in the second action was or could have been resolved in the first." *Sewell*, 463 Mich. 575; see also, *Washington*, 478 Mich. at 420; *Begin*, 284 Mich.App at 599-601. It is evident that both petitions shared a common motivation, i.e., appellees' need to protect their beneficial interests in the trust's assets. Both actions sought to recover monies that Richard Barron and Marjorie Schneider believed appellant im-

properly disbursed from the trust, were related in time in that they concerned trust disbursements occurring during the period ending April 14, 2008, and originated from the same interim accounting prepared by appellant. Therefore, the actions were sufficiently related in motivation, time, and origin, and would have formed a "convenient trial unit" to constitute the same transaction for purposes of res judicata. *Begin*, 284 Mich.App at 601. Although the earlier and subsequent petitions did not necessarily rely on the same evidence, i.e., the evidence relevant in the earlier action concerned the nature and source of a specific claim allowed against the trust, whereas the evidence relevant in the subsequent action concerned the reasonableness of appellant's fees, "under Michigan's broad application of res judicata applying the 'same transaction' test, whether evidence necessary to support a first lawsuit differs somewhat from that necessary for subsequent claims will not be dispositive." *Id.*, 284 Mich.App at 601. Because appellees could have raised their objection to appellant's trustee fee disbursed during the accounting ending in April 14, 2008 in his earlier action had they exercised reasonable diligence, it is now barred by res judicata. *Begin*, 284 Mich.App at 600, 603, 605.

III. REMAND IS NECESSARY FOR THE PROBATE COURT TO CONSIDER BARS TO APPELLEES' OBJECTIONS TO THE TRUST ACCOUNTINGS

*5 Appellant next claims that appellees were precluded from objecting to certain trust accountings because the trust agreement imposes a 90-day limitations period during which the beneficiaries are allowed to object to the accountings received from the trustee; otherwise the accounting is deemed to be accepted. Although the probate court did not decide this issue, we address it because appellant raised it before the court and it presents an issue of law. See *Detroit Leasing Co. v. City of Detroit*, 269 Mich.App 233, 237-238; 713 NW2d 269 (2005), citing *Steward v. Panek*, 251 Mich.App 546, 554; 652 NW2d 232 (2002). However, because further fact finding is needed to resolve this

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issue, we remand for further consideration of the trust accountings to determine whether the limitations periods imposed by the terms of the trust agreement or MCL 700.7905 preclude appellees from objecting to appellant's trustee fees disclosed in those accountings.

In order to provide guidance to the trial court on remand, we make the following observations. In the absence of court supervision over the trust or a petition for review, the administration of the trust, including the payment of a trustee's fees, should proceed expeditiously in the hands of the trustee, consistent with the terms of the trust, free of judicial intervention. *Temple*, 278 Mich.App at 137-138; MCL 700.7201(2); MCR 5.501(B), (C).^{FN3} The trust agreement contains a provision requiring the trustee, at least annually, to furnish the income beneficiaries with accountings of the principal, income, and disbursements of the trust. The provision also requires income beneficiaries to object to the accountings within 90 days of their receipt, or else the accountings are "deemed to be accepted." Accordingly, under the terms of the trust agreement, which govern the administration in the absence of judicial supervision or a petition for review, appellees were required to object within 90 days of their receipt of the accountings. Therefore, failure by appellees to object to the accountings within the time prescribed by the trust agreement constitutes acquiescence in the amount of trustee fees paid to appellant and precluded any challenge to the trustee fees disclosed in those accountings.

FN3. The probate court's jurisdiction was initially invoked when two of the appellees filed a petition seeking court supervision of the trust on the basis that appellant had an adversarial relationship with them and continued to display bias against them. There is no indication in the lower court record that the court ever ordered supervision of the trust, and thus, the trust's administration should proceed consistent with the terms of the trust.

Appellant claims that he furnished quarterly trust accountings disclosing the amount of his fees to appellees following the grantor's death on January 28, 2008. However, the record before this Court contains no evidence, with the exception of the first accounting for the period ending April 14, 2008, from which it can be determined when appellant provided the interim accountings, because neither the accountings nor appellant's monthly billing statements were admitted in evidence or filed with the probate court as part of appellees' objections to the interim accountings. There was also no admissible testimony at the evidentiary hearing regarding this issue. Therefore, this Court is unable to determine whether any interim accountings disclosing appellant's fees were furnished to appellees before March 16, 2010, without objection. If so, then appellees are precluded from objecting to those accountings in accordance with the limitations period imposed under the trust agreement, which in the absence of judicial supervision, governed its administration. MCL 700.7201(2).

*6 Additionally, appellees may also be barred from objecting to certain accountings under MCL 700.7905(1)(a), which provides a limitations period of one year to claim breach of trust where the trustee "sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding." In the absence of the accountings or testimony regarding this issue, however, we cannot ascertain whether appellant adequately informed appellees of the time allowed for commencing a proceeding against a trustee for breach of trust as required to invoke the one-year time limitation period. MCL 700.7905(1)(a), (2).

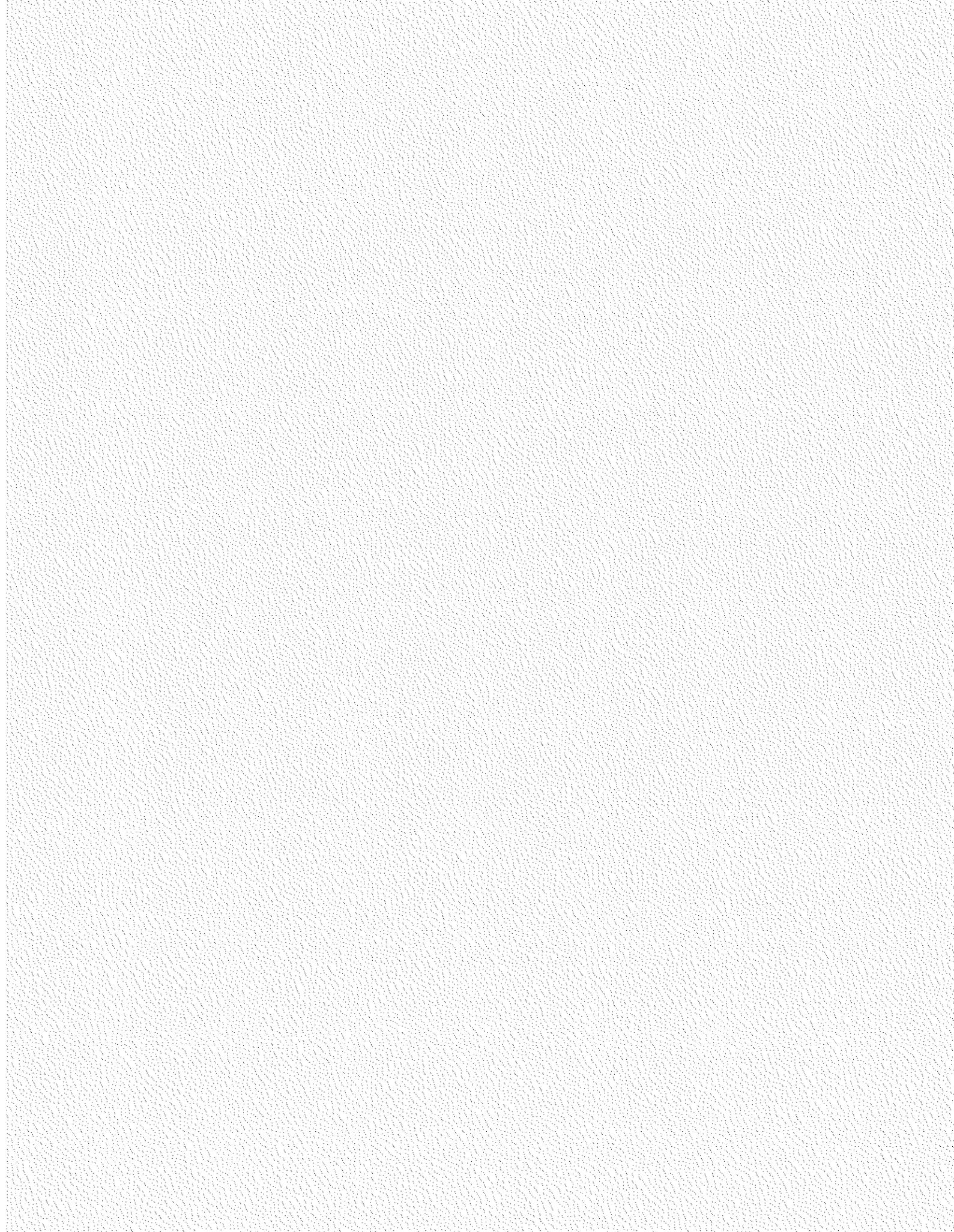
We affirm the probate court's order reducing appellant's hourly rate for his fiduciary fees to \$100 per hour. We remand for further consideration of whether appellee's objections to the trust accountings are barred by language of the trust agreement or MCL 700.7905(1)(a), with the caveat that objections to the April 14, 2008 accounting are barred by

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res judicata. We do not retain jurisdiction.

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.

In re John F ERVIN TESTIMENTARY TRUST,
Jane Pearson EVANS a/k/a Mary Jane Pearson
Evans, Petitioner-Appellant,

v.

BANK ONE TRUST CO. NA, Respondent-Appellee,
and

ERVIN INDUSTRIES, INC., John Pearson, Nancy
P. Rudolph, and Ann E. Jorgenson, Appellees.

In re John F ERVIN TESTIMENTARY TRUST,
Mary Jane Pearson EVANS, Petitioner-Appellant,

v.

BANK ONE TRUST CO. NA, Respondent-Appellee,
and

ERVIN INDUSTRIES, INC., John Pearson, Nancy
P. Rudolph, Ann E. Jorgenson, and Mary Ervin
Pearson, Appellees.

In re John F ERVIN TESTIMENTARY TRUST,
Mary Jane Pearson EVANS, Petitioner,

and

Andrea EVANS, Petitioner-Appellant,

v.

BANK ONE TRUST CO. NA, Respondent-Appellee,
and

ERVIN INDUSTRIES, INC., John Pearson, Nancy
P. Rudolph, and Ann E. Jorgenson, Appellees.

No. 249974, 253745, 253824.
Feb. 24, 2005.

Before: MARKEY, P.J., and FITZGERALD and
OWENS, JJ.

[UNPUBLISHED]

PER CURIAM.

*1 In Docket No. 249974, petitioner Jane Pearson Evans, also known as Mary Jane Pearson Evans, (Petitioner) appeals by leave granted an order of the circuit court that reversed the probate court's decision not to disqualify petitioner's counsel. In Docket No. 253745, petitioner appeals by right two orders denying her motion for partial summary disposition and granting respondent's (the bank) motion for summary disposition. In Docket No. 253824, petitioner Andrea Evans (Andrea), petitioner's daughter, appeals by right the orders appealed by petitioner in Docket No. 253745. The appeals have been consolidated on appeal. We affirm.

Interested party Ervin, whose voting shares are held in trust by the bank, and interested parties Pearson, Nancy Pearson Rodolph, Anne Jorgenson, and Mary Ervin Pearson, beneficiaries of five of the trusts, have filed briefs on appeal. The State Bar of Michigan Probate and Estate Planning Section was granted leave to file an amicus brief with respect to Docket No. 249974. This case arose when petitioner became unhappy with her brother John Pearson's management of Ervin Industries, Inc. (Ervin), the bank's supervision of Ervin's management, and the bank's management of the six trusts.

Petitioner first argues that the circuit court erred in disqualifying her attorney on conflict of interest grounds.^{FNI} We disagree.

FNI. Petitioner argues that Bank One Trust Company was not the proper trustee in the instant suit. Although the probate court later indicated that Bank One Trust Company was the proper trustee when it denied petitioner's motion to remove Bank One Trust Company, we analyzed this issue as though the trustee were Bank One because of petitioner's claim that she has appealed the probate court's decision. Nevertheless, if the proper trustee is Bank One Trust Company, the bank's case is even

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stronger because petitioner's argument with respect to separate legal entities would fail.

As an initial matter, plaintiff argues that the court did not have the power to disqualify her attorney. Michigan Rules of Professional Conduct are judicially enforceable. *Evans & Luptak v. Lizza*, 251 Mich.App 187, 194; 650 NW2d 364 (2002). It is the judiciary's exclusive constitutional prerogative under Const 1963, art 3, § 2, to define and regulate the practice of law with respect to judicial proceedings, and the power to regulate and discipline members of the state bar constitutionally belongs to our Supreme Court pursuant to Const 1963, art 6, § 5. *Attorney Gen v. Public Service Comm*, 243 Mich.App 487, 491; 625 NW2d 16 (2000). Moreover, “[a] judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.” *Evans, supra* at 200, quoting Michigan Code of Judicial Conduct Canon 3(B)(3). Therefore, the court had the power to disqualify plaintiff's attorney on conflict of interest grounds. “The application of ‘ethical norms’ to a decision whether to disqualify counsel is reviewed de novo.” *Rymal v. Baergen*, 262 Mich.App 274, 317; 686 NW2d 241 (2004), citing *General Mill Supply Co v. SCA Services, Inc*, 697 F.2d 704, 711 (CA 6, 1982). With respect to conflict of interest, MRPC 1.7(a) states:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

*2 The plain language of the rule does not indicate, as the circuit court found, that disqualification is automatic when a conflict exists. Instead, there are numerous variables that must be con-

sidered. For example, the parties' interest must be directly adverse, counsel may reasonably believe that neither attorney-client relationship will be affected, or the client may consent. Thus, we find that a case-by-case analysis is required with respect to disqualification proceedings pursuant to MRPC 1.7(a), and provide the following analysis to be conducted before an attorney is disqualified: (1) the court should determine whether a conflict exists, (2) if a conflict exists, the court should determine whether it is directly adverse, (3) if the conflict is directly adverse, representation is prohibited unless (a) the attorney reasonably believes the dual representation will not adversely affect the attorney-client relationship with either client, and (b) both clients consent after consultation.

A trial court's determination whether a conflict of interest exists is reviewed for clear error. *Rymal, supra* at 316. A conflict of interest is defined in relevant part as a “real or seeming incompatibility between the interests of two of a lawyer's clients.” Black's Law Dictionary (8th ed). Here, a fee agreement signed by a representative of Berry Moorman but not by a representative of the bank-specifically incorporated the bank's guidelines for outside counsel. The bank's guidelines for outside counsel stated in relevant part that “[a]ll of Bank One's subsidiaries and affiliates should be treated as clients for the purposes of [MRPC] 1.7,” and that waivers would not be extended to matters of litigation or adversarial representation.

Although the agreement was not signed by the bank, an acceptance of an offer “ ‘arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose.’ ” *In re Costs and Attorney Fees*, 250 Mich.App 89, 96-97; 645 NW2d 697 (2002), quoting *Kraus v. Gerrish Twp*, 205 Mich.App 25, 45; 517 NW2d 756 (1994), *aff'd* in part and remanded in part on other grounds sub nom *Kraus v. Dep't of Commerce*, 451 Mich. 420 (1996). The bank's re-

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ention of the firm indicated an unequivocal act of acceptance of the firm's offer to be bound by the bank's guidelines for outside counsel; thus, a contract regarding representation existed, which contained the guidelines for outside counsel, and the firm could not later deny the contract's existence. Therefore, the firm was bound by its agreement that representation of one affiliate constituted representation of Bank One, and dual representation of Bank One and plaintiff constituted a conflict of interest.^{FN2} The probate court's conclusion that a conflict existed, and the circuit court's treatment of the issue as though a conflict existed, were not clearly erroneous. *Rymal, supra* at 316.

FN2. *Pennwalt Corp v. Plough, Inc.*, 85 FRD 264 (D Del, 1980), cited by petitioner as the leading case for the proposition that an attorney who represents a corporation in an unrelated matter is not disqualified from representing an adversary of the corporation's affiliate, was not accurately portrayed. Although the court found that disqualification in the case against the affiliate was not required, *id.* at 274, this was after the firm's motion to withdraw from representing the corporation had been granted on the ground that if it were not permitted to withdraw a conflict would arise, *id.* at 268, 272. The court acknowledged that choosing to represent the more favored client in a conflict situation was expressly disfavored, but found that no current conflict existed at the time of withdrawal because the corporations had recently become affiliated without the knowledge of counsel, and the in-house legal departments of the two corporations had not yet merged. *Id.* at 266, 272.

