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

# PROBATE LAW CASE SUMMARY

**BY**: Alan A. May

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

He was selected for inclusion in the 2007-2014 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. Mr. May maintains an "AV" peer review rating with Martindale-Hubbell Law Directory, the highest peer review rating for attorneys and he is listed in the area of Probate Law among Martindale-Hubbell's Preeminent Lawyers. He has also been selected by his peers for inclusion in *The Best Lawyers in America*® 2015 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2014 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011.

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

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**DT**: January 28, 2016

**RE: In Re Robert Stout Revocable Trust, Robert Stout Testamentary Trust, and the Dolores M.A. Stout Trust Agreement**
STATE OF MICHIGAN COURT OF APPEALS

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**"Alan, you cannot write about baseball all your life"**
- **Mrs. Pollinger**
- **12th Grade English Comp**
- **Mumford High - 1959**

**BASEBALL STATS:**

AUTHOR EXPELS TWO PLAYERS FROM HIS ALL JEWISH BASEBALL TEAM

The current issue of Jewish Sports Review published its list of non-Jews, who in some way or other were deemed to be members of the faith.

For those of you who missed my team, it was:

Pitcher – Sandy Koufax
Catcher – Harry Danning
First Base _ Hank Greenberg
Second Base – Buddy Myer
Shortstop – Lou Boudreau
Third Base – Al Rosen
Outfield – Sid Gordon
Outfield – Andy Cohen
Outfield – Shawn Green

Jewish Sports Review has unequivocally stated that all-star Buddy Myer was not a member in any fashion of the Jewish faith. Jewish Sports Review recognized Boudreau as the child of a Jewish mother who died and Boudreau was brought up Catholic. As the Talmud gave deference to the dad and modern Judaism would have recognized the conversion to Catholicism, Jewish Sports Review is probably correct.

The expulsion of Myer is of no import. He is easily replaced by Ian Kinsler of our Detroit Tigers. But Boudreau? Not no easily to be replaced, because there has never been a Jewish shortstop.

So well is this phenomenon known that Lowell Komie actually wrote a novel called "The Last Jewish Shortstop in America."

The website "jewornotjew.com" offers the following: "The Torah says thou shalt not covet thy neighbor, nor shall thou stand in a space between the second and third baseman in a game that hath not yet been invented. But trust me when it shows up it'll be awesome and you'll want to play so do me a favor and just don't fucking do it."

Whatever the reason, pentateuchal or otherwise, we must accept our plight until a shortstop develops or Ozzie Smith converts. In the meantime, I am forced to use the touchstone of "who would have Hitler have killed" and readmit Lou Boudreau on to my all-star team.

**REVIEW OF CASE:**

Referenced Files: Remedy for Breach
Right of Fiduciary to Demand a Release
Right of Trustee to Recover Overpayment

This appeal resulted from a hearing held by a probate court pursuant to a remand directed by the Court of Appeals in a previous appellant hearing.

In the former portion of this matter, the Lower Court had determined a breach of fiduciary responsibility in that the fiduciary had overpaid a beneficiary of the trust. A further breach was a demand of release from liability in exchange for the final distribution. In the previous appellant

iteration of this matter, the court issued an important directive which should be remembered by the practitioner as a good rule for a court to follow:

> "We emphasize that the trial court need not find that a remedy is necessary or warranted" because of any of the breaches; rather "[t]he most important remedy is to ensure that monies due to petitioners under the trusts are distributed."

This is a good directive. Look at the ultimate result. Don't necessarily focus on the breach and the fiduciary.

The Lower Court found that she who had been overpaid, had filed for bankruptcy.

The trustee, through an attorney, pursued the debt. The bankruptcy court held up its determinations pending probate court clarity (usually they don't). The Lower Court surcharged the fiduciary and forbad the fiduciary from pursuing the overpayment.

