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 2007-2017, 2019 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*® 2020 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2018 by Woodward/White, Inc., of SC). He has been included in the Best Lawyers listing since 2011. Additionally, Mr. May was selected by a vote of his peers to be included in *DBusiness* magazine's list of 2017 Top Lawyers in the practice area of Trusts and Estates. Kemp Klein is a member of LEGUS a global network of prominent law firms.

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For those interested in viewing previous Probate Law Case Summaries, go online to: http://kkue.com/resources/probate-law-case-summaries/.

He is the published author of "Article XII: A Political Thriller" and
"Sons of Adam," an International Terror Mystery.

DT: May 26, 2020
RE: ***In re Estate of Parker***
STATE OF MICHIGAN COURT OF APPEALS

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

BASEBALL – THE BIG INNING

Are you ready fans? This story isn't about just a big inning, it's about THE big inning.

> Emerson said of the battle of Concord, April 19, 1775:
> "Here once embattled farmers stood/
> And fired the shot heard round the world."

Yes, Emerson failed in a perfect rhyme, and yes, the start of democracy is worthy of remembrance, but not when compared to THE shot heard round the world, and that was Bobby Thompson's three-run homer in the bottom of the ninth inning in the third game of a Pennant playoff with the Brooklyn Dodgers. A three-run homer off Ralph Branca that resulted in a 5-4 win for the Giants and vaulted them into the World Series against the Yanks.

Most of us fans have heard the moment recreated on audio and film so there is no need to recreate the inning, but an analysis of what happened that day will be for you, the reader, a fun endeavor.

The Background.

Through the season, the Dodgers lead the Giants by as many as 13 ½ games and were bound and determined to win the Pennant, especially after the unfortunate ending of the 1950 season. When the season rounded third base, the Dodgers began to faulter and the Giants began to climb. Some say the Giants' climb was due to sign stealing. The season ended with the two teams tied and under National League rules, a three-game playoff ensued.

The Games were played on three consecutive days; October 1st,2nd and 3rd. The Giants won the first game with Bobby Thompson hitting a home run off Dodger pitcher, Ralph Branca. The Dodgers took the second game setting up a sudden death finale at the Polo Grounds, home of the Giants.

The Game.

Ace, Don Newcombe, was on the mound for the Dodgers. Many say the greatest player not in the Hall of Fame. Big Newc finished the season with a 20-9 record and going into the ninth inning had only allowed 4 hits.

Leo Durocher was the Manager of the Giants. A wild man. A former member of the Cardinals Gas House Gang. A great Gin player with the filthiest mouth in baseball. His nickname? Leo the Lip. Though the Manager, Durocher also coaches third base.

Bobby Thompson, a third sacker. A good hitter who entered the game batting .292.

The Dodgers whose fans coined the phrase “wait til next year”, take a 4-1 lead into the bottom of the ninth.

THE BIG INNING

The Lip Gets Lippy. Now you have to understand that the “N” word’s use in baseball had become somewhat passe. Its use did not throw black players off their stride. The adjectives and adverbs used in connection therewith were applied by the Lip with acuity and great strategy. Leo was all over Newcombe. His goal was to get Newc to come after him so they would both be thrown out of the game and the Dodgers be forced to use a relief pitcher. Newc gives some mean stares and faints toward third base but keeps his composure. Maybe.

Alvin Dark and Don Mueller single. Hall of Famer, Monty Irvin pops to the first baseman. Whitey Lockman doubles scoring Dark. Mueller pulls up lame at third. Did Durocher’s lip rattle Big Newc? Maybe.

Dodger Manager talks to his pitching coach in the Dodger Bullpen, Clyde Sukeforth, and decides to bring in Ralph Branca to pitch to Bobby Thompson. Durocher sees this and knows Newc is going to come after him to seek recompense. Durocher substitutes Clint Hartung for the lame runner, Don Mueller. Hartung is six foot five, 250 pounds. Newcombe backs off and heads to the dugout.