*3 The probate court found that the law firm engaged in representation that was directly adverse, stating “[when a law firm represents two parties, especially where one is suing the other, it follows then that the representations are directly adverse.”

The circuit court also indicated that the interests of the parties were directly adverse. “Directly” is defined as exactly or precisely, while “adverse” is relevantly defined as antagonistic or “opposing one's interests.” *Random House Webster's College Dictionary* (2001). Clients' interests are directly adverse when one client sues another client. See *Rymal, supra* at 320-321; *Barkley v. Detroit*, 204 Mich.App 194, 203-204, 209; 514 NW2d 242 (1994). Nevertheless, petitioner claims that representation of a bank in its corporate capacity is different from representation of the bank in its fiduciary capacity, and that the proposed revision of MRPC 1.7 recognizes this distinction. The changes to MRPC 1.7 are merely proposed changes that have not been enacted. It would not be wise for this Court to decide a case according to changes that may never occur. Moreover, petitioner does not cite the language of the MRPC 1.7 itself, but the commentary to the rule. “The text of each rule is authoritative. The comment that accompanies each rule does not expand or limit the scope of the obligations, prohibitions, and counsel found in the text of the rule.” MRPC 1.0(c). Thus, petitioner's reliance on the proposed changes to the comment to MRPC 1.7 is unfounded.^{FN3}

FN3. Petitioner also cites *Riggs Nat'l Bank of Washington, DC v Zimmer*, 355 A 2d 709 (Del Ch, 1976), *Moeller v Los Angeles Superior Court*, 16 Cal 4th 1124; 947 P.2d 317 (Cal, 1997), and *Martin v Valley Nat'l Bank of Arizona*, 140 FRD 291 (SD NY, 1991) for the proposition that trustees should be treated differently with respect to their respective capacities. However, each of these cases involved the assertion of the attorney-client privilege and work product privilege to avoid discovery; the issue was not whether counsel engaged in a conflict of interest. *Riggs Nat'l Bank of Washington, DC, supra*, 355 A 2d at 711, 713-714, *Moeller, supra*, 16 Cal 4th at 1129, *Martin, supra*, 140 FRD at 317-318. Although the court in *Martin, supra*, 140

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FRD at 318-319, noted that the firm would have engaged in a conflict of interest if it had represented both the bank and the trust, the court's comments were not germane to whether the documents were protected by the attorney-client privilege and, thus, were dicta. Furthermore, although several Michigan statutes cited by petitioner recognize the different fiduciary and individual capacities of a trustee, MCL 700.7306, MCL 700.7403, MCL 700.1214, the statutes govern the conduct of the trustee; they do not govern the conduct of a judicial officer, nor do they indicate that a trustee in its fiduciary capacity is any less entitled to loyal representation by legal counsel than other clients in this state.

The bank cites *Harrison v. Fisons Corp*, 819 F Supp 1039 (MD Fla, 1993), for the proposition that a law firm may not sue a bank in its fiduciary capacity when it represents the bank in other matters. The court in that case noted, "Because [the bank] has fiduciary responsibilities [as the guardian of the minor's estate] and has its own commercial interest in management of the property of its ward, it is more than a nominal party." *Harrison, supra*, 819 F Supp at 1040. The court, citing Florida's equivalent to MRPC 1.7 and its similar commentary, acknowledging the hardship to the defendant from the firm's disqualification, and having noted that one office of the firm represented the bank while a separate office represented the defendant, granted the bank's motion to disqualify the firm. *Id.* at 1040-1042.

Although none of the authority cited by either party is binding on this Court, we found the authority cited by the bank to be more persuasive because it was on point, it invoked a rule remarkably similar to MRPC 1.7, and the rule's commentary was very similar. We thus conclude that no distinction should be drawn between a trustee in its fiduciary capacity and a trustee in its individual capacity. Because the parties' interests were directly adverse, disqualifica-

tion was required absent the consent of both parties, and Bank One did not consent; therefore, the circuit court reached the right result.

*4 Petitioner next argues that her claims should not have been barred by res judicata because the accounts did not disclose material facts. We disagree.

Whether res judicata applies is a question of law subject to de novo review. *Adair v. State*, 470 Mich. 105, 122; 680 NW2d 386 (2004). The probate court granted the bank summary disposition on res judicata grounds with respect to all petitioner's claims that occurred before January 1997 because petitioner failed to file an objection with respect to the bank's accounts.

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich.App 371, 375; 521 NW2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. *Id.* at 375-376. [*Sewell v. Clean Cut Management, Inc.*, 463 Mich. 569, 575; 621 NW2d 222 (2001).]

Because the orders settling the accounts involved petitioner and either the bank or its predecessor, the orders involved the same subject matter and parties or parties' privies as the instant case. Thus, the third prong of the res judicata test has been satisfied. An order of a probate court is final and res judicata with respect to its subject matter, *Banks v. Billups*, 351 Mich. 628, 634; 88 NW2d 255 (1958), and an "allowance of an account is an adjudication of each item of it," *McDannel v. Black*, 270 Mich. 305, 310, 312; 259 NW 40 (1935). Therefore, the first prong of the res judicata test has been satisfied. With respect to the second prong, our Supreme Court has stated that a settled account is conclusive with respect to the parties absent fraud, mistake, omission or inaccuracy. *Id.* at

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635, citing *McDannel*, *supra* at 311. Thus, if material facts were omitted, *res judicata* arguably would not apply.

Nevertheless, our Supreme Court has also indicated that “ ‘if the party seeking relief was aware of the facts at the time of the settlement of the account, then the subsequently sought relief will be refused.’ ” *In re Humphrey Estate*, 141 Mich.App 412, 429; 367 NW2d 873 (1985), quoting *McDannel*, *supra*, 270 Mich. at 311-312.^{FN4} Moreover, *res judicata* has been held to bar claims that the parties failed to raise but could have raised had they used reasonable diligence. *Adair*, *supra* at 121, citing *Dart v. Dart*, 460 Mich. 573, 586; 597 NW2d 82 (1999). With respect to diligence, petitioner stated numerous times that she did not read all the information sent to her by the bank or the company because she relied on the bank and her brother to look out for her. Petitioner admitted that Pearson had held bi-annual shareholder meetings to explain Ervin's financial status, but very few questions were asked.

FN4. This Court's decision in *In re Humphrey Estate*, 141 Mich.App 412, 429; 367 NW2d 873 (1985), was made pursuant to MCL 700.564 of the Revised Probate Code, and no similar statute was enacted under EPIC; however, *McDannel v. Black*, 270 Mich. 305, 310, 312; 259 NW 40 (1935), appears to be based on common law. “Unless displaced by the particular provisions of [EPIC], general principles of law and equity supplement this act's provisions.” MCL 700.1203(1).

She also acknowledged that Ervin complied with several valuations of the company, and that one of the valuations indicated that the strategic plan was for moderate growth in sales and research and development for new applications. Moreover, she noted that the trust officer had always attempted to answer her questions. However, she claimed she did not read the reports of the companies she separately hired to value Ervin. Petitioner did not

demonstrate reasonable diligence where the company and bank clearly cooperated with her requests for information, she did not ask the questions she now complains were unanswered, and she did not read the information she did request. Because she did not exercise reasonable diligence, she failed to raise claims she could have raised, and the court properly dismissed her claims on *res judicata* grounds. *Adair*, *supra* at 121, citing *Dart*, *supra* at 586.^{FN5}

FN5. Andrea argues that *res judicata* did not apply to her because the fiduciary's accounts did not disclose material facts regarding transactions that affected her interest. *Res judicata* operates to bar claims with respect to parties and their privies. *Peterson Novelties, Inc v. City of Berkley*, 259 Mich.App 1, 12; 672 NW2d 351 (2003), citing *In re Humphrey Estate*, *supra*, 141 Mich.App at 434. Privity exists when “ ‘the interests of the non-party are presented and protected by the party in the litigation.’ ” *Peterson Novelties, Inc*, *supra*, 259 Mich.App at 13, quoting *Phinisee v. Rogers*, 229 Mich.App 547, 553-54; 582 NW2d 852 (1998). Here, because Andrea merely adopts her mother's arguments, she has failed to demonstrate that she had unprotected interests. Therefore, because she is a privy to the instant action and the previously filed accounts, Andrea is likewise barred by *res judicata*. Moreover, Andrea argues that as a presently vested beneficiary, she was entitled to receive annual accounts, and because she did not receive the accounts, *res judicata* cannot bar her claims. Although *In re Childress Trust*, 194 Mich.App 319, 322-323, 327; 486 NW2d 141 (1992) supports Andrea's claim that she was a presently vested beneficiary entitled to annual accounts under the revised probate code MCL 700.814(4), Andrea was a minor during this time. MCL 700.32

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provides in relevant part, “[i]n all proceedings under this act notice to a parent is notice to minor children residing with the parent.” And Jane acknowledged receiving annual accounts and financial statements. Therefore, Andrea’s claim has no merit under the revised probate code. Under EPIC, a trustee must only furnish an unsolicited annual account to each current beneficiary; the trustee must furnish an account upon request to all other beneficiaries. MCL 700.7303(3)(b). A current beneficiary is one who is “currently eligible to receive income from the trust.” *In re Childress Trust*, *supra*, 194 Mich.App at 327. Because Andrea’s interest was a presently vested future interest, she was not currently eligible to receive income from the trust and was not entitled to unsolicited annual accounts, and she provided no evidence that she requested annual accounts from the trustee. Therefore, Andrea’s claim fails under EPIC as well.

*5 Petitioner next argues that the court erred when it determined that her claims were barred by the statute of limitation pursuant to MCL 700.7307(1) because her claims accrued before EPIC became effective.^{FN6} We agree.

FN6. Additionally, Andrea argues that MCL 700.7303 did not bar her petition because MCL 700.7307 only applies to receipt of accounts and Andrea never received the accounts. Because we agree that MCL 700.7307 did not apply to claims that accrued before EPIC’s effective date, we do not reach Andrea’s claim.

Which statute of limitation applied, whether the statute was tolled, and when the limitation period ended are questions of law. *Wickings v. Arctic Enterprises, Inc.*, 244 Mich.App 125, 147; 624 NW2d 197 (2000). Questions of law are reviewed de novo. *Bertrand v. Mackinac Island*, 256 Mich.App 13, 28; 662 NW2d 77 (2003).

At the time the court made its decision, MCL 700.7307(1) provided:

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred unless a proceeding to assert the claim is commenced within 1 year after receipt of an annual or final account as to each beneficiary who receives the annual or final account.^{FN7}

FN7. MCL 700.7307(1) was amended by 2004 PA 314 to read:

A beneficiary is barred from commencing a proceeding against a trustee for breach of trust if the proceeding is not commenced within 1 year after the date the beneficiary or a representative of the beneficiary is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary of the time allowed for commencing a proceeding. A beneficiary may also be barred from commencing a proceeding against a trustee for breach of trust by adjudication, consent, ratification, estoppel, or other limitation.

MCL 700.7307(1) is part of EPIC, MCL 700.1101, *et seq.* 1998 PA 386. Assuming that EPIC applied, petitioner’s claim was arguably barred because the last account was filed March 2, 2000, and petitioner did not file her petition for order on supervision and appointment of a successor trustee until August 31, 2001. With respect to the retroactivity of the act, EPIC provides in relevant part:

(1) This act takes effect April 1, 2000.

(2) Except as provided elsewhere in this act, on this act’s effective date, all of the following apply:

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(b) The act applies to a proceeding in court pending on that date or commenced after that date regardless of the time of the decedent's death except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice.

(d) This act does not impair an accrued right or an action taken before that date in a proceeding. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time that commences to run by the provision of a statute before this act's effective date, the provision remains in force with respect to that right. [MCL 700.8101(1), (2)(b), (d).]

Petitioner claims that her rights accrued before April 1, 2000 and, thus, EPIC does not apply pursuant to MCL 700.8101(d). The trustee argues that MCL 700.992 of the revised probate code contained substantially similar language to MCL 700.8101, the Michigan Supreme Court has construed this language to mean that the revised probate code applied to a proceeding begun after its effective date, and EPIC should be construed in the same fashion. Although the Supreme Court in *In re Finlay Estate*, 430 Mich. 590, 596-597; 424 NW2d 272 (1988), indeed found that the revised probate code was the applicable law pursuant to MCL 700.992, the case did not involve an issue with respect to the applicable statute of limitation. Nor, for that matter, did this Court's decision in *In re Smith Estate*, 252 Mich.App 120; 651 NW2d 153 (2002), involve a statute of limitation issue. Instead, this Court has indicated that statutes of limitation are generally not given retroactive effect. *Gorte v. Dep't of Transportation*, 202 Mich.App 161, 167; 507 NW2d 797 (1993).

*6 “[A] statute of limitations may not be applied retroactively to take away vested rights.” *Gorte, supra*, 202 Mich.App at 168. A statute of limitation operates prospectively “unless an intent to have the statute operate retrospectively clearly

and unequivocally appears from the context of the statute itself.” *Rzadkowolski v. Pefley*, 237 Mich.App 405, 411; 603 NW2d 646 (1999), citing *Great Lakes Gas Transmission Co v State Treasurer*, 140 Mich.App 635, 650-651; 364 NW2d 773 (1985). The plain language of MCL 700.8101 does not clearly and unequivocally indicate retroactive effect with respect to statutes of limitation. Instead, MCL 700.8101(b) signifies general retroactive effect, while MCL 700.8101(d) excepts acquired rights from EPIC's retroactive application. Thus, MCL 700.7307 did not bar petitioner's claim.

Nevertheless, MCL 700.819 was not the applicable statute of limitation as petitioner argues, because the trustee did not give petitioner “a final account or other statement fully disclosing the matter and showing termination of the trust relationship,” which was required to trigger the period of limitation pursuant to MCL 700.819. Instead, this Court has applied the general three-year period of limitation for tort actions to breaches of fiduciary duty. *Miller v. Magline, Inc.*, 76 Mich.App 284, 313; 256 NW2d 761 (1977). See also *Smith v First Nat'l Bank & Trust Co of Sturgis*, 177 Mich.App 264, 270; 440 NW2d 915 (1989).^{FN8}

FN8. See, also, *In re Bentley Trust*, unpublished opinion per curiam of the Court of Appeals, issued August 23, 2002 (Docket No. 228711), 3, *In re Brockway Trust*, unpublished opinion per curiam of the Court of Appeals, issued July 16, 1999 (Docket No. 208504), 3, *In re Barnes Revocable Trust*, unpublished opinion per curiam of the Court of Appeals, issued June 27, 2000 (Docket No. 211968), 3.

“A claim of breach of fiduciary duty or breach of trust accrues when the beneficiary knew or should have known of the breach.” *Bay Mills Indian Comm v. Michigan*, 244 Mich.App 739, 751; 626 NW2d 169 (2001), citing *Baks v. Moroun*, 227 Mich.App 472, 493-494; 576 NW2d 413 (1998), overruled on other grounds sub nom *Estes v Idea Engineering & Fabricating, Inc.*, 250 Mich.App

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270, 278; 649 NW2d 84 (2002). The “knew or should have known” language indicates that when a claim accrues is subject to an objective standard. “A plaintiff is deemed to be aware of a possible cause of action when he becomes aware of an injury and its possible cause.” *Shawl v. Dhital*, 209 Mich.App 321, 324-325; 529 NW2d 661 (1995), citing *Moll v. Abbott Laboratories*, 444 Mich. 1, 24; 506 NW2d 816 (1993).^{FN9}

FN9. Although *Shawl v. Dhital*, 209 Mich.App 321; 529 NW2d 561 (1995) involved a medical malpractice action, our Supreme Court, in *Soloway v. Oakwood Hosp Corp.*, 454 Mich. 214, 222; 561 NW2d 816 (1997), extended the “possible cause of action” standard to other tort claims that were subject to the discovery rule. *Baks, supra*, 227 Mich.App at 495 n 10.