The Lower Court found a breach by the trustee in that it demanded a release as precondition for distribution and made an over-distribution. The fiduciary was surcharged on the theory that everything that was untoward flowed from those acts. At the time there was sufficient funds to equalize the distribution without litigation. The trustee was forced to pay the equalized distribution, with no right of recovery, from she who was overpaid.

The Court of Appeals held:

1. You can't deny a right of recoupment on an overpayment when you surcharge the fiduciary.

2. You can't demand a release as a predicate for distribution.

3. The Lower Court on remand can't go beyond the scope of the remand.

4. Attorney fees can be denied when you are suing for a matter due to your own mismanagement.

5. There can be a denial of fees for services rendered prior to notification that you would be charging for fees.

6. Though dicta, the Court of Appeals observed that the distribution could have been equalized out of remaining corpus and not spent on attorney fees.

This matter was partially reversed and remanded. Have you seen this happen more and more in probate court appellant review?

AAM:kjd
Attachment
826199

# STATE OF MICHIGAN

# COURT OF APPEALS

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*In re* Robert Stout Revocable Trust, Robert Stout Testamentary Trust, and the Dolores M.A. Stout Trust Agreement.

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TARA ARWOOD, ALISON ARWOOD, and KYLE ARWOOD,

Petitioner-Appellees,

v

KEVIN STOUT, trustee of the ROBERT STOUT REVOCABLE TRUST, ROBERT STOUT TESTAMENTARY TRUST, AND THE DOLORES M.A. STOUT TRUST AGREEMENT,

Respondent-Appellant.

UNPUBLISHED
December 15, 2015

No. 323535
Genessee Probate Court
LC No. 12-192872-TV

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Before: SAWYER, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals by right the trial court's opinion and order, following an evidentiary hearing, regarding the dispositions of the trusts for which he is trustee. We affirm in part, reverse in part, and remand for further proceedings.

## I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case was previously before this Court. *In re Robert Stout Revocable Trust*, unpublished opinion per curiam of the Court of Appeals, issued January 23, 2014 (Docket No. 313063). We set forth the basic facts of this case in our previous opinion:

> This case involves three trusts: (1) the Robert Stout Revocable Trust (RS Trust), (2) the Robert Stout Testamentary Trust (RS Testamentary Trust) that was to be created under Robert Stout's Will (RS Will), and (3) the Dolores M.A. Stout Trust (DS Trust). Robert Stout (Robert) and Dolores Stout (Dolores) were married and had three children: Tara—one of the petitioners, Kevin—respondent, and Shawn. Tara had two children, petitioners Alison and Kyle, and Shawn had two children,

Jessica Webster (Jessica) and Shelby Webster (Shelby). Robert was the settlor of the RS Trust and the testator of the RS Will. Robert nominated respondent as the successor trustee. Dolores was the settlor of the DS Trust, and she nominated respondent as the successor trustee. Robert passed away on January 25, 2009, and Dolores passed away on October 9, 2010. Prior to Dolores's death, she was declared incompetent by a court. Robert was initially appointed her guardian, and after his death, Tara was appointed her guardian.

The beneficiaries under the RS Trust are Tara and Shawn, to receive 20 percent of the trust, and Alison, Kyle, Jessica, and Shelby, to receive 15 percent. At the time of trial, Alison and Kyle had only received $9,000, 2.8 percent of the RS Trust, and nothing from the DS Trust. Aside from Tara, Alison, and Kyle, all of the other beneficiaries have received their distributive share of the DS Trust. The RS Testamentary Trust was never created.

The beneficiaries under the DS Trust are Tara, Shawn, and Kevin, to receive 20 percent; Alison, Kyle, Jessica, and Shelby, to receive 10 percent; Eleanor Snead, to receive five percent; and Debra Novak, to receive 2.5 percent. Aside from Tara, Alison, and Kyle, who have received nothing, all of the other beneficiaries have received their distributive share of the DS Trust.

According to Tara, she is still owed $3,600, which was given to Shawn by respondent. Tara also believes her children are owed between $18,000 to $25,000 each.