Branca throws the first one inside and low. Thompson hits the next one on a line into the lower deck in left, a three-run homer and the Giants win the Pennant. No easy thing; there is an overhang in left field and only about five feet between the top of the lower left field fence and the overhang. Only a line drive could make it in.

The Analysis

The following is based on years of study and thought, fantasy, Talmud and speculation.

What the devil happened and why?

Predicate. Durocher approaches Thompson and reminds Thompson that he owns Branca. That he has faced him 12 times this year and homered four. He tells Bobby that Branca threw him a slider two days ago that Bobby hit out of the park and wouldn’t dare throw another breaking pitch. Even absent sign stealing, Bobby knows he is going to get fast balls.

Now unless Jolly Charlie Dressen, Manager of the Dodgers is stupid, Dressen knows this too.

Charlie Dressen. Why, oh why, did he pull Newcombe? And why, why oh why, Ralph Branca as a reliever. Although Chuck Dressen spent four years as a Manager in the Bigs, 34' thru 37' with the Reds, he spent the next 13 years in the Minors. In 49' and 50' he piloted the Oakland Oaks of the Pacific Coast league to two championships. The Dodgers were Jolly Charlie's first gig back. I was not his shrink, but I'll bet he was timid and cautious prone to rely on others. His own version of the why is that Clyde Sukeforth, the pitching coach had two pitchers warming up in the pen; Branca and Erskine. Charlie said Clyde told him Erskine had just bounced a curve.

What is bouncing a curve? Two explanations. The first, the ball breaks downward to early and hits the dirt. The second, the ball breaks too early, too high, and the batter has extra time to see the ball break because there is a bigger arc and has more time to hit it. Neither is good. "Sukey" probably meant the first.

Being a first-year Manager in a tough situation, Dressen was probably prone to take an "expert's" advice. Clyde, however, was no expert, and Dressen would (should) have known this. Durocher was afraid that Branca would walk Thompson. Willie Mays is the next batter. Mays was not the Mays of later years. He was a rookie batting .274 and walking Thompson would have set up a play at any base, one out and a two-run lead. Dressen shouldn't have been afraid of a bounced curve. Rube Walker was a good catcher. (Yeah, I know baseball fans Campy was the MVP in 1951, but he aggravated a leg injury in the first game of the series sliding into home, and Walker finished the series), Only six misplays for the year. Next Thompson owned Branca and Dressen should have known, as Durocher did, that Thompson would only get fast balls. Either way Dressen could have walked Thompson. Finally, he could have left Newc in the game.

Whatever the reason, Dressen should never have blamed Sukeforth, Dressen didn't have to take his advice. The best theory was that Dressen was a timid rookie Manager prone to take advice so he could later cast aspersions.

I have two of my own theories; one realistic, one surrealistic.

Theory one. In 1950, Dodger Manager, Burt Shotton didn't pull Newcombe and Dick Sisler hit a homerun. Dressen pulled Newcombe because Shotton didn't.

Theory Two. Branca had pitched on October 1st and given up a homer to Thompson. October was the first day of Rosh Hashanah. Even a reform Jew knows enough not to play on the first day. God punished Branca with the first homer, and then God said, "Boy you didn't listen," and there was a second homer off Branca.

But wait a minute, Ralph Branca was a practicing Roman Catholic. But fans, his mother Katherine Berger was Jewish, making Ralph the same under Jewish Law. Ralph's sisters said, they all knew. Even if he didn't know, God knew. Remember he saw Moses behind a bush and burned it. Well God smoked out Ralph.

Ralph made up for it. At 84 years old, he had Bar Mitzvah in Rye Brook, New York.

What do you think?