Petitioner claims that the trustee fraudulently concealed these events from her by not including the events in the annual accounts, and that this tolled the statute of limitations pursuant to MCL 600.5855. “Generally, for fraudulent concealment to postpone the running of a limitation period, the fraud must be manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery.” *Witherspoon v. Guilford*, 203 Mich.App 240, 248; 511 NW2d 720 (1994), citing *Draws v. Levin*, 332 Mich. 447, 452; 52 NW2d 180 (1952). However, a fiduciary has an affirmative duty to disclose to his principal. *Brownell v. Garber*, 199 Mich.App 519, 527; 503 NW2d 81 (1993). On the other hand, if liability was discoverable from the outset, then MCL 600.5855 will not toll the applicable period of limitation. *Witherspoon, supra*, 203 Mich.App at 248-249. If a plaintiff knows of a cause of action, there can be no concealment. *Eschenbacher v. Hier*, 363 Mich. 676, 681; 110 NW2d 731 (1961). With respect to whether a plaintiff is aware of a cause of action, our Su-

preme Court stated:

*7 “It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim.” [*Eschenbacher, supra*, 363 Mich. at 682, quoting 37 CJ, Limitation of Actions, § 359, p 976.]

As previously discussed with respect to res judicata, petitioner was presented with sufficient evidence to place her on notice of the now-challenged events. “A plaintiff cannot claim to have been defrauded where he had information available to him that he chose to ignore.” *Nieves v. Bell Industries*, 204 Mich.App 459, 465; 517 NW2d 235 (1994), citing *Webb v. First of Michigan Corp.*, 195 Mich.App 470, 475; 491 NW2d 851 (1992). Therefore, the statute was not tolled by MCL 600.5855, and given the abundance of information provided to petitioner, as well as the company's cooperation with respect to investigations performed on behalf of petitioner, we find that all claims that arose more than three years before August 31, 2001 were barred by MCL 600.5805(10).^{FN10} Thus far, petitioner's only claims that have survived res judicata and the statute of limitation are the Bamsteel transaction, which occurred in January, 1999, and the guaranteed loans that occurred in 2000 and 2001.^{FN11}

FN10. Andrea argues that because she did not receive notice of accounts, she was not subject to the period of limitation under MCL 600.5805(10). However, because Andrea was a minor, she did receive notice of the accounts through her mother's notice pursuant to the revised probate code, MCL 700.32, and because she was not a current income beneficiary, she was not entitled to receive automatic, unsolicited notice of the accounts under EPIC, MCL 700.7303(3)(b). Therefore, any claims that were barred to

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her mother were also barred to her pursuant to MCL 700.32. And under EPIC, because she did not request the annual accounts, she sat on her rights. Any claim that did not fall within the three-year period before she filed her concurrence with Jane's petition should have been barred by MCL 600.5805(10) because she should have discovered the alleged breach. *Bay Mills Indian Comm, supra*, 244 Mich.App at 751, citing *Baks, supra*, 227 Mich.App at 493-494.

FN11. Petitioner argues that the trial court improperly granted summary disposition to the bank on all her claims where several of her claims were not raised in the bank's motion for summary disposition but were raised in the bank's draft order that the court signed. Petitioner has not cited a single case to support her argument. An appellant may not merely announce his position without providing authority to support his claims. *Wilson v. Taylor*, 457 Mich. 232, 243; 577 NW2d 100 (1998). We decline to review this issue.

Petitioner next argues that the court erred by failing to grant her summary disposition with respect to the bank's self-dealing loans. The court found that the revised probate code did not apply, and the loans were proper under EPIC because they were not made to the trust, they were permitted by MCL 700.7403, MCL 700.7401(2)(q), and MCL 450.1545a, and because Ervin's disinterested directors approved the loans. MCL 700.7403 states:

(1) If the trustee's duty and the trustee's individual interest or the trustee's interest as a trustee of another trust conflict in the exercise of a trust power, the power may be exercised if any of the following are true:

(c) The transaction is otherwise permitted by statute.

MCL 700.7401 provides in relevant part:

(1) A trustee has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, use, and distribution of the trust property to accomplish the desired result of administering the trust legally and in the trust beneficiaries' best interest.

(2) Subject to the standards described in subsection (1) and except as otherwise provided in the trust instrument, a trustee possesses all of the following specific powers:

(q) To borrow money for any purpose from the trustee or others and to mortgage or pledge trust property.

Thus, assuming that the trust agreement did not prohibit the bank from lending money to Ervin, the bank had the power to do so if the loan was reasonable and prudent. The trust authorized the bank to borrow money on behalf of the trust and to exercise the same control over the property as the settlor might if living. Importantly, the trust did not preclude the bank from lending money to Ervin. Moreover, MCL 450.1545a(1) provides in relevant part:

*8 A transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes any of the following:

(a) The transaction was fair to the corporation at the time entered into.

(b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and the

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board, committee or independent director or directors authorized, approved, or ratified the transaction.

An affidavit by Maretta indicated that besides himself, Ervin's board of directors consisted of members of Ervin's management James Stephenson, John Pearson, Lynn Rogers, and outside directors Amherst H. Turner and Richard Sarns. Maretta also stated:

8. Ervin obtains competitive bids from multiple financial institutions before it enters into any loan transaction with any lender.

9. Neither I nor any other member of Bank One (i.e. Bank One Trust Company, N.A.) has had any involvement in the decision by any Bank One affiliate to make any loan to Ervin. The terms and conditions of these loans were negotiated entirely between the Bank One affiliates and Ervin without my involvement or the involvement of other members of our trust group.

10. In each circumstance where a Bank One affiliate was a lender to Ervin, the loan from the Bank One affiliate was on terms that were much more favorable to Ervin than those offered by any other lender. At no time did Ervin enter into any loan with a Bank One affiliate as an inducement to, or reward for, any action by Bank One as trustee.

Similar statements were made by Richard Cohn, who was the Vice-President, Secretary, and Treasurer of Ervin. The practice of obtaining competitive bids and the fact that the trust group did not participate in the loan negotiations indicated that the loan transactions between the bank and Ervin were fair. Moreover, a consent resolution signed by all members of the board of directors indicated that the material facts of all transactions and the bank's interests were known by all directors, and the directors approved the loans because they were fair and in Ervin's best interest. Therefore, the interested loans were authorized by statute on two separate grounds. MCL 450.1545a(1)(a), (b). We dis-

agree with petitioner's contention that MCL 450.1545a does not apply to trustees. Our Supreme Court in *In re Butterfield Estate*, 418 Mich. 241, 257; 341 NW2d 453 (1983), noted that when trustees serve as corporate directors, it is necessary to consult both the law of corporations and the law of trusts to determine the trustees' duties to the creditors, shareholders, and beneficiaries.

Petitioner further argues that while MCL 700.7401(2)(q) gives a trustee the power to borrow money from itself, the power can only be exercised within the confines of MCL 700.1214. MCL 700.1214 provides:

*9 Unless the governing instrument expressly authorizes such a transaction or investment ... a fiduciary in the fiduciary's personal capacity shall not engage in a transaction with the estate that the fiduciary represents... A fiduciary's deposit of money in a bank or trust company, in which the fiduciary is interested as an officer, director, or stockholder, does not constitute a violation of this section.

Notably, MCL 700.1214 does not contain an exclusion like MCL 700.7403, "otherwise permitted by statute." Thus, there appears to be some conflict between MCL 700.7401(2)(q), which authorizes a trustee to lend money to the trust, and MCL 700.1214, which appears to strictly prohibit self-dealing. Apparent inconsistencies between statutes should be reconciled if possible. *Nowell v. Titan Ins Co*, 466 Mich. 478, 483; 648 NW2d 157 (2002). Statutes relating to the same subject are in pari materia and must be read collectively as one law. *State Treasurer v. Schuster*, 456 Mich. 408, 417; 572 NW2d 628 (1998).

When interpreting statutes, the goal is to discover and give effect to legislative intent. *Neal v. Wilkes*, 470 Mich. 661, 665; 685 NW2d 648 (2004). To determine intent, appellate courts first look at the specific language of the statute. *Halloran v. Bhan*, 470 Mich. 572, 577; 683 NW2d 129 (2004). Unless defined in the statute, every word should be

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accorded its ordinary meaning given the context in which the word is used. *Lee v. Robinson*, 261 Mich.App 406, 409; 681 NW2d 676 (2004). The fair and natural import of the terms employed, in view of the subject matter of the law, governs. *In re Wirsing*, 456 Mich. 467, 474; 573 NW2d 51 (1998). MCL 700.1214 does not specifically address loans; in fact, the only word that could potentially refer to a loan is the word "transaction." However, transaction is used in conjunction with the word investment, "transaction or investment."

Although "or" is a disjunctive term, *Auto-Owners Ins v. Stenberg Bros, Inc.*, 227 Mich.App 45, 50; 575 NW2d 79 (1997), it is also "used to connect alternative terms for the same thing" and "used to correct or rephrase what was previously said." *Random House Webster's College Dictionary* (2001). In this context, the word transaction is synonymous with investment. MCL 487.14405 refers a fiduciary bank's investment of trust property, and MCL 700.1214 prohibits the fiduciary from (a) engaging in a transaction with the estate, (b) investing estate money in an affiliate of the fiduciary or (c) making a profit by purchasing, selling, or transferring estate property. Although the word transaction certainly could encompass a loan, the context of the statute indicates that the term transaction should be more narrowly construed.

Without this construction, the statutes cannot be harmonized; petitioner's interpretation disregards the provision in MCL 700.7403(c), which authorizes the transaction if otherwise permitted by statute. When the conflict cannot be harmonized, the specific statute controls. *Gebhardt v. O'Rourke*, 444 Mich. 535, 542-543; 510 NW2d 900 (1994). Here, MCL 700.7401(2)(q) specifically grants a trustee the power to make a loan to the trust. This provision is more specific than MCL 700.1214, which prohibits transactions or investments by fiduciaries in general. Moreover, MCL 700.7401(2)(q) is listed under the portion of EPIC specifically dealing with trusts, MCL 700.7201, *et seq.*, while MCL 700.1214 is listed under the construction and gener-

al provisions portion of EPIC, MCL 700.1201, *et seq.* Therefore, because the more specific statute controls, the loans by the bank to Ervin were not prohibited under EPIC. Petitioner's claims with respect to the guaranteed loans all involved transactions occurring in 2000 and 2001; petitioner's evidence indicated that she did not receive notice of these loans until March 29, 2002. Therefore, petitioner's claims did not accrue until after EPIC's effective date of April 1, 2000, and the claims were barred. MCL 700.8101(1), (2)(b).

*10 Petitioner next argues that Bank One and Bank One Trust Company did not comply with the requirements of MCL 487.14402; because they did not comply, neither Bank One nor Bank One Trust Company was the proper trustee; and the court erroneously denied her summary disposition with respect to this issue. We disagree.

As a current income beneficiary of a testamentary trust, petitioner was entitled to notice of substitution sent by certified mail, which explained her right to object. In her affidavit, petitioner claimed she did not receive this notice. If the affidavit had been the only evidence admitted, it arguably would have been sufficient to support granting summary disposition to petitioner on this ground. Nevertheless, petitioner's deposition testimony contradicted the affidavit, and the deposition testimony controlled. In her deposition, petitioner stated numerous times that she did not read all the information sent to her by the bank or the company because she relied on the bank and her brother to look out for her interests. Because petitioner's deposition testimony clearly indicated that she did not remember one way or the other whether she received notice from the bank, and she stated numerous times throughout the deposition that she did not read information provided to her, the deposition testimony contradicted petitioner's statement in her affidavit. And an affidavit may not be used to create an issue of material fact by contradicting damaging deposition testimony. *Dykes v. William Beaumont Hosp.*, 246 Mich.App 471, 478-480; 633 NW2d 440

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(2001).

Because this issue was raised in petitioner's motion for summary disposition, petitioner had the initial burden of supporting her position with admissible evidence. *Smith v. Globe Life Ins Co*, 460 Mich. 446, 455; 597 NW2d 28 (1999). Petitioner did not meet this burden. If the nonmoving party is entitled to summary disposition, the court may grant it to the nonmoving party. MCR 2.116(1)(2). Marett asserted in his affidavit that he sent petitioner statutorily sufficient notice of the substitution and her right to object. Because petitioner did not meet the initial burden, and the bank provided evidence that it complied with the requirements of MCL 487.14402, summary disposition was appropriately granted to the bank. *Dykes, supra*, at 478-479.

Petitioner's sole remaining claim to survive summary disposition on statute of limitation and res judicata grounds is with respect to the Barnsteel acquisition. Petitioner claims the bank had a conflict of interest because it was a lender for the Barnsteel transaction, and the analysis performed by the bank showed numerous risks involved with the purchase, none of which were disclosed to the beneficiaries. The documents presented by petitioner to support her claim appear to be internal company documents evaluating Barnsteel's strengths and weaknesses, evaluating the positives and negatives of the proposed acquisition, and establishing a maximum price Ervin was willing to pay for the business. One of the reasons in support of the purchase was to protect or increase Ervin's market share. We find that protection of market share was a prudent reason for the investment.

*11 Had petitioner presented evidence indicating that the investment was not prudent, an issue of material fact would have existed requiring a trial on this issue. However, petitioner did not provide any affidavits from financial or business experts indicating that the investment was imprudent at the time it was made. Moreover, this was evidence petitioner could have presented, which did not rely on the

completion of discovery. "[A]n adverse inference may be drawn against a party who fails to produce evidence within its control." *Grossheim v Associated Truck Lines, Inc*, 181 Mich.App 712, 715; 450 NW2d 40 (1989), citing *Griggs v. Saginaw & F R Co*, 196 Mich. 258, 265-266; 162 NW 960 (1917).

If the opposing party is entitled to judgment, the court may render judgment in its favor. *Auto-Owners Ins v Allied Adjusters & Appraisers, Inc*, 238 Mich.App 394, 397; 605 NW2d 685 (1999). De novo review requires this Court to review the evidence in the same manner as the trial court to determine whether an issue of material fact existed. *Morales v. Auto-Owners Ins*, 458 Mich. 288, 294; 582 NW2d 776 (1998). The bank argued in its reply brief to petitioner's motion for summary disposition that it had acted prudently and had not breached its fiduciary duties. Therefore, the issue was before the trial court. Although failure to raise an issue of material fact was not the ground on which the trial court granted summary disposition-the trial court granted summary disposition on statute of limitations grounds pursuant to MCL 700.7307(1)-a decision that reaches the right result for the wrong reason will not be reversed on appeal. *Grand Trunk W R, Inc v. Auto Warehousing Co*, 262 Mich.App 345, 354; 686 NW2d 756 (2004).