On March 31, 2011, respondent sent a letter to the beneficiaries, intending to make final distributions and to terminate the trusts, and respondent included a "Receipt and Release Agreement" to release respondent from liability and indemnify him, and the letter indicates that upon a beneficiary's execution of the agreement, his or her scheduled final distributions would be made. Attached to the letter were informal accountings. On September 7, 2011, pursuant to a request by petitioners, respondent sent a second letter and "Receipt and Release Agreement" that contained more detailed accountings.

Petitioners filed their motion to remove the trustee, for surcharge of the trustee, trust supervision, and appointment of a successor trustee on February 10, 2012, alleging that respondent breached various fiduciary duties owed to petitioners that resulted in damages. Respondent then filed a petition to settle the trusts on March 8, 2012. On March 15, 2012, petitioners responded to respondent's petition to settle the trusts, asserting that petitioners were still entitled to distributions from the RS and DS Trusts. In May 2012, the parties agreed to enter mediation. On June 13, 2012, petitioners filed a petition, which was later amended, to appoint an interim special fiduciary or trustee in light of several alleged transfers from the checking account of the trusts that constituted breaches of respondent's fiduciary duties, which petitioners learned of during discovery. Respondent responded by asserting that he explained these transfers to petitioners, and petitioners had no good faith argument regarding the appropriateness of the transfers. Mediation

efforts between the parties failed, and the parties proceeded with a bench trial on September 24, 2012.

In its opinion and order filed October 5, 2012, the probate court found respondent breached his fiduciary duties as trustee when he listed the River Property for sale and awarded petitioners attorney fees for the related litigation expenses of that breach, but found that the remainder of petitioners' action was frivolous, and (1) sanctioned Tara by ordering her to "forfeit to the estate the sum of $59,398.00, representing the distributions received by her[,]" (2) awarded respondent $3,625.00 in trustee fees to be paid from the trust, (3) awarded respondent "[a]ll attorney fees incurred by [respondent] as a result of this litigation" to be paid from the trust, excluding the costs he incurred as a result of Tara retaining Attorney George Rizik, and (4) ordered that the remaining trust assets be distributed to the remaining beneficiaries—including Kyle and Alison—according to the terms of the trust.

This Court found that respondent had breached his duty of care in several respects, although we found several of the breaches harmless. *Id*. at 3-16. However, we found some breaches not to be harmless. Specifically, we remanded the case for the trial court to consider the impact of the following breaches of duty by the trustee, and to determine the appropriate remedy for those breaches pursuant to MCL 700.7901 and MCL 700.7902:

(1) Respondent's requirement that petitioners sign a release indemnifying him before distributions would be made as required by the trusts. With regard to this breach, the trial court was to consider the $3,600 that Tara Arwood was to receive from another beneficiary upon signing the release. *Robert Stout Revocable Trust*, unpub op at 11.

(2) Respondent's charging of personal expenses to the trusts related to attending his mother and father's funerals, without adequately relating these expenses to the administration of the trusts. The trial court was to consider "each of these expenses and whether they were 'properly incurred in the administration of the trust' as opposed to expenses incurred merely for attending the respective funerals as the decedent's son." *Id*. at 15, quoting MCL 700.7709.

(3) Respondent's failure to timely notify petitioners that he began collecting a trustee fee on May 11, 2011. This Court vacated the trial court's award of $3,625 to respondent and directed the trial court on remand to "(1) consider whether respondent's trustee fees should be denied pursuant to MCL 700.7904(3) or (2) at a minimum, recalculate the trustee's fee to include only those hours of work incurred after petitioners had notice of respondent's intent to collect his fee." *Id*. at 16.

This Court stated, "We emphasize that the trial court need not find that a remedy is necessary or warranted" because of any of these breaches; rather "[t]he most important remedy is to ensure that monies due to petitioners under the trusts are distributed." *Id*. at 11 n 8.