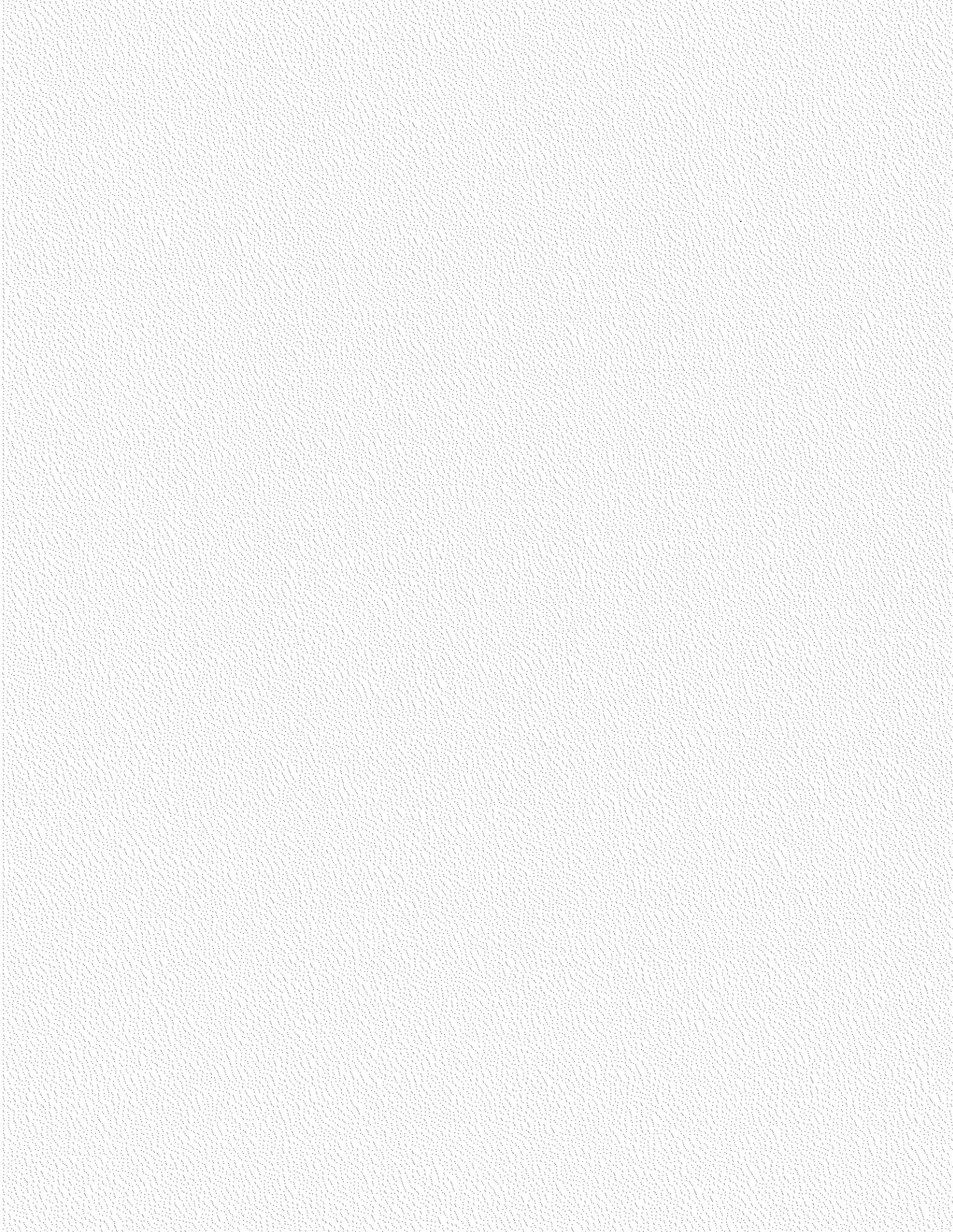
Because petitioner's petition was properly dismissed in its entirety, we need not reach petitioner's argument that a trustee is liable for assets held outside the trust.

Affirmed.

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.
In re ESTATE OF Helen D. EWBank TRUST.
Philip P. Ewbank, Scott S. Ewbank, and Brian B.
Ewbank, Petitioners-Appellants,

v.

Karin H. Swanson, Co-Trustee, and Robert C.
Tuck, Former Co-Trustee, Respondents-Appellees.
In re Estate of Paul C. Ewbank Trust.

Philip P. Ewbank, Scott S. Ewbank, and Brian B.
Ewbank, Petitioners-Appellants,

v.

Karin H. Swanson, Co-Trustee, and Robert C.
Tuck, Former Co-Trustee, Respondents-Appellees.

Docket Nos. 264606, 264608.
March 8, 2007.

Calhoun Probate Court; LC Nos. 01-001032-TT,
01-001033-TT.

Before: WHITBECK, C.J., and BANDSTRA and
SCHUETTE, JJ.

PER CURIAM.

*1 Petitioners appeal the order of probate Judge Donald Halstead dismissing their Restated Petitions to Surcharge trustees Karin Swanson and Robert Tuck and dismissing all claims for acts before June 1, 1992. We affirm in part, and remand in part for additional findings.

On October 11, 1977, Paul and Helen Ewbank, husband and wife, executed mirror-image trusts, which are now the subject of this suit. Both trust agreements were completely revocable and reserved all incidents of ownership of trust assets to the settlor. Each trust agreement named the surviving

spouse as the beneficiary for life, and each provided for identical distribution of the assets after the death of the surviving spouse-to their daughter and daughter-in-law for life, and the remainder to their six grandchildren, who were named in the trust agreements. Petitioners are grandsons and remainder beneficiaries of both Paul and Helen. Respondent Swanson is their granddaughter, and she is also a remainder beneficiary. Respondent Tuck was a co-trustee with Swanson and a successor to Theodore Van Dellen, the Ewbanks' attorney and family friend, who was initially a trustee for both trusts.

Paul Ewbank died on November 10, 1980, and Helen Ewbank died on October 24, 1999. After Helen's death, Van Dellen resigned as trustee, and Swanson took responsibility for distributing the assets. Eventually, Tuck was appointed as a co-trustee. Unhappy with the pace of distribution of the trusts' assets, petitioners filed a petition to replace Swanson and Tuck as trustees, and eventually filed a petition to surcharge both for breach of their fiduciary duties. Petitioners also requested that the co-trustees provide them with accountings for both trusts since their inception in 1977. Respondents protested, arguing that petitioners were not entitled to accountings between 1977 and 1999 because petitioners were not currently vested beneficiaries, but merely contingent, remainder beneficiaries, until Helen died in 1999. The probate court noted that, before this Court decided *In re Childress Trust*, 194 Mich.App 319; 486 NW2d 141 (1992), trustees were not required to provide remainder beneficiaries with accountings, and thus, respondents would not be required to provide accountings for the trusts' investments before June 1992. The court then dismissed the petition to surcharge for claims based on acts that occurred before June 1, 1992.

Petitioners argue on appeal that the trial court wrongly dismissed the surcharge action for claims before 1992 because, applying *Childress*, it found that the trustees owed no duty to provide informa-

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tion regarding the trusts' administration before 1992, and thus, they could not be surcharged for a breach of fiduciary duty for any breach before 1992. We conclude that the trial court's holding was incorrect.

A trustee's duties to beneficiaries are determined by the trust agreement and the intent of the settlor. *In re Butterfield Estate*, 418 Mich. 241, 259; 341 NW2d 453 (1983). Relevant statutes and case law also define what duties the trustee owes. *In re Green Charitable Trust*, 172 Mich.App 298, 312; 431 NW2d 492 (1988). Whether a trustee has breached his duties is determined by the facts of each case. *Id.* A trustee owes a duty of care to both the income beneficiaries and the remainder beneficiaries of a trust. *In re Butterfield Estate, supra* at 256. The duty of care is defined in part by the prudent investor rule, codified in the revised probate code at MCL 700.813, and now codified in the Estates and Protected Individuals Code (EPIC): "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 ... the trustee is under a duty to use those skills." MCL 700.7302. Long before the prudent person rule was codified, the Michigan Supreme Court held that "a trustee must show the utmost good faith. He must exercise in the execution of the trust the degree of care and diligence which a man of ordinary prudence would exercise in the management of his own affairs." *Michigan Home Missionary Soc v. Corning*, 164 Mich. 395, 402; 129 NW 686 (1911). The Court defined prudence as "acting with care, diligence, integrity, fidelity and sound business judgment." " *In re Messer Trust*, 457 Mich. 371, 380; 579 NW2d 73 (1998), quoting *In re Buhl's Estate*, 211 Mich. 124, 132; 178 NW2d 651 (1920).

*2 In addition, a trustee must act with honesty, good faith, and loyalty, and must refrain from acting in his or her own self-interest. *In re Green Charitable Trust, supra* at 313. If a trustee acts in

good faith, with reasonable diligence, he is not liable for mere mistakes in judgment. *In re Estate of Norris*, 151 Mich.App 502, 512; 391 NW2d 391 (1986); *In re Tolfree's Estate*, 347 Mich. 272, 285-286; 79 NW2d 629 (1956). Further, a trustee must act impartially between successive beneficiaries, respecting the differing interests each has. *Restatement Trusts*, 3d (Prudent Investor Rule) (1992), § 232, at 181; *In re Butterfield Estate, supra* at 257.

In this case, the trial court dismissed the surcharge claims for any acts prior to June 1, 1992. It apparently decided that because the trustees had no duty to account to the remainder beneficiaries before 1992, they had no fiduciary duties at all to those remainder beneficiaries. The parties and the trial court in this case focused on whether *Childress* was applicable and whether it required the trustees to provide notice to the petitioners. Such focus, however, was misplaced. A trustee's fiduciary duties are not swept away simply because there is no obligation to provide account reports to beneficiaries. Although a trust agreement may relieve a trustee's duty to account to beneficiaries, it cannot relieve the duty to account to the probate court. *Raak v. Raak*, 170 Mich.App 786, 793; 428 NW2d 778 (1988). Even in situations where beneficiaries have no right to receive trust reports, "the trustee will, nevertheless, be required in a suit for an accounting to show that he faithfully performed his duty and will be liable to whatever remedies may be appropriate if he was unfaithful to his trust." *Id.* at 792, citing *Wood v. Honeyman*, 169 P.2d 131, 166 (Or 1946). In *Raak*, this Court held that the trustee could be required to account for the trust's assets to determine what happened to \$70,000 of the corpus because, without an accounting, there was no way to prove the faithful performance of the trustee's duties. *Id.* at 790. Therefore, in this case, even if the trustees had no duty to account to the petitioners as remainder beneficiaries, they still had fiduciary duties to the petitioners, which may have been breached. *In re Butterfield Estate, supra* at 256. As such, they may be required to account for the trust

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funds. *Childress* does not address whether a trustee can be surcharged for negligence, and the trial court's reliance on the case to resolve the issue was improper.

A beneficiary may petition the probate court to "surcharge" the trustee for a breach of fiduciary duties. *In re Tolfree's Estate*, *supra* at 288; *In re Green Charitable Trust*, *supra* at 309; MCL 700.7306(4). Further, any beneficiary of the trust may file for a surcharge, including remainder beneficiaries. See *In re Messer Trust*, *supra* at 373. Thus, a surcharge action by the petitioners in this case was the proper remedy to address the trustees' alleged breach of fiduciary duties.

*3 The trial court erred by dismissing the surcharge petition solely on the basis that the trustees had no duty to provide accounts to the remainder beneficiaries. We note, however, that the trial court could have properly considered whether petitioners' claims were barred by laches. Respondents raised that defense below, and the trial court acknowledged that it could consider the defense in its ruling. Nevertheless, it did not make findings of fact or conclusions on that issue.

Laches is an equitable affirmative defense that is primarily applicable where circumstances make it inequitable to grant relief to a plaintiff who unreasonably delays filing a claim. *Yankee Springs Twp v. Fox*, 264 Mich.App 604, 611; 692 NW2d 728 (2004). The unreasonable delay must cause a change in a material condition, which results in prejudice. *Id.* at 612. The defendant bears the burden of proving that a lack of due diligence by the plaintiff caused him prejudice. *Id.* While laches is not generally applied when the parties have a fiduciary relationship, *Schmude Oil Co v. Omar Operating Co*, 184 Mich.App 574, 583; 458 NW2d 659 (1990), it will be applied in certain circumstances where there is a fiduciary relationship. See *Seguin v. Madison*, 328 Mich. 600, 607-608; 44 NW2d 150 (1950) (allowing laches as a defense where beneficiaries delayed suit 35 years).

In this case, petitioners claim a breach of fiduciary duty for poor investments since 1977, and they particularly point to the failure to sell Eagle-Picher Industries stock in the late 1980s when the company was embroiled in asbestos litigation and declared bankruptcy. Petitioners waited well over ten years to assert their claims. During that time, memories faded, old accountings and files were lost, and two trustees died—Helen Ewbank and Van Dellen. Respondents have clearly been prejudiced by the delay because evidence necessary for their defense is unavailable. Petitioners argue that they did not receive accountings and had no knowledge of the trusts until their grandmother died, and so the delay in asserting their claims is not unreasonable. A factual issue thus exists, which should be resolved by the trial court on remand.

Further, we note that both parties claim that MCL 700.7307 supports their arguments for and against a conclusion that this action is barred by the applicable statute of limitations. The statutory provision relied upon is part of the Estates and Protected Individuals Code, which has a section that makes it applicable to actions, like those at issue here "commenced after [April 1, 2000] ... except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of the infeasibility of applying this act's procedure." MCL 700.8101(2)(b). On remand, the trial court should consider and apply these statutory provisions, as appropriate, especially with regard to respondents' argument that petitioners' claim for breach of fiduciary duties prior to 1992 should be barred because, under the doctrine of "virtual representation," their interests were represented by Helen, the primary beneficiary of both trusts until her death in 1999. Also, see MCL 700.7303(3)(a).

*4 On appeal, respondent Tuck separately argues that the trial court's dismissal of the petition for surcharge for claims arising before 1992 should be affirmed, at least as to Tuck, because it is undisputed that he did not become a trustee until April

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18, 2000. An appellee may argue alternative grounds for affirmance as long as he is not seeking to enlarge the relief granted by the trial court. *Middlebrooks v. Wayne Co*, 446 Mich. 151, 166 n 41; 521 NW2d 774 (1994). Tuck is not seeking to enlarge the relief previously granted to him, but he is merely arguing alternative grounds to affirm the lower court's dismissal. Thus, we may address his argument.

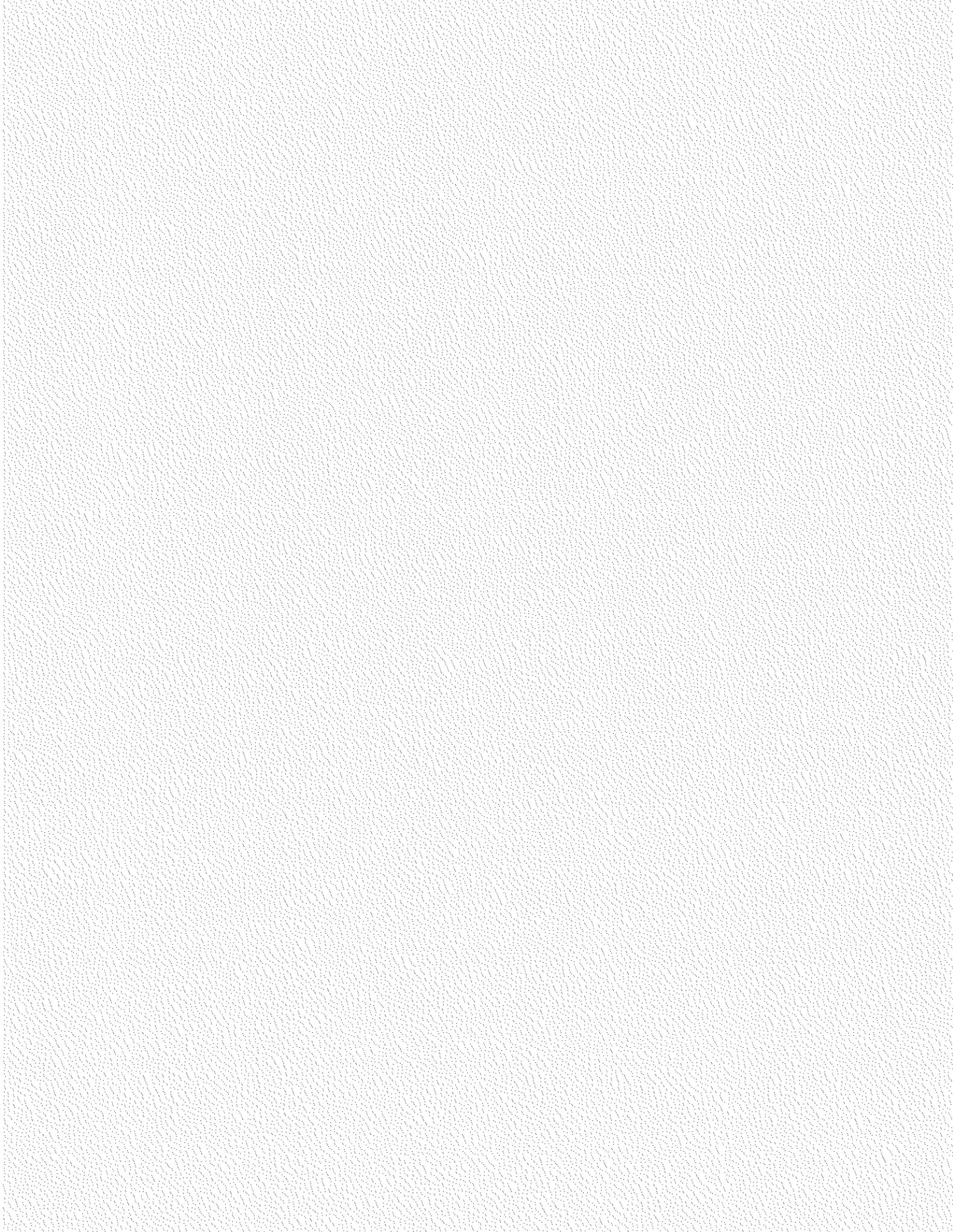
Tuck was named a trustee of both trusts in April 2000. Any cause of action against Tuck for failing to pursue a claim against Van Dellen accrued after Tuck became a trustee, which was well after June 1, 1992. We therefore affirm the court's dismissal of surcharge claims against respondent Tuck for trustee actions before June 1, 1992.

In reaching our conclusion, we note that petitioners, in their reply brief, indicate that they wish to appeal the dismissal of post-1992 claims as well. However, petitioners failed to include those claims in the statement of questions presented, and they are not properly presented for this Court's review. *Grand Rapids Employees Independent Union v. Grand Rapids*, 235 Mich.App 398, 409-410; 597 NW2d 284 (1999). Further, a reply brief may only contain rebuttal argument; raising an issue in a reply brief is insufficient to properly present it for appeal. MCR 7.212(G); *Maxwell v. Dep't of Environmental Quality*, 264 Mich.App 567, 576; 692 NW2d 68 (2004). Therefore, we will not address the dismissal of any post-1992 claims.

We affirm the trial court's order dismissing petitioners' claims against respondent Tuck. We otherwise reverse the trial court's order and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

Mich.App.,2007.
In re Estate of Ewbank Trust
Not Reported in N.W.2d, 2007 WL 704982
(Mich.App.)

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.
Deborah Jo LAFAVE, Plaintiff-Appel-
lant/Cross-Appellee,
v.
Michael H. JACOBSON, Defendant-Appel-
lee/Cross-Appellant,
and
BEAR, STEARNS & CO., INC., Defendant.

No. 213187.
Dec. 21, 1999.

Before: MURPHY, P.J., and HOOD and NEFF, JJ.

PER CURIAM.

*1 Plaintiff appeals as of right from the probate court order granting defendant's ^{FN1} motion for summary disposition. Defendant cross-appeals from the probate court order denying his motion for costs and attorney fees. We affirm in part and reverse in part.

FN1. Defendant, Bear, Stearns & Co, Inc, reached a settlement with plaintiff and is not a party to this appeal. Accordingly, we refer to Michael H. Jacobson only as defendant.

On December 1, 1995, plaintiff filed a three-count complaint alleging breach of fiduciary duty, misrepresentation, and innocent misrepresentation. Specifically, plaintiff alleged that she married David Alan Finkelstein on January 15, 1988. Following the marriage, an irrevocable trust entitled "The Deborah Jo Stegehuis Trust" was created. The trust was primarily funded with assets consisting of stock and bonds, and defendant served as its trust-

ee. On December 31, 1991, the trust purchased 5,000 shares of Cortech. In 1991, Finkelstein commenced divorce proceedings against plaintiff, but the pair reconciled. In 1993, the parties separated and activated the divorce proceedings. Defendant undertook the legal representation of Finkelstein and continued to serve as trustee of the trust. During the course of the divorce proceeding, defendant made representations regarding the value of the trust and number of stock shares. Although a stock split had caused the number of shares of Cortech stock to deplete to 2,500, defendant represented to plaintiff that she still had 5,000 shares. Shortly after making this representation to plaintiff, defendant withdrew from representing Finkelstein in the divorce proceeding. However, plaintiff allegedly relied on defendant's representation in reaching an equitable property division in the consent judgment of divorce which entered on January 27, 1994. Following entry of the judgment, plaintiff requested that defendant, as trustee, distribute the assets of the trust for liquidation purposes, but defendant did not distribute the bulk of the assets, which included the Cortech stock. When the stock was finally turned over to plaintiff, the value of the stock had dropped significantly, causing a substantial loss to plaintiff. Although defendant filed both an answer and amended answer to the complaint, defendant did not raise the statute of limitations as an affirmative defense.

On December 5, 1996, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (C)(10). Specifically, defendant argued that exclusive jurisdiction of the claims against defendant rested in the probate court. Additionally, defendant argued that plaintiff had failed to mitigate her damages by seeking to modify the consent judgment of divorce based on a mutual mistake of fact. Defendant did not seek transfer of the litigation to the probate court, but outright dismissal. On January 29, 1997, the circuit court heard oral arguments regarding defendant's motion for

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summary disposition. The circuit court held that the probate court had exclusive jurisdiction of plaintiff's complaint. However, the trial court declined to grant defendant's motion for dismissal pursuant to MCR 2.116(C)(4), but rather ordered that the case be transferred to the probate court pursuant to MCR 2.227(A)(2), with plaintiff bearing the cost of the transfer fee. The circuit court also ordered that the entire file would be transferred to the probate court.

*2 On May 14, 1997, defendant filed its second motion for summary disposition before the probate court based on the statute of limitations. Defendant asserted that plaintiff learned of all facts which gave rise to her complaint for breach of fiduciary duty and misrepresentation no later than July 22, 1994. However, plaintiff did not file suit until December 1, 1995. Pursuant to the six-month statute of limitation period set forth in M.C.L. § 700.819; MSA 27.5819, defendant asserted that plaintiff's complaint was barred. In opposition to the motion, plaintiff asserted that the six-month limitation period did not apply because defendant had never provided plaintiff with a final accounting or given a full disclosure of the state of the trust.

On June 17, 1997, the probate court heard oral arguments regarding defendant's second motion for summary disposition. The probate court held that plaintiff had filed her complaint in circuit court in order to avoid the six-month limitation period set forth in the probate code. The probate court held that a formal accounting was unnecessary to commence the statutory period, and defendant's resignation from the position and appointment of a successor was sufficient. Furthermore, the probate court held that plaintiff admitted in her deposition that she was aware of all of the facts necessary for bringing her complaint for seventeen months prior to the actual filing date.

On February 24, 1998, plaintiff filed a motion to set aside the order granting defendant's motion for summary disposition. Plaintiff argued that the statute of limitations period was not six-months, but

three-years due to defendant's failure to provide an accounting. On April 23, 1998, the probate court heard oral arguments regarding plaintiff's motion to set aside the order and defendant's motion for attorney fees and costs. The probate court held that there was no doubt that defendant acted improperly as a trustee by not advising plaintiff, in a timely manner, of the status of the trust. However, plaintiff learned in 1994 of the status of the trust. Once plaintiff acquired that knowledge, irrespective of the source, the statute began to run. The probate court went on to state that it no longer opined that plaintiff had filed the action initially in circuit court to avoid the statute of limitations. Lastly, the probate court denied defendant's motion for attorney fees and costs, holding that any award was discretionary, and in any event, defendant came before the court with unclean hands.

Plaintiff first argues that the trial court erred in holding that the six-month statute of limitations period applied. We agree. Our review of a trial court's order of summary disposition is de novo. *Dobie v. Morrison*, 227 Mich.App 536, 538; 575 NW2d 817 (1998).^{FN2} MCL 700.819; MSA 27.5819 provides:

FN2. Defendant contends that plaintiff's motion to set aside the order of summary disposition should have been entitled a motion for reconsideration and the abuse of discretion standard of review should apply on appeal. Appellate review of the original grant of defendant's motion for summary disposition is appropriate. *Gavulic v. Boyer*, 195 Mich.App 20, 23-24; 489 NW2d 124 (1992).

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the

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final account or statement. Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary.

*3 If statutory language is clear and unambiguous, additional judicial construction is neither necessary nor permitted, and the language must be applied as written. *Ahearn v. Bloomfield Twp.*, 235 Mich.App 486, 498; 597 NW2d 858 (1999). The primary goal of statutory interpretation is to give effect to the intent of the legislative body. *Ballman v. Borges*, 226 Mich.App 166, 168; 572 NW2d 47 (1997). Meaning should be given to every word of a statute, and no word should be treated as surplusage or rendered nugatory if at all possible. *Hoste v. Shanty Creek Mgt, Inc.*, 459 Mich. 561, 574; 592 NW2d 369 (1999). Furthermore, a statute should be construed so as to prevent absurd results, injustice, or prejudice to the public interest. *McAuley v. General Motors Corp.*, 457 Mich. 513, 518; 578 NW2d 282 (1998). Interpretation and application of a statute presents a question of law which is reviewed de novo. *Id.*

In the present case, the probate court held that a final accounting was unnecessary to trigger the running of the six-month statute of limitations period, and defendant's withdrawal from representation of the trust was sufficient to trigger the statutory period. Furthermore, the probate court held that plaintiff's knowledge impacted the six-month limitation period. We disagree. Applying the rules of statutory interpretation and construction, any event of withdrawal is insufficient to trigger the commencement of the six-month limitations period. Rather the trustee must provide a "final account or other statement fully disclosing the matter and showing termination of the trust relationship ..."

The statute does not set forth any exceptions or substitutions for this required action. In this case, defendant failed to provide a final account to plaintiff of the status of the trust. Alternatively, defendant could have withdrawn with the condition that he provide a statement fully disclosing the matters surrounding the trust. While defendant did, in fact, withdraw from representation of the trust, he did not provide a statement fully disclosing the status of the trust. Instead, plaintiff, through her counsel, had to communicate with defendant's former law firm in an attempt to learn the status of her stock shares. The interpretation of the statute by the probate court would lead to injustice and absurd results. *McAuley, supra*. It would allow a trustee to remove himself from further representation of a trust without performing any disclosure functions. If a plaintiff was unable to determine whether a breach of fiduciary duty had occurred within six-months, there would be no sanction for the breach of fiduciary duty. Additionally, it appears that the knowledge of a plaintiff is irrelevant because there is no language in the statute to indicate that a plaintiff's knowledge has any bearing on the trigger date for the six-month period. *Ahearn, supra*. Plaintiff's complaint was timely filed within the three year statutory period due to defendant's failure to comply with the procedure for invoking the six-month statutory period.

*4 Our statutory interpretation is consistent with the legislative intent in enacting M.C.L. § 700.819; MSA 27.5819. The House Legislative Analysis for 1978 PA 642 indicates that "If all beneficiaries had received the final account and there had been full discharge, the trustee would not be liable after three years from filing the final account." House Bill Analysis HB 4475, July 39, 1979. Accordingly, the probate court erred in applying the six-month statute of limitations where defendant failed to provide a final accounting or give a full disclosure with his withdrawal from representation.

Plaintiff next argues that the probate court erred in granting defendant's motion for summary

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disposition when the statute of limitations was not pled as an affirmative defense. Our holding that the six-month statutory period did not apply and that plaintiff was within the three year limitations renders this issue moot.^{FN3}

FN3. In *In re Crawford Estate*, 115 Mich.App 19, 23-25; 320 NW2d 276 (1982), we held that the court rules regarding failure to plead affirmative defenses did not apply in probate proceedings because those rules had not been adopted by the probate court. However, since the *Crawford* decision has issued, MCR 5.001 was adopted which provides that “[p]rocedure in probate court is governed by the rules applicable to other civil proceedings, except as modified by the rules in this chapter.” The viability of the *Crawford* decision is unclear because the terms used in the probate proceedings differ from the terms applied to civil proceedings, and court rules governing the discrepancy have not been created. 5 Martin, Dean & Webster, Michigan Court Rules Practice, Authors' Comment, pp 334-335. But see *In re Pitre*, 202 Mich.App 241, 243; 508 NW2d 140 (1993). Because this issue is moot we decline to examine whether the adoption of MCR 5.001 indicates that MCR 2.111(F)(3) may be applied in probate proceedings.

On cross-appeal, defendant argues that the probate court erred in failing to award costs and attorney fees for defending in the wrong court as required by MCR 2.227(A)(2). We disagree. We review a lower court's interpretation of court rules de novo. *McAuley, supra*. Where the issues remain the same and the case proceeds uninterrupted, there are no additional expenses and the request for attorney fees is unreasonable. *Michigan State Employees Association v Civil Service Commission*, 177 Mich.App 231, 238-239; 441 NW2d 423 (1989). Defendant contends that the present factual scen-

ario is distinguishable because it, in fact, incurred additional expenses when it filed its motion for summary disposition. However, the motion for summary disposition was not based solely on subject matter jurisdiction, but also based on plaintiff's alleged failure to mitigate her damages. Therefore, defendant did not incur additional expenses in attending in the wrong court, and defendant did not seek transfer of the litigation to the probate court. Rather, defendant hoped to obtain outright dismissal of the litigation by moving pursuant to MCR 2.116(C)(4) and (C)(10). Accordingly, the probate court did not err in refusing to award defendant costs and attorney fees. *Michigan State, supra*.

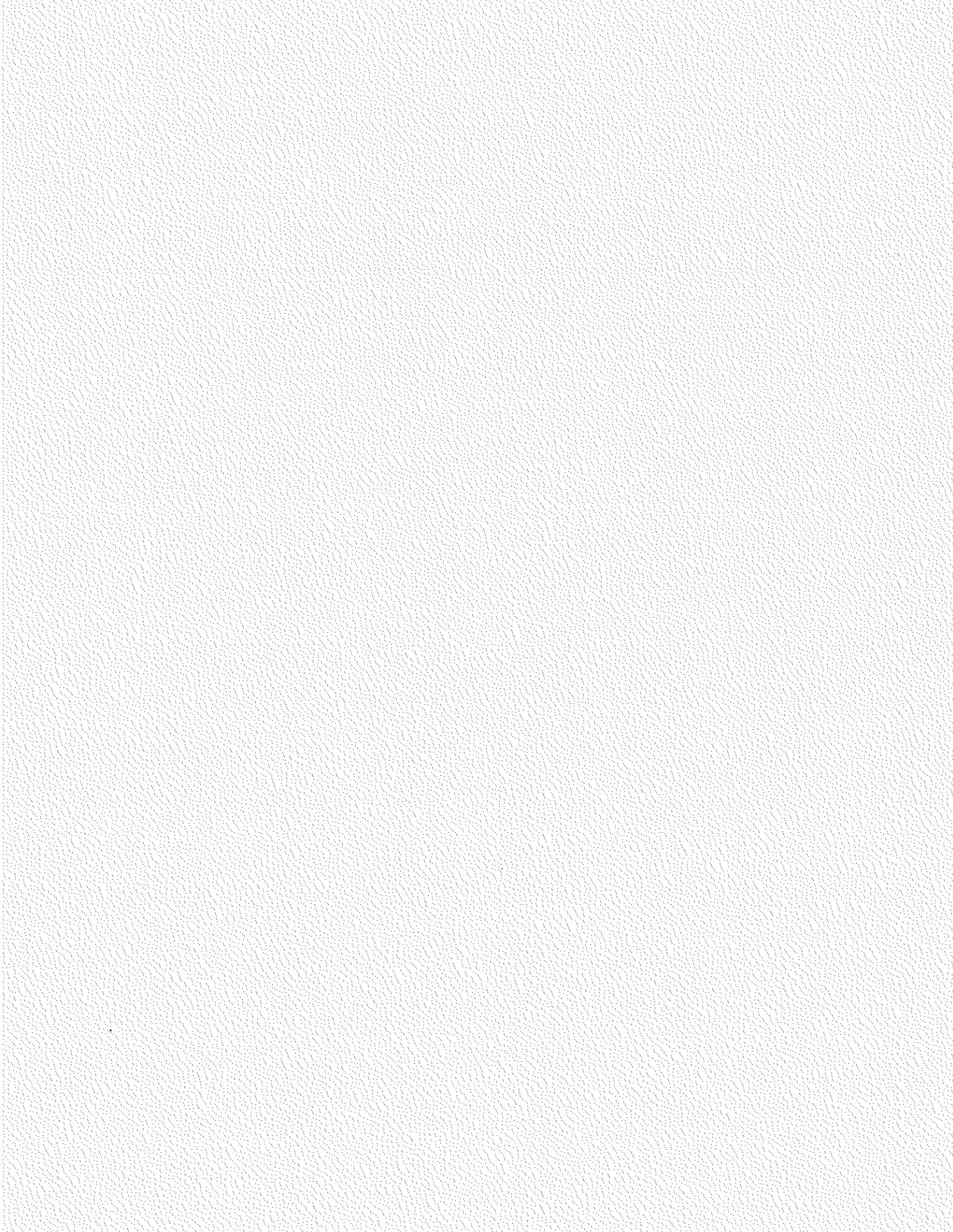
Affirmed in part, reversed in part. We do not retain jurisdiction.