We ordered that the trial court consider on remand whether its award of attorney fees to respondent, paid from the trusts, should be reduced or denied in light of respondent's breaches of

duty, although we found that petitioners had waived appellate review of the reasonableness or amount of fees incurred. *Id*. at 19-20. We also ordered the trial court to consider a portion of a document offered by petitioners as exhibit 8 at the bench trial, and excluded by the trial court, in fashioning a remedy for respondent's breaches of duty. *Id*. at 17. Finally, we vacated the trial court's award of $59,398 in sanctions against Tara Arwood. We affirmed the trial court's ruling in other respects, and remanded for further proceedings. *Id*. at 19.

An evidentiary hearing was held on these issues on August 1, 2014. At the hearing, Alison Arwood testified that respondent never mailed her a release, that she never received updates from respondent directly, and she had never received money from respondent directly. She testified that she lived with Tara Arwood (her mother) at the time of the previous litigation, and that Tara had an account in Alison's name; she denied that $30,000 from the trust[1] was ever deposited in that account. Kyle Arwood testified similarly, and also denied that $30,000 from the trust was deposited in an account for him.

Tara Arwood testified on direct examination that, consistent with her answers to interrogatories in the case, petitioners had received $109,000 from the trust, and that after taxes approximately $80,000 remained, which was distributed 40% to her, 30% to Alison, and 30% to Kyle; the funds transferred to her were either deposited into an account with Chase Bank or were left in beneficiary accounts with Met Life or Prudential, and Kyle and Alison's funds were deposited into accounts with Chase. However, on cross-examination, Tara stated that there was one Chase account in which she put any money received from the trust, and that she received $30,000 and put it into the Chase account. She testified that she had not received any other funds since she was asked by respondent to sign a release. On redirect, Tara stated that she did not receive $109,000, and only received $30,000 from the trust in cash. She testified that "the other money was an annuity."

Tara testified that she filed for bankruptcy in 2012 as a result of the probate court's original judgment against her. She testified that the bankruptcy was currently "on ice" pending a final decision in the probate court on the issue of distributions from the trusts. Respondent testified regarding legal fees incurred in attempting to collect on the probate court's original judgment against Tara, and stated that he "believed it was [his] fiduciary responsibility" to collect the judgment.

Respondent testified the total amount distributed to petitioners was $109,753. He testified that Tara received $30,000 in the first distribution, and received a cash advance of $3,600 dollars to cover an emergency expense. He testified that the remaining funds were from four different annuities, two from Jackson National and two from Prudential, which respondent

[1] As discussed in our previous opinion, the Robert Stout Testamentary Trust was never actually created, and the funds for the remaining two trusts were comingled. Thus, although the parties and lower court frequently refer to "the trust", it is clear from context that they are actually referring to the Robert Stout Revocable Trust and the Dolores M.A. Stout Trust Agreement. See *Robert Stout Revocable Trust*, unpub op at 5. Where we use the singular "trust," it is with that understanding.

had purchased with trust assets and which named Tara and her children as beneficiaries, as well as $8,300 from life insurance. He testified to his understanding that $75,000 of the $109,753 would have been subject to income tax. Respondent testified that the $30,000 was given by check from the trust, and that he wrote a personal check to Tara for $3,600 and reimbursed himself from the trust. He testified that the annuities were distributed directly to Tara without his involvement, presumably upon the death of one or both of the settlors, although the record is not clear on this point. Respondent testified that petitioners' total amount due under the trusts was approximately $150,000, and that $109,000 had been distributed. However, he testified that Tara actually received more than her share, and that she needed to transfer some of her distributions to her children. He testified that Alison and Kyle were each due a distribution of $20,100 from the trusts. However, respondent later testified that only $842.00 remained in the trusts. Respondent testified at length regarding "adjustments" he had made to the distribution to account for Tara's tax rate.