Mich.App.,1999.

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UNPUBLISHED OPINION. CHECK COURT
 RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
 In re TIFFANY SMITH TRUST.
 Judy Anderson, Guardian for Joshua A. Smith, and
 Julie Melchiori, Trustee for the Tiffany Smith
 Trust, Appellees,
 v.
 Loretta A. Plumley, Appellant,
 and
 Chris Paquin, Not Participating.

Docket No. 303128.
 Oct. 25, 2012.

Gogebic Probate Court; LC No.2009-000042-TR.

Before: MURPHY, C.J., and SAWYER and
 HOEKSTRA, JJ.

PER CURIAM.

*1 Appellant,^{FN1} Loretta Plumley, appeals as of right the probate court's order imposing a surcharge of \$168,058.84 for misappropriation of funds from the Tiffany Smith Trust. We affirm the surcharge but remand for the reasons stated in this opinion.

FN1. Although Chris Paquin is named as an appellant, he subsequently settled his claim, and is no longer a party to the appeal. The term "appellant" in this opinion will refer exclusively to Loretta Plumley.

When Tiffany Smith learned that she was dying, she established a trust for the benefit of her minor son. The trust named Smith's cousin, Loretta Plumley^{FN2} (appellant), as managing trustee and,

additionally, named Smith's mother, Judy Anderson, as both guardian of Smith's minor son and co-trustee.

FN2. Loretta Plumley is referred to by her maiden name, Loretta Wrosch, in the Tiffany Smith Trust. To avoid confusion, "Plumley" or "appellant" will be used throughout this opinion to mean either Loretta Plumley or Loretta Wrosch.

The trust was funded by Smith's life insurance policy and was created with a \$400,751.09 payment upon Tiffany's death. Of these funds, a \$50,000 gift was to be paid directly to appellant, and an additional \$50,000 gift was to be paid directly to Chris Paquin. The remaining balance was to be invested and used for the minor son's benefit.

Contrary to the express terms of the trust, appellant failed to fund an account for the son's daily expenses and, likewise, failed to report all trust activity to Anderson. Anderson, therefore, filed a petition in Gogebic Probate Court to compel appellant to make an accounting of the trust activity. Several court proceedings ensued.

Appellant and Anderson stipulated to have Julie Melchiori, an accountant and unrelated third party, named as replacement trustee of the Tiffany Smith Trust. The stipulated order compelled appellant to cooperate with Melchiori's requests for information regarding the accounting and management of the trust's funds. Despite the order, appellant continued to not follow Melchiori's requests.

The probate court held a series of hearings to consider sanctions against appellant and to review Melchiori's trust report. Appellant refused to testify at these hearings due to a possible criminal investigation into her misappropriation of funds.

At the conclusion of these hearings, the probate court found that appellant "misappropriated and embezzled" funds from the Tiffany Smith Trust.

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The court then surcharged appellant a total of \$168,058.84. This figure was based on the court's acceptance of Melchiori's report and consisted of \$115,558.84 in funds spent inappropriately, \$2,500 in appellant's incurred legal expenses paid from the trust, and the \$50,000 gift that was owed Paquin. Paquin testified in a previous hearing that, although he allowed appellant to use a portion of his gift, he did not waive his right to the gift.

Plaintiff first argues that the probate court's order violated her due process rights by failing to give notice of her criminal contempt and order to repay \$168,058.84. Plaintiff's argument fails because she was not found in contempt. Rather, the probate court imposed a surcharge for her mishandling of the trust.

Appellant next argues that the probate court erred by denying her compensation for time spent on trust services and expenses related to the minor son. Appellant believes this error should result in a reduction of her surcharge. We disagree that appellant was denied rightful compensation. Instead, the probate court acted within its statutory authority when it denied appellant her requested compensation.

*2 We review a probate court's decision to impose a surcharge on a trustee for an abuse of discretion. *In re Baldwin Trust*, 274 Mich.App 387, 397; 733 NW2d 419 (2007). And we review a probate court's findings of fact for clear error. *In re Estate of Raymond*, 483 Mich. 48, 53; 764 NW2d 1 (2009). A finding of fact is considered clearly erroneous when this Court is left with a firm and definite conviction that a mistake was made. *In re Green Charitable Trust*, 172 Mich.App 298, 311; 431 NW2d 492 (1988). The Michigan Trust Code applies to all trusts. MCL 700.8206(1)(a). According to the Michigan Trust Code, any violation of a duty owed to the beneficiary by the trustee is considered a "breach of trust." MCL 700.7901(1). A court has the power to remedy a breach of trust through various methods. MCL 700.7901(2)(a)-(j). Among these methods, is a court's right to "[r]educe or

deny compensation to the trustee." MCL 700.7901(2)(h). Likewise, "[a] court may reduce or deny a trustee's claim for compensation, expenses, or disbursements with respect to a breach of trust." MCL 700.7904(3).

We conclude that the probate court did not clearly err when it found that appellant was in breach of the trust. Appellant violated several terms of the trust that were established for the benefit of Smith's minor son. Appellant failed to fund an account to provide for Smith's son's daily expenses and refused to give an accounting of the fund to her co-trustee. Additionally, appellant failed to provide appropriate documentation for her claimed services as trustee and expenses for the minor child. The probate court, therefore, acted within its statutory authority under MCL 700.7901 and MCL 700.7904 when it denied appellant her requested compensation. We, therefore, affirm the probate court's decision on this issue.

Finally, appellant argues that the probate court erroneously found that Paquin had not waived his \$50,000 gift from the trust. Appellant believes this error should result in a reduced surcharge. We affirm the probate court's finding, but conclude that appellant's surcharge should be reduced by \$50,000 because appellant has settled her claim with Paquin.

We review a probate court's findings of fact for clear error. *In re Estate of Raymond*, 483 Mich. at 53. A lower court's decision is considered clearly erroneous if this Court is left with a definite and firm conviction that a mistake was made. *In re Green Charitable Trust*, 172 Mich.App at 311. Here, the probate court made no mistake in finding that Paquin had not intentionally waived his gift of \$50,000 from the trust. Paquin testified in a previous hearing that he had not intended to waive his gift. However, Paquin subsequently settled his dispute with appellant. That settlement is not a matter before this Court. Therefore, because Paquin has been satisfied by the terms of the settlement, appellant's surcharge will be reduced by the \$50,000 that would have been gifted to Paquin. Appellant's ad-

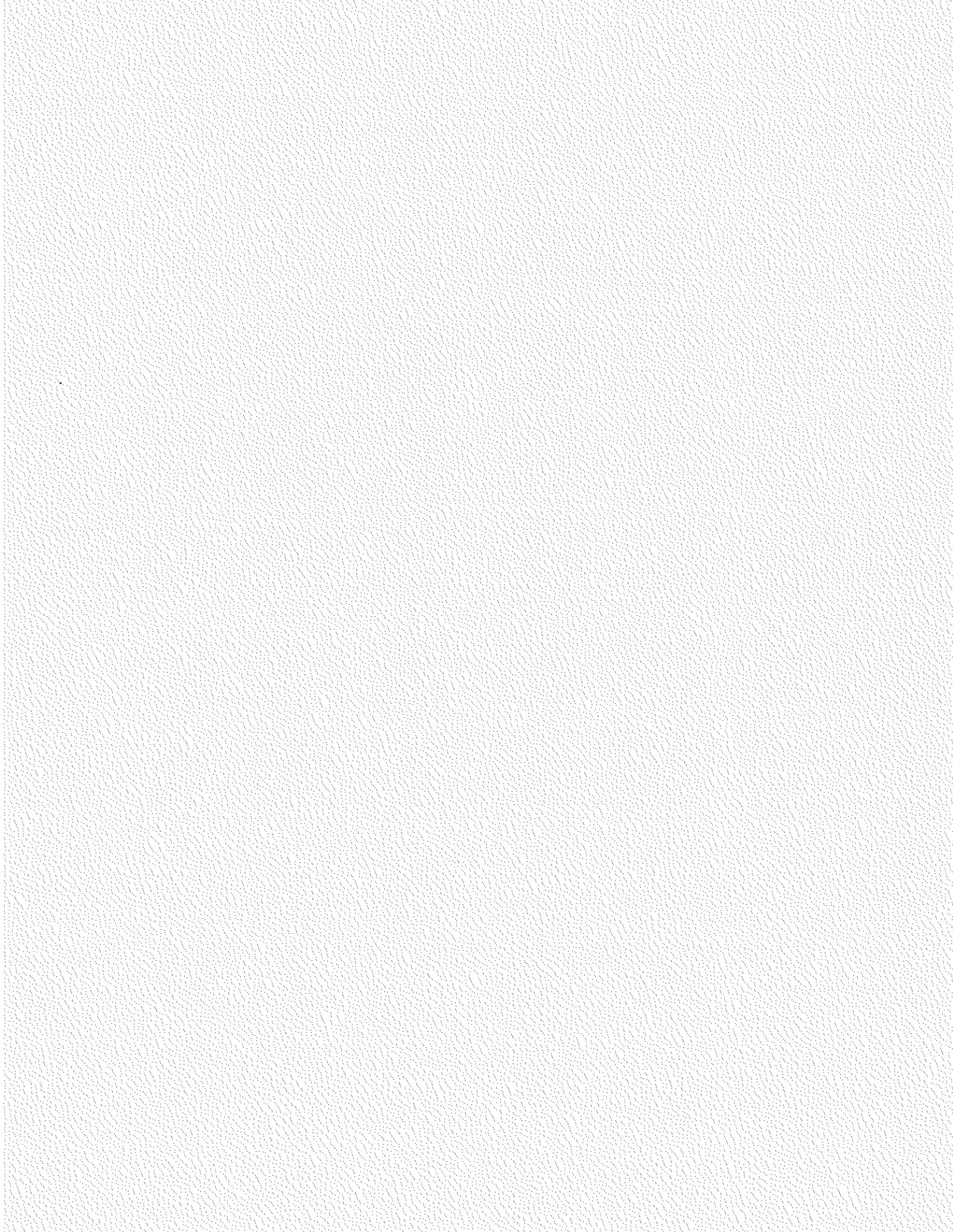
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(Cite as: 2012 WL 5290282 (Mich.App.))

justed surcharge is \$118,058.84.

*3 For these reasons we affirm the probate court's decision to impose a surcharge, but remand the matter to the probate court to reduce appellant's surcharge to \$118,058.84 for the reason stated above. We do not retain jurisdiction. No costs.

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(Cite as: 2006 WL 173172 (Mich.App.))

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Appeals of Michigan.

In the Matter of the Jervis C. WEBB Trust.
Christopher J. WEBB, Petitioner-Appellant,
v.

Jervis H. WEBB, Trustee, and Joyce W. Clark,
Former Trustee, Respondents-Appellees.

In the Matter of the Jervis B. & Maureen C. WEBB
Trust.

Christopher J. WEBB, Petitioner-Appellant,
v.

Susan M. WEBB, Trustee, Barbara J. Webb, Trust-
ee, and Joyce W. Clark, Former Trustee, Respond-
ents-Appellees.

Christopher J. WEBB, Petitioner-Appellant,
v.

Barbara M. WEBB, Personal Representative of the
Estate of George H. Webb, Deceased, Respondent-App-
pellee.

No. 263759, 263900.
Jan. 24, 2006.

Before: SAWYER, P.J., and WILDER and H.
HOOD,^{FN*} JJ.

FN* Former Court of Appeals judge, sit-
ting on the Court of Appeals by assign- ment.

[UNPUBLISHED]

PER CURIAM.

*1 In these consolidated cases, petitioner al-
leges that the trustees of his father's and grandpar-
ents' trusts breached their fiduciary duties by retain-
ing stock held in the family's closely owned corpora-
tion, the Jervis B. Webb Company, and by failing

to diversify the assets of the trusts and invest in
stocks that paid higher dividends. The parties filed
cross-motions for summary disposition and the pro-
bate court granted partial summary disposition for
respondents. The court granted partial summary
disposition under MCR 2.116(C)(7), based on the
statute of limitations. Additionally, the court grant-
ed summary disposition under MCR 2.116(C)(10),
holding that there was no genuine issue of material
fact that respondents did not breach their fiduciary
duties by retaining the family stock and failing to
diversify the trusts' assets. Petitioner appeals as of
right. We affirm.^{FN1}

FN1. We find no merit to respondents' argu-
ment that this Court does not have sub-
ject-matter jurisdiction over respondents
Jervis H. Webb, Susan Webb, and Barbara
Webb, because they were not named as re-
spondents in the trial court. As current or
former trustees of the trusts at issue, they
are each interested persons, MCL 700.1105
, and, therefore, are properly respondents
in these appeals in their representative ca-
pacities. We decline to consider petition-
er's Exhibits 2-5, and 8-9, attached to his
brief on appeal because those documents
were not presented in the trial court. *Isag-
holian v. Transamerica Ins Corp*, 208
Mich.App 9, 18; 527 NW2d 13 (1994).

This case involves two different trusts and
three separate actions that arise out of the two
trusts. The two trusts primarily consist of stock in
the Jervis B. Webb Company ("the Company"),
which was founded by Jervis B. Webb in 1919. The
Company has grown significantly over the years,
but remains a closely owned corporation and its
leadership has passed between generations of the
Webb family. Almost all of the Company's stock is
held by family members or their trusts.

Jervis B. Webb and his wife, Maureen,^{FN2}
founded the Company. Their children, Jervis C.

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(Cite as: 2006 WL 173172 (Mich.App.))

Webb, George Webb, and Joyce Clark, comprise the second generation. Petitioner is the son of Jervis C. Webb. Petitioner and his six siblings, along with six children of George and Joyce, comprise the third generation.

FN2. According to respondents, "Maurene" is the correct spelling of petitioner's grandmother's name, but her name is incorrectly spelled as "Maureen" on the trust agreement.

There has been a long history of family members working for the Company. Petitioner worked for the Company after graduating from law school and served as a vice president and general counsel for the Company until November 2002.

In 1946, Jervis B. and Maurene Webb established a trust naming their three children, Jervis C., George, and Joyce, as co-trustees. That trust (hereinafter referred to as the "1946 trust") was funded solely with the Company's stock.

In 1989, Jervis C. Webb, petitioner's father, created a trust for the benefit of his children who had jobs with the Company (hereinafter referred to as the "1989 trust"). Jervis C. Webb named his siblings, George and Joyce, as the trustees.

At issue in this case are petitioner's claims that the trustees of both trusts breached their fiduciary duties. The probate court concluded that petitioner's claims were barred by the three-year limitations period prescribed in MCL 600.5805(10) and, therefore, granted summary disposition under MCR 2.116(C)(7). The court additionally held that there was no genuine issue of material fact that the trustees did not breach their fiduciary duties by retaining the Company stock and failing to diversify the trusts' assets and, therefore, granted summary disposition under MCR 2.116(C)(10).

*2 This Court reviews a trial court's decision on summary disposition de novo. *Spiek v. Dep't of Transportation*, 456 Mich. 331, 337; 572 NW2d

201 (1998). Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. As explained in *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich.App 345, 348; 533 NW2d 365 (1995),

[a] defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v. Kleiman*, 447 Mich. 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff.

"If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr*, 242 Mich.App 703, 706; 620 NW2d 319 (2000).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v. Robertson*, 212 Mich.App 45, 48; 536 NW2d 834 (1995).