Respondent testified that he would withdraw his request for reimbursement from the trusts for expenses associated with his parents' funerals. Respondent testified that the recalculated trustee fees he believed he was owed were in the amount of $3,470.

Tara was recalled to the stand and testified that she paid an income tax rate of 35.5% on the approximately $75,000 she received from annuities purchased by the trust with her as the beneficiary. Tara further testified regarding attorney fees she had incurred in this litigation.

Following the hearing, the trial court issued a written opinion and order. The trial court noted that this Court had held that respondent breached his fiduciary duty by denying petitioners their mandatory distributions by requiring either Tara or all petitioners[2] to sign a release, and that, were it not for respondent's breach, "petitioners would have had the timely use and enjoyment of their distributions." Therefore, the trial court held that "petitioners should now receive the distributions they would have received at the time respondent made the distributions" to the other trust beneficiaries. The trial court noted that the exact amount of the distributions was unclear given the trial testimony and "confusion regarding overpayments and underpayments." The trial court went on to find that any overpayment to Tara was a result of respondent's mismanagement of the trust, that Tara was not required to reimburse the trust, and that "any alleged overpayment to Tara shall not be calculated against the amounts due to Alison and Kyle." The trial court further found that any overpayment to Shawn Webster, another beneficiary of the trusts (and not a party to this litigation) "shall be the responsibility of respondent personally."

With regard to trustee compensation, the trial court reasoned that respondent was only entitled to compensation from the day that respondent first notified petitioners of his intent to collect a fee (July 23, 2012), "until the time he wrongfully required petitioners to execute the release." The trial court found that, adjusting this amount for the personal expenses that

[2] The trial court noted that it was disputed whether respondent requested a release from Alison and Kyle, but in any event respondent refused to distribute funds to Alison and Kyle until Tara signed a release.

respondent had agreed to pay and adjusting his hourly rate to $25 per hour, respondent's requested trustee fee was reasonable.

With regard to attorney fees, the trial court found that attorney fees should only be allowed to respondent from the time he qualified as trustee until he breached his fiduciary duties by requiring petitioners to sign the release. Finally, the trial court ordered that "if trust assets are insufficient to cover any of the distributions required under this opinion, respondent shall pay the remaining amounts due from his personal funds."

This appeal followed.

## II. STANDARD OF REVIEW

We review issues of statutory interpretation de novo. *Townsend v Townsend*, 293 Mich App 182, 186; 809 NW2d 424 (2011). We also review the trial court's interpretation of trust language de novo. *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005). We review a trial court's decision to surcharge a trustee for an abuse of discretion, *In re Duane V. Baldwin Trust*, 274 Mich App 387, 397; 733 NW2d 419 (2007), as we do a trial court's decision regarding trustee's fees, *In re Baldwin's Estate*, 311 Mich 288, 311; 18 NW2d 827 (1945), and its decision regarding attorney fees, *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). An abuse of discretion occurs when the trial court selects an outcome outside the range of principled outcomes. See *Maldonado v Ford Motor Co*, 476 Mich 372, 389; 719 NW2d 809 (2006).

## III. PERSONAL LIABILITY FOR TRUST DISTRIBUTIONS

Respondent first argues that the trial court abused its discretion by ordering that respondent could not seek the return of any overpayments to beneficiaries, and for ordering that he be personally liable for any deficiency in the trust assets. We agree that respondent should be able to seek amounts erroneously overpaid from beneficiaries, but disagree that the trial court erred in holding him personally liable for any deficiency in trust assets.

With regard to the trial court's determination that any overpayments to beneficiaries was the fault of the trustee and could not be collected, to the extent that the trial court found a different breach of respondent's fiduciary duty than it found in the first appeal, such a determination was outside the scope of our remand. See *Mitchell v Cole*, 196 Mich App 675, 679; 493 NW2d 427 (1992). Further, the trial court's order would allow the overpaid beneficiaries of the trusts to receive more funds than they were due under the trusts, which conflicts with our directive that the trial court "ensure that monies due to petitioners under the trusts are distributed." *Robert Stout Revocable Trust*, unpub op at 11 n 8. Finally, such a sanction is not provided for in MCL 700.7902.