The trial court held that petitioner's claims were governed by the three-year period of limitations prescribed in MCL 600.5805(10). MCL 600.5827 addresses when a claim accrues for purposes of determining when the statute of limitations begins to run:

Except as otherwise provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 [MCL 600.5829 to MCL 600.5838], and in cases not covered by these sec-

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tions the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Sections 5829 to 5838 do not apply to this case. Therefore, pursuant to MCL 600.5827, petitioner's claim accrued at the time the alleged wrong was committed, regardless of when damages resulted, unless the discovery rule applies. The parties disagree whether the discovery rule can be applied to extend the period of limitations to claims involving breaches of fiduciary duty. We agree with the trial court that the discovery rule does not apply to this case.

In *Boyle v. General Motors Corp.*, 468 Mich. 226, 228-229, 231-232; 661 NW2d 557 (2003), the Supreme Court reversed this Court's determination that the discovery rule applies to fraud claims. The Supreme Court's decision was based on MCL 600.5827, as well as its prior decisions in *Thatcher v. Detroit Trust Co.*, 288 Mich. 410; 285 NW 2 (1939), and *Ramsey v. Child, Hulswit & Co.*, 198 Mich. 658; 165 NW 936 (1917), where the Court refused to apply the discovery rule in fraud cases.^{FN3} In *Boyle*, *supra* at 231-232, the Court stated:

FN3. *Thatcher* also involved a claim for breach of fiduciary duty by a trustee which was barred by the statute of limitations.

*3 The discovery rule has been adopted for certain cases. For example, in *Johnson v. Caldwell*, [371 Mich. 368; 123 NW2d 785 (1963),] the Court held that the discovery rule applies to actions for medical malpractice. This Court has not, however, overruled *Ramsey* and *Thatcher*, or held that the discovery rule applies to actions for fraud or intentional misrepresentation. Moreover, after *Ramsey* and *Thatcher* were decided the Legislature enacted MCL 600.5827, which provides:

"Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not

covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

Under MCL 600.5827 a claim accrues when the wrong is done, unless §§ 5829 to 5838 apply. Plaintiff does not claim that any of those sections apply.

The Court of Appeals erred in holding that the discovery rule applies to the accrual of actions for fraud. That holding directly contradicts *Ramsey* and *Thatcher* and ignores the plain language of MCL 600.5813 and 600.5827.

Plaintiffs' cause of action accrued when the wrong was done, and they had six years thereafter to file a complaint. Because plaintiffs failed to do so, their cause of action is barred. [Footnotes omitted.]

Although *Boyle* involved a fraud claim, the principle applies here as well: the language of MCL 600.5827 is clear and unambiguous that a claim accrues when the wrong is committed, not when it is discovered, unless it falls within §§ 5829 to 5838. Thus, because the claim here does not fall within §§ 5829 to 5838, the proper test for determining when petitioner's claim for breach of fiduciary duty accrued is not when he knew or should have known of the alleged breach, but when the alleged wrong was committed, causing the alleged harm. *Boyle*, *supra* at 231 n 5.^{FN4}

FN4. To the extent that this Court has held that a claim for breach of fiduciary duty accrues when the beneficiary knew or should have known of the breach, see *Bay Mills Indian Community v. Michigan*, 244 Mich.App 739, 751; 626 NW2d 169 (2001), we believe those cases have been overruled by *Boyle*. However, an exception to this rule exists for claims of fraudulent concealment. See *The Meyer & Anna Prentis Family Foundation, Inc v Barbara*

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Ann Karmanos Cancer Institute, 266 Mich.App 39, 45-48; 698 NW2d 900 (2005); MCL 600.5855. Petitioner has not argued that MCL 600.5855 applies in this matter.

On the basis of the undisputed documentary evidence presented below, it is apparent that petitioner was clearly aware of both trusts and their holdings of the Company's stock for many years before these actions were filed. Because any alleged harm arising from respondents' alleged breaches of their fiduciary duties occurred more than three years before these actions were filed, the trial court properly granted summary disposition under MCR 2.116(C)(7).

We find no merit to petitioner's argument that his claims are not subject to the statute of limitations. Our Supreme Court has clarified that statutes of limitation apply to claims for breach of fiduciary duty that are cognizable at law. See *Thatcher*, *supra* at 416-417. Thus, MCL 600.5805 was properly applied to petitioner's claims.

In addition, petitioner's reliance on MCL 700.7307(4) for the proposition that he had five years to file his claims is misplaced. Subsection (4) of that statute was not added until the statute was amended, effective September 1, 2004. Statutes of limitation generally are not given retroactive effect unless such an intent clearly and unequivocally appears from the context of the statute itself. *Gorte v. Dep't of Transportation*, 202 Mich.App 161, 167; 507 NW2d 797 (1993). No such intent appears here and, therefore, MCL 700.7307(4) may not be applied retroactively.

*4 Petitioner next argues that the trial court erred in holding that there was no genuine issue of material fact with respect to petitioner's claims that the trustees breached their fiduciary duties by retaining the Company stock and not diversifying the trusts' assets.

We must refer to the trust instruments to de-

termine the powers and duties of the trustees and the intent of the settlors regarding the purpose of the trusts. *In re Butterfield Estate*, 418 Mich. 241, 259; 341 NW2d 453 (1983). In addition, relevant statutes and case law define a trustee's duties. *In re Green Charitable Trust*, 172 Mich.App 298, 312; 431 NW2d 492 (1988). Whether there has been a breach of duty and any resulting liability is dependent upon the facts of each case. *Id.*

Generally, trustees must meet the standard of care of a prudent person when dealing with trust property. *In re Green Charitable Trust*, *supra* at 312. This rule is codified at MCL 700.7302 (formerly MCL 700.813 ^{FN5}):

FN5. MCL 700.813, repealed by 1998 PA 386, provided as follows:

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

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.

To be prudent means to act with care, diligence, integrity, fidelity, and sound business judgment. *In re Messer Trust*, 457 Mich. 371, 380; 579 NW2d 73 (1998). In addition, a trustee is bound by the fiduciary duties of honesty, loyalty, good faith, and restraint from self-interest. *In re Green Charitable Trust*, *supra* at 313.

Not Reported in N.W.2d, 2006 WL 173172 (Mich.App.)
(Cite as: 2006 WL 173172 (Mich.App.))

The prudent investor rule may require a trustee to diversify a trust's investments. That rule is summarized in Restatement Trusts, 3d (Prudent Investor Rule) (1990), § 227(b), p 8, as follows:

In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

While there may generally be a duty to diversify investments, a settlor may always authorize a trustee not to diversify. *Baldus v. Bank of California*, 12 Wash App 621, 628; 530 P.2d 1350, 1355 (1975).

Liability for lack of diversification is based upon a breach of a fiduciary's duty to prudently manage the estate. *In re Estate of Janes*, 165 Misc.2d 743; 630 N.Y.S.2d 472 (1995). To determine whether such a breach of duty occurred, the Court must evaluate the fiduciary's actions along with relevant factors which affected or ought to have affected the fiduciary's decisions; for instance, the performance of the market, the corpus of the estate (both in size and composition), the situation and needs of the beneficiaries, potential tax consequences, the time (investment) horizon of the estate, the terms of the governing instrument ... and the intent of the settlor....

*5 In this extensive and non exhaustive list, the terms of the governing instrument are highly important because the terms of the instrument itself can set the stage for the weight to be applied to the other factors, and can completely reframe the fiduciary's perspective in monitoring the interplay between them. [*In the Matter of Will of Charles G Dumont*, 4 Misc.3d 1003(A); 791 N.Y.S.2d 868 (N.Y. Sur, 2004).]

An examination of the trust provisions in these cases reveal that the settlors of both trusts relieved the trustees of any duties to diversify assets and follow the prudent man investor rule with respect to the Company's stock.

The 1946 trust specifically gave the trustees the authority to retain the Company stock even if it might be imprudent to do so:

6. The Trustees shall invest and reinvest the trust estate in such investments as they deem proper. *They shall not be required to dispose of stock in the Jervis B. Webb Company, or any company succeeding to part or all of the business of Jervis B. Webb Company, and they may retain the same or may make loans to or additional investments in any such company regardless of whether they consider it a prudent investment for trustees.* Stock dividends and stock rights are to be treated as corpus. Any action of the Trustees, including voting stock or deciding on investments or sales, shall be valid if taken by a majority.... [Emphasis added.]

The 1989 trust similarly allowed the trustees to retain the Company stock, and further expressed the settlor's intent that the purpose of the trust was to retain the Company's stock so that his children, who were employed by the Company, would thereby benefit.

Five of Settlor's seven children and the spouse of a sixth are employed by the Jervis B. Webb Company. Settlor believes it would enhance the interest of these six children and their spouses in the Webb Companies as that term is defined below and would strengthen the companies if the six children were to acquire a beneficial interest in them on the terms set forth below. Settlor owns stock in the companies and wants to use it to set up such a beneficial interest. Accordingly, Settlor by these presents assigns, transfers, conveys and delivers to the Trustees the property described in the schedule attached hereto and made a part hereof. The Trustees agree to hold the same on the following terms and conditions.

(b) *Powers of Trustee.*

(i) *The Trustees specifically are authorized to*

Not Reported in N.W.2d, 2006 WL 173172 (Mich.App.)
 (Cite as: 2006 WL 173172 (Mich.App.))

retain all shares of stock in any Webb companies without regard to any rule or requirement of diversification of investments, and even if such stock does not pay dividends or pays only a small dividend. For purposes of this trust, the term "Webb companies" shall include Jervis B. Webb Company and any corporation now or hereafter affiliated with or growing out of Jervis B. Webb Company, and "stock of Webb companies" shall include stock received as a result of a change in capital structure, liquidation, partial liquidation, reorganization, split-up, spin-off, dissolution or merger involving Jervis B. Webb Company or any other Webb Company.

*6 (ii) Subject to (i), above, the Trustees shall have the power to invest and reinvest the trust assets in such stocks, bonds and other securities and properties as they may deem advisable, including unsecured obligations, undivided interests, interests in investment funds, mutual funds, legal and discretionary common trust funds, leases, properties which are outside of the State of Michigan and partnerships, all without diversification as to kind or amount and without being restricted in any way by any statute or court decision (now or hereafter existing) regulating or limiting investments by fiduciaries; and to register and carry any property in their own names or in the names of their nominee or to hold it unregistered.

(iii) In addition to the powers granted above and elsewhere in this Agreement and to all powers granted by law to trustees generally, the Trustees shall have the powers and authority set forth in Article 8 of the Revised Probate Code, being Public Act 642 of Michigan, 1978, which Article is incorporated herein by reference, as it exists on the date of this Agreement. [Emphasis added.]

Although both trusts vested the trustees with the discretion to sell the Company's stock, they also vested the trustees with the authority to retain the stock even if it would not be prudent to do so,

without regard to the rules of diversification, and even if the stock did not pay dividends. The 1989 trust also made it clear that the settlor intended that the trustees should retain the Company stock so that the family could maintain control of the Company and continue to have employment opportunities with the Company.

The trial court properly determined that both trusts relieved the trustees of any duty of diversification. Because both trusts allow the trustees to retain the stock even if it would not be prudent to do so, there is no genuine issue of material fact that the settlors of both trusts intended that the trustees would not be subject to the prudent investor rule with respect to the Company stock. Accordingly, petitioner cannot rely on that rule to argue that respondents breached their fiduciary duties as trustees by holding onto the stock.

Respondents acknowledge that a court of equity may intervene and change the terms of a trust if some unusual exigency arises that was not contemplated by the settlor. *Young v. Young*, 255 Mich. 173, 179-180; 237 NW 535 (1931). Here, however, petitioner has not demonstrated that such an exigency existed.

In light of the plain language of the trust instruments that clearly demonstrate that the trustees may retain the Company stock even if it would not be prudent to do so, the trial court did not err in concluding that petitioner failed to establish a genuine issue of material fact with regard to his claims that the trustees breached their fiduciary duties by retaining the Company stock and failing to diversify the trusts' assets.

Affirmed.

Mich.App.,2006.
 In Matter of Jervis C. Webb Trust
 Not Reported in N.W.2d, 2006 WL 173172
 (Mich.App.)

END OF DOCUMENT

STATE OF MICHIGAN
IN THE COURT OF APPEALS

DONN R. DUCHARME,

Case No. 314736

Plaintiff/Appellant,

Eaton County Probate Court

v

Case No. 12-49110-CZ

MICHELLE K. DUCHARME,

Defendant/Appellee.

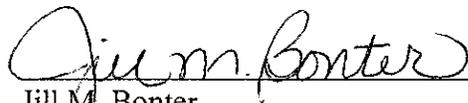
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PROOF OF SERVICE

The undersigned states that she is an employee of Warner Norcross & Judd LLP, and that on September 3, 2013, she served a copy of the **Brief of *Amicus Curiae* The Probate Council of the Probate and Estate Planning Section of the State Bar of Michigan**, and this **Proof of Service** on Sheila K. McCoy and David R. Russell at their above-indicated address, by placing copies of said document in first-class United States mail, postage pre-paid.



Jill M. Bonter

ATTACHMENT 5

PROBATE & ESTATE PLANNING SECTION

Respectfully submits the following position on:

*

MCR 5.108(B), 5.125(B)(2), 5.125(C)(6), 5.125(C)(19),
5.125(C)(22), 5.125(C)(24), 5.125(C)(27), 5.208(C)(1),
5.208(F)(2), 5.403(A)

*

The Probate & Estate Planning Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Probate & Estate Planning Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Probate & Estate Planning Section is 4,128.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 23. The number who voted in favor to this position was 21. The number who voted opposed to this position was 0.



Report on Public Policy Position

Name of Section:

Probate & Estate Planning Section

Contact person:

Shaheen I. Imami

E-Mail:

sii@probateprince.com

Regarding:

MCR 5.108(B), 5.125(B)(2), 5.125(C)(6), 5.125(C)(19), 5.125(C)(22), 5.125(C)(24), 5.125(C)(27), 5.208(C)(1), 5.208(F)(2), 5.403(A)

Date position was adopted:

June 8, 2013

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

23

Number who voted in favor and opposed to the position:

21 Voted for position

0 Voted against position

0 Abstained from vote

2 Did not vote

Position:

The Probate & Estate Planning Section wishes to pursue specific amendments to MCR 5.108(B), 5.125(B)(2), 5.125(C)(6), 5.125(C)(19), 5.125(C)(22), 5.125(C)(24), 5.125(C)(27), 5.208(C)(1), 5.208(F)(2), 5.403(A) in order to clarify interested persons in proceedings under the Estates and Protected Individuals Code and the Michigan Trust Code, and to reflect changes in the law by MCL 700.5202a, MCL 700.5301a, and MCL 700.5433.

Rule 5.108 Time of Service

(A) Personal. Personal service of a petition or motion must be made at least 7 days before the date set for hearing, or an adjourned date, unless a different period is provided or permitted by court rule. This subrule applies regardless of conflicting statutory provisions.

(B) Mail.

(1) Petition or Motion. Service by mail of a petition or motion must be made at least 14 days before the date set for hearing, or an adjourned date.

(2) Application by a Guardian or Conservator Appointed in Another State.

(a) A court may appoint a temporary guardian or conservator without a hearing pursuant to MCL 700.5202a, MCL 700.5301a, or MCL 700.5433.

(b) If a court appoints a temporary guardian or conservator pursuant to MCL 700.5202a, MCL 700.5301a or MCL 700.5433, the temporary guardian or conservator must, not later than 14 days after the appointment, serve notice of the appointment by mail to all interested persons.

(C) Exception: Foreign Consul. This rule does not affect the manner and time for service on foreign consul provided by law.

(D) Computation of Time. MCR 1.108 governs computation of time in probate proceedings.

(E) Responses. A written response or objection may be served at any time before the hearing or at a time set by the court.

Rule 5.125 Interested Persons Defined

(A) [Unchanged]

(B) Special Conditions for Interested Persons.

(1) [Unchanged]

(2) Devisee. Only a devisee whose devise remains unsatisfied, or a trust beneficiary whose beneficial interest remains unsatisfied, need be notified of specific proceedings under subrule

(C).