MCL 700.7902 provides:

> A trustee who commits a breach of trust is liable to the trust beneficiaries affected for whichever of the following is larger:

(a) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred.

(b) The profit the trustee made by reason of the breach.

The trial court was presented with no evidence that respondent had profited from any breach of duty. And allowing certain beneficiaries to receive more than their share under the trusts, even if the overpayment was due to the respondent's error, would not "restore the . . . trust distributions to what they would have been had the breach not occurred." We thus conclude that the trial court erred in ordering that respondent may not seek the return or redistribution of excess funds distributed to beneficiaries under the trusts.

However, should there remain a deficiency once the overpayments are redistributed, the trial court did not abuse its discretion in ordering that respondent be personally liable for the remaining funds necessary to distribute funds to all beneficiaries in full. It appears from the record that the lack of sufficient funds in the trusts is due to respondent's charging of legal fees to the trusts after petitioners commenced litigation concerning his breach of duty in conditioning distributions on the signing of a release, which will be addressed in Part IV. In the event that a deficiency remains after the legal fee issue is resolved, the trial court's decision was expressly allowed by MCL 700.7902 and was not an abuse of discretion. *Duane V. Baldwin Trust*, 274 Mich App at 397.

We note that respondent, while admitting that the trial court had the authority to sanction respondent in such a manner, urges this Court to find that it abused its discretion under principles of equity, based primarily on the allegation that Tara Arwood had "unclean hands." This allegation is primarily based on respondent's repeated claim that Tara "lied" at the evidentiary hearing about the amounts of money distributed to her from the trusts. Our review of the record indicates that, while all parties engaged in the use of round numbers and somewhat loose mathematics at the hearing, Tara was substantially correct in stating that she had received $30,000 in cash from respondent and approximately $75,000 in annuities paid directly to her. The confusion between $30,000 and $109,000 appears to arise from the fact that some money was disbursed to her by respondent via check from the trusts, while other monies were sent directly to her from the financial institutions that held the annuities the trusts had purchased. In any event, we discern no substantial inequity in essentially requiring each party in this matter to bear his or her own litigation costs, or in the trial court's rulings in this regard, which were designed to ensure that beneficiaries who had not been fully paid had the opportunity to receive the monies they were due under the trusts.

## IV. ATTORNEY FEES

Respondent next argues that the trial court erred in denying respondent all attorney fees that arose after respondent required petitioners to sign the release. Again, we agree in part. The trial court was within its discretion to deny attorney fees related to the breach, but to the extent it denied attorney fees incurred by respondent during the period when the trusts were judgment creditors of Tara Arwood during her bankruptcy proceeding, it abused its discretion in doing so.

MCL 700.7904 provides in relevant part:

> (2) Subject to subsection (3), if a trustee participates in a civil action or proceeding in good faith, whether successful or not, the trustee is entitled to receive from trust property all expenses and disbursements including reasonable attorney fees that the trustee incurs in connection with its participation.
>
> (3) A court may reduce or deny a trustee's claim for compensation, expenses, or disbursements with respect to a breach of trust.

We stated in our first opinion that the trial court "acted within its discretion by awarding the trustee costs and reasonable attorney fees, paid from the trust, for his participation in the proceedings." *Robert Stout Revocable Trust*, unpub op at 17. However, we directed the trial court to determine whether the fees paid to respondent from the trusts should be reduced or denied pursuant to MCL 700.7904(3). The trial court determined, in essence, that the litigation brought by petitioners was engendered by respondent's breach of trust concerning the release. It further noted, as we did in our original opinion, that absent legal fees from that litigation, there would remain sufficient assets in the trusts to pay the beneficiaries fully. We thus find that the trial court did not abuse its discretion in denying attorney fees to respondent resulting from petitioners' litigation. Although some of petitioners' claims were ultimately unsuccessful, the trial court's holding was not outside the range of principled outcomes in light of MCL 700.7904(3) and our directive to the trial court to fashion a remedy that ensures that beneficiaries are paid the monies owed them under the trusts.

However, during the time that the trusts possessed a valid judgment against Tara, respondent properly acted within his fiduciary duties in seeking to protect the trusts' interests in the bankruptcy proceeding. MCL 700.7904(1). The trial court thus abused its discretion to the extent that it denied respondent attorney fees relating to that proceeding. *Temple Marital Trust*, 278 Mich App at 128. On remand, the trial court should determine what amount of attorney fees should be paid to respondent with regard to the bankruptcy proceeding occurring prior to the issuance of our January 23, 2014 opinion, as these legal fees were incurred in the valid exercise of respondent's fiduciary duty and were not directly related to his breach of trust. We clarify that our holding that petitioners have waived review of the reasonableness or amount of fees incurred by respondent, *Robert Stout Revocable Trust*, unpub op at 21, related only to attorney fees in petitioners' probate court litigation, not the bankruptcy litigation. Thus the trial court should determine whether the fees incurred by respondent in protecting the trusts' interest in the bankruptcy proceeding were reasonable. *Smith v Khouri*, 481 Mich 519, 529–530; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.).

## V. TRUSTEE FEES

Finally, respondent argues that the trial court erred in denying him trustee fees for the time period preceding his provision of notice to petitioners of his intent to collect a fee, and after his breach of duty related to the release. We disagree.

Respondent notes that in effect, the trial court's order denies him any trustee fees, because he did not inform petitioners of his intent to seek a fee until after he had conditioned future distributions on the signing of a release. Respondent admits that, pursuant to MCL 700.7814(2)(d), he was not entitled to the fees he claimed before providing notice to

petitioners of his intent to collect a fee. MCL 700.7802(7)(b) provides that reasonable compensation may be paid to the trustee, "if fair to trust beneficiaries." Here, the trial court did not directly state that it found it unfair to beneficiaries to pay respondent a trustee fee after the breach of duty occurred, and indeed it does appear that the trial court may not have realized that the time frame in which it allowed trustee fees to be collected did not exist. However, it was not an abuse of discretion for the trial court to forbid respondent from charging fees after his breach which resulted in litigation at substantial expense to both parties; the trial court noted, albeit in the context of attorney fees, that it would be "unfair to petitioners for this Court to tax respondent's attorney fees against the distributions wrongfully withheld from them." That reasoning applies equally to trustee fees; in fact, MCL 700.7904(3) makes reference, in addition to attorney fees, to "a trustee's claim for compensation." And respondent admits that it was not an abuse of discretion for the trial court to deny fees for the time period before his provision of notice to petitioners. Thus, notwithstanding that these two time periods overlap in a way that denies respondent the collection of any trustee fees, the trial court's denial of fees during either of these two periods was within a range of principled outcomes and was not an abuse of discretion. *In re Baldwin's Estate*, 311 Mich at 311.[3]

We affirm the trial court's order apart from the portions forbidding respondent from seeking return of overpayments to beneficiaries and denying respondent attorney fees related to the bankruptcy proceedings that occurred prior to the issuance of our previous opinion. We remand for further proceedings consistent with this opinion. We note that our remand is limited to the determination of these issues; the trial court should not allow either party to raise any new issues or unnecessarily extend this already protracted litigation. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Mark T. Boonstra

[3] In their briefs on appeal, the parties assert that, following the issuance of its order, the trial court appointed a special fiduciary to make a recommendation concerning the schedule of final distributions from the trust. Petitioners represent in their brief on appeal that the special fiduciary recommended that respondent receive some compensation from his work in managing the trusts. We have not considered the special fiduciary's report in our analysis of the trial court's rulings on remand, and leave it to the trial court's discretion as to whether to adopt the special fiduciary's recommendation.