(3 – 5) [Unchanged]

(C) Specific Proceedings.

(1-5) [Unchanged]

(6) The persons interested in a proceeding for examination or approval of an account of a fiduciary are:

(a) for a testate estate, the devisees under the will (and if one of the devisees is a trustee or a trust, and the persons referred to in MCR 5.125(B)(3)),

(b) for an intestate estate, the heirs,

(c) for a conservatorship, the protected individual (if he or she is 14 years of age or older and can be located), the presumptive heirs of the protected individual, and the guardian ad litem, if any,

(d) for a final conservatorship or guardianship account following the death of the protected person, the personal representative, if one has been appointed,

(e) for a guardianship, the ward (if he or she is 14 years of age or older and can be located), the presumptive heirs of the ward, and the guardian ad litem, if any,

(f) for a revocable trust, the settlor (and if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2)), the current trustee, and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust protector,

(g) for an irrevocable trust, the current trustee, the qualified trust beneficiaries, as defined in MCL 700.7103(g), and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust protector,

(h) in all matters described in this subsection (6), claimants, and

(i) in all matters described in this subsection (6), any person whose interests would be adversely affected by the relief requested, including an insurer or surety who might be subject to financial obligations as the result of the approval of the account, or a claimant.

~~(a) devisees of a testate estate, and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3),~~

~~(b) heirs of an intestate estate,~~

~~(c) protected person and presumptive heirs of the protected person in a conservatorship,~~

~~(d) ward and presumptive heirs of the ward in a guardianship,~~

~~(e) claimants,~~

~~(f) settler of a revocable trust,~~

~~(g) if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603(2),~~

~~(h) current trustee,~~

~~(i) qualified trust beneficiaries described in MCL 700.7103(g)(i), for a trust accounting, and~~

~~(j) other persons whose interests would be adversely affected by the relief requested, including insurers and sureties who might be subject to financial obligations as the result of the approval of the account.~~

(7)-(18)[Unchanged.]

(19) The persons interested in an application for appointment of a guardian of a minor by a guardian appointed in another state and in a petition for appointment of a guardian for of a minor are

- (a) the minor, if 14 years of age or older;
- (b) if known by the petitioner or applicant, each person who had the principal care and custody of the minor during the 63 days preceding the filing of the petition or application;
- (c) the parents of the minor or, if neither of them is living, any grandparents and the adult presumptive heirs of the minor[.];
- (d) the nominated guardian[.] and
- (e) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to make decisions regarding the person of a minor.

(20)-(21)[Unchanged.]

(22) The persons interested in an application for appointment of a guardian of an incapacitated individual by a guardian appointed in another state or in a petition for appointment of a guardian of an alleged incapacitated individual are:

- (a) the alleged incapacitated individual or the incapacitated individual,
- (b) if known, a person named as attorney in fact under a durable power of attorney,
- (c) the alleged incapacitated individual's spouse or the incapacitated individual's spouse,
- (d) the alleged incapacitated individual's adult children and the individual's parents or the incapacitated individual's adult children and parents,
- (e) if no spouse, child, or parent is living, the presumptive heirs of the individual,
- (f) the person who has the care and custody of the alleged incapacitated individual or of the incapacitated individual, ~~and~~
- (g) the nominated guardian[.] and
- (h) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to have care and control of the incapacitated individual.

(23)[Unchanged.]

(24) The persons interested in an application for appointment of a conservator for a protected individual by a conservator appointed in another state or for the petition for the appointment of a conservator or for a protective order are:

- (a) the individual to be protected if 14 years of age or older,
- (b) the presumptive heirs of the individual to be protected,
- (c) if known, a person named as attorney in fact under a durable power of attorney,
- (d) the nominated conservator, ~~and~~
- (e) a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending [,] and
- (f) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to manage the protected individual's finances.

(25)-(26)[Unchanged]

(27) The persons interested in receiving a copy of an inventory or account of a conservator or of a guardian are:

- (a) the protected individual or ward, if he or she is 14 years of age or older and can be located,
- (b) the presumptive heirs of the protected individual or ward,
- (c) the claimants, ~~and~~
- (d) the guardian ad litem, and
- (e) the personal representative, if any.

(28-33) [Unchanged]

MCR 5.125 (D-E) [Unchanged]

Rule 5.208 Notice to Creditors, Presentment of Claims

(A – B) [Unchanged]

(C) Publication of Notice to Creditors and Known Creditors by Trustee. A notice that must be published under MCL 700.7608 must include:

- (1) The name, and, if known, ~~last known address,~~ date of death, and date of birth of the trust's deceased settlor;

(2 – 5) [Unchanged]

(D – E) [Unchanged]

(F) A claim is considered presented

(1) [Unchanged]

(2) in all other cases, when received by the personal representative, or trustee or the attorney for the personal representative or trustee or in the case of an estate when filed with the court.

~~For purposes of this subrule (F), personal representative includes a proposed personal representative.~~

Rule 5.403 Proceedings on Temporary Guardianship

(A) Limitation. The court may appoint a temporary guardian ~~only~~ in the course of a proceeding for permanent guardianship or pursuant to an application to appoint a guardian serving in another state to serve as guardian in this state.

(B)-(D)[Unchanged.]

ATTACHMENT 6

ELDER LAW AND DISABILITY RIGHTS SECTION

September 10, 2013

Linda Rexer, Angela Tripp and Janet Welch

Executive Director
Michigan State Bar Foundation
306 Townsend St Fl 4
Lansing, MI 48933

Managing Attorney
Michigan Poverty Law Program
220 E Huron St Ste 600A
Ann Arbor, MI 48104

Executive Director
State Bar of Michigan
306 Townsend St
Lansing, MI 48933

Dear Ms. Rexer, Tripp and Welch:

On behalf of the Elder and Disability Rights Section of the State Bar of Michigan and its approximately 1,700 members, I write to express our concerns about the Michigan Legal Help Program (MLH).

Our section has qualms about the program, and the way it circumvents use of attorneys for legal matters and information, but most particularly because it seems poised to offer "self-help" documents in the future not at all related to court appearances--nor self-help--for those representing themselves in civil matters.

We have had a chance to learn about the program though presentations by others, meetings with officers, and by way of a presentation to the Council

-
- CHAIR, BRADLEY A. VAUTER, 1805 DREXEL RD, LANSING, MI 48915
 - CHAIR-ELECT, ROSEMARY H. BUHL, 271 WOODLAND PASS, SUITE115, EAST LANSING, MI 48823
 - SECRETARY, PATRICK J. BOND, 400 MAPLE PARK BLVD SUITE 402, SAINT CLAIR SHORES, MI 48081
 - TREASURER, JOHN B. PAYNE, 1800 GRINDLEY PARK ST. SUITE 6, DEARBORN, MI 48124
 - IMMEDIATE PAST CHAIR, CAROLINE M. DELLENBUSCH, 2944 FULLER AVENUE NE, SUTE 100, GRAND RAPIDS, MI 49505

as a whole. Indeed we were approached to help provide a name for someone who could serve as an elder law expert for a probate/elder content review committee. We have declined to do so.

We have been informed that MLH will continue to try to gather experts for their probate/elder law content committee, to post probate/elder law information and forms sometime in the fall of 2013 or later. We find this troublesome, and hope the Bar, and Foundation and MPLP will reconsider such irresponsible developments.

While the discussion about the distinction between legal information and advice will likely continue for some time, and the definition of the practice of law remain a bit elusive, it does not strike us that providing “fill-in-the-blank” forms for DPOAs is the better part of wisdom. (We also have some concerns as well about “form” Patient Advocate designations, even though we are aware some are in circulation already.)

We understand the program places great emphasis on decision trees—and have been told that some users should stop and not finish the paperwork as the matter is complicated, or a lawyer is need, and so on.

But we are not at all sanguine about such claims, and “protections” particularly when the site itself has a 9 page adhesion “terms of use” section with terms and conditions—little read by users--by which the Michigan Poverty Law Program and the Michigan State Bar Foundation walk away from all responsibility to end users and even requires the poor to indemnify and defend and hold harmless the Foundation and the Program not only by users claims and claims by the Foundation and Program, but even claims by third parties.

This is such a contrast to the responsibilities an attorney has to clients, responsibilities that can't be shrugged off without separate legal counsel so advising, under the Michigan Rules of Professional Conduct Rule 1.8 (h), that MLH should find it disquieting they even need this terms of use disclaimer for a site that claims to be providing mere legal information.

We also reminded you all that misuse of durable power of attorney forms loomed large when the Governor's Task Force on Elder Abuse made its report in August 2006. Making forms easier to get, without an attorney, is hardly a solution to this known problem.

And given the fact that poor senior citizens (particularly those over 75) are among the least likely to use the internet themselves, per some studies such as the Pew Research study, MLH plans only stand to exacerbate the problem. This is because it is likely non-attorneys (whether family members, neighbors, librarians, or so on) will actually be “making” the forms. And as the Utah Cost of Financial Exploitation study by Jilene Gunther found, about 72 per cent of abusers were well known to the victim. This finding is not uncommon.

There also seems to be a certain amount of mission creep involved if you go the route of form creation by use of MLH. When Michigan Supreme Court Chief Justice Marilyn Kelly established the "Solutions on Self-Help (SOS) Task Force" in April of 2010, it was to promote greater centralization, coordination and quality of support for persons representing themselves in legal matters in Michigan. The goal then seemed to be to help non-lawyers represent themselves as best as possible. In such a setting, a judge can observe what is happening—in effect, there is an authority who can call time out, if problems develop. That is not the case with a DPOA or Patient Advocate document.

So expansion beyond the original SOS scope seems unwise and unwarranted. The documents we were asked about, patient advocate designations and creation of an agency relationship via a durable power of attorney are powerful important and very often nuanced documents. One could mean an early end to life or a life prolonged despite possible medical futility, the other could allow an agent to rob you blind. If ever there were documents that deserved proper review consideration and advice, those arrangements fill the bill. They are hardly suitable as “standardized” forms.

And a lot of damage can happen with such “standardized” forms, before any court involvement would be involved. In fact, these arrangements are often undertaken to avoid trips to court. As Just Levin observed in *State Bar of Michigan v. Cramer*, 399 Mich 116, 249 NW2d1 (1976), at 15:

There is far less risk of harm to the public resulting from misuse of a ‘divorce kit’ than from misuse of form deeds of conveyance, land contracts, business or residential property leases, inter vivos trusts or wills.

If a complaint for divorce is improperly filed, a judge has the opportunity to notice the defect and it can be

remedied or a new complaint filed. When an error is discovered in other legal forms, indiscriminately available to the public, it is often too late to correct the mistake.

Given our concerns, we hope you will not use bar dues money or ATJ funding to make non-court related documents or forms indiscriminately available via the internet. We think the promotion of decision tree internet-based form creation may actually be a disservice to the public especially when such forms are not to be used in court by self- represented litigants.

Sincerely,

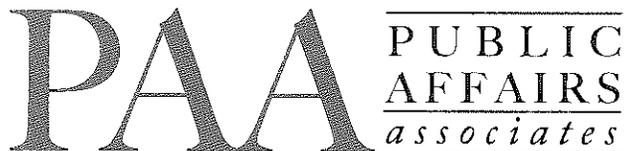


Bradley A. Vauter
Chair, Elder and Disability Rights
Section of the State Bar of Michigan

CC

Bruce Courtade
Candace Crowley
Terri Stangl
Erika Lorraine Davis
Barbara BakerOmerod
Dana M Warnez
Robert J Buchanan
Mark K Harder ✓
Marilyn Kelly

ATTACHMENT 7



AUG 26 2013

Discover a New Level in Government Relations

Mr. Mark Harder
Council of the Probate & Estate Planning Section of the State Bar
85 E. 8th St, Ste 310
Holland, MI 49423

Dear Mark:

Enclosed, for your records, is a stamped copy of the Financial Report Summary, which was filed at the Secretary of State's office. This form reported direct lobbying expenditures during the period January 1 through July 31, 2013, and was filed by the September 3, 2013 deadline.

The next report will be for the period, August 1 through December 31, 2013, and will be due January 31, 2014. You will be hearing from us the first part of January with our statement for that period.

Please call or email (jane@paaonline.com) if you have any questions. Thank you.

Sincerely,



Jane Cheesmond

Enclosure

August 23, 2013

2013

LOBBY REGISTRATION
FINANCIAL REPORT SUMMARY

READ INSTRUCTIONS BEFORE COMPLETING THIS FORM

BUREAU OF ELECTIONS
MICHIGAN DEPT. OF STATE
2013 AUG 23 PM 1:01

1. REGISTRANT'S NAME Council of the Probate & Estate Planning Section of the State Bar <input type="checkbox"/> CHECK BOX IF THIS NAME HAS CHANGED SINCE THE LAST REPORT FILED	2. REGISTRANT'S ID NUMBER L-6350-3 3. TELEPHONE NUMBER (810) 540-0555
---	--

4a. MAILING ADDRESS (ALL MAILINGS WILL BE SENT TO THE ADDRESS LISTED HERE)
ATTN: Mr. Mark Harder
85 E. 8th St, Ste 310
Holland, MI 49423
 CHECK BOX IF THIS ADDRESS HAS CHANGED SINCE THE LAST REPORT FILED

4b. IF INDIVIDUAL, RESIDENTIAL ADDRESS <input type="checkbox"/> CHECK BOX IF THIS ADDRESS HAS CHANGED SINCE LAST REPORT FILED	4c. BUSINESS ADDRESS <input type="checkbox"/> CHECK BOX IF THIS ADDRESS HAS CHANGED SINCE LAST REPORT FILED
--	--

5. TYPE OF REPORT:

a. <input checked="" type="checkbox"/> JANUARY - JULY <u>2013</u> (DUE AUGUST 31)	c. <input type="checkbox"/> AMENDMENT TO ITEM(S) _____
b. <input type="checkbox"/> AUGUST - DECEMBER _____ (DUE JANUARY 31)	d. <input type="checkbox"/> TERMINATION DATE TERMINATED

e. ITEMIZED EXPENDITURES FORM IS ATTACHED YES NO

6. BRIEF DESCRIPTION OF LOBBYING ACTIVITIES: **Communicating with public officials for the purpose of influencing official action of interest to our organization.**

CHECK HERE IF THERE WAS NO LOBBYING ACTIVITY DURING THIS PERIOD:

7. EXPENDITURES BY CATEGORY	THIS REPORTING PERIOD	YEAR TO DATE
a. FOOD AND BEVERAGE FOR PUBLIC OFFICIALS.....	\$0.00	\$0.00
b. MASS MAILINGS AND ADVERTISING.....	\$0.00	\$0.00
c. ALL OTHER LOBBYING EXPENDITURES.....	\$7000.00	\$7000.00
d. TOTAL LOBBYING EXPENDITURES (TOTAL OF a, b & c).....	\$7000.00	\$7000.00

8. NAME AND ADDRESS OF EACH ADDED OR DELETED PERSON EMPLOYED, COMPENSATED OR REIMBURSED FOR LOBBYING. NOTE: THE ENTRY OF A PERSON'S NAME AND ADDRESS UNDER THIS ITEM DOES NOT REGISTER OR TERMINATE THE PERSON AS A LOBBYIST OR A LOBBYIST AGENT.

<input type="checkbox"/> ADD <p style="text-align: center;">N/A</p> <input type="checkbox"/> DELETE	<input type="checkbox"/> ADD <input type="checkbox"/> DELETE
<input type="checkbox"/> ADD <input type="checkbox"/> DELETE	<input type="checkbox"/> ADD <input type="checkbox"/> DELETE

9. VERIFICATION: I CERTIFY THAT ALL REASONABLE DILIGENCE WAS USED IN THE PREPARATION OF THE ABOVE FORM, AND THE CONTENTS ARE TRUE AND ACCURATE, TO THE BEST OF MY KNOWLEDGE.

Rebecca L. Bechler	
TYPE OR PRINT NAME OF AUTHORIZED SIGNATORY	
	8 9 2013
SIGNATURE	MONTH DAY YEAR