Caveat: MCR 2.119, MCR 7.212 and 7.215 take effect May 1, 2016 on propriety of citing unpublished cases

REVIEW OF CASE:

RE: *In re Estate of Parker*

- Sanctions
- Litigation Fees
- Error of Law
- Equality of Distribution
- Overpayment of Distribution
- Fees – Jury Trial
- Error Caused by Litigants' Negligence

At the lower level, a Jury Trial took place over the issue of fees. The Jury awarded fees to both sides. A beneficiary, arguably, was overcompensated during the lifetime of decedent. The Court refused to pass judgment on that issue. One side asked for sanctions and the request was denied. One side doubled the amount of attorney fees awarded by the Jury claiming the trust allowed for litigation expenses and that amount wasn't considered by the Jury. The lower Court denied this fee and awarded that paid amount repaid and distributed to the trust beneficiaries.

The Court of Appeals affirmed the lower Court on all issues, except regarding the issue of improper distribution. Inter alia the court:

1. It did not touch the issue as to whether a Jury can consider fees, BUT as it used the Jury's Verdict as a basis for the balance of its' rulings by implication, it confirmed the validity of such a procedure.

2. The Court has statutory authority to determine a distribution from a trust. A distributional ruling is reviewed for abuse of discretion. It is an issue of law and an error of law IS an abuse of discretion. Hence, the vacation of the lower Court's order and remand of that issue.

3. When a question of fees and costs are submitted to the Court, (or in this case, a Jury), the issue of sanctions is "subsumed" in such a request. The implication of this ruling is one of procedure and timing. Sanction requests should be submitted with the request for fees.

4. Special over General. MCL 700.7904 deals specifically with litigation expenses, therefore, other sections do not apply. *In re Kostin* is cited.

5. Failure to submit an issue to the Court or Jury vitiates error because of the litigants causing of such error.

6. Even if a trust allows the payment of attorney fees, the Court can reduce those fees.

4839-5128-3133

STATE OF MICHIGAN

COURT OF APPEALS

JAMIE WING, as Personal Representative of the ESTATE OF CALVIN D. PARKER,

Petitioner-Appellee,

v

CORWIN L. PARKER and COLEEN PARKER, Co-trustees of the THORNTON E. PARKER LIVING TRUST and CECIL M. PARKER LIVING TRUST,

Respondents-Appellants.

UNPUBLISHED
April 30, 2020

No. 347017
Shiawassee Probate Court
LC No. 16-036896-CZ

Before: BORRELLO, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

Respondents, co-trustees of the Thornton E. Parker Living Trust and Cecil M. Parker Living Trust (the Trusts), appeal as of right the trial court's order denying their request for sanctions against petitioner Jamie Wing, who is the personal representative for the estate of respondents' brother, Calvin Parker. The same order required an additional distribution of $17,485.73 from the Trusts to petitioners, which represented $^1/_3$ of the $52,457.19 in attorney fees erroneously charged to the Trusts by respondents. The order further disallowed respondents' request for trustee fees, and ruled that there would be no offset for excess distributions that Calvin allegedly received during his lifetime. We affirm in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

The underlying facts of this case are relatively straightforward. As the case developed, however, it became convoluted. Along the way, the parties participated in a three-day jury trial. That trial ended with the jury awarding both sides' attorney fees, but declining to award any damages. After trial, the parties continued filing motions, and new disagreements cropped up. Eventually, over a year after trial ended, the trial court entered the judgment that is now on appeal.

The issues on appeal largely developed during the year between the end of trial and the entering of final judgment, as will become evident.

In 1991, Thornton Parker established the Thornton E. Parker Living Trust, and Cecil Parker established the Cecil M. Parker Living Trust. The Trusts provided that upon the death of Cecil or Thornton, whichever occurred last, the trustees would divide the Trusts into equal shares for each of their children: Calvin, Corwin, and Coleen. Each share would be held as a separate trust for that child. If one of the children died, the trustees could pay the expenses of his or her last illness, burial, and all taxes, expenses, trustee fees, and attorney fees. After that, they were to distribute the remainder of that child's share of the Trusts in accordance with the child's will "provided that the Will [made] specific reference to the trust estate," or if the child had no will, or if within one month, the trustees had no notice of the existence of a will, the trustees were to distribute the remainder of the child's share to the child's then-living children.

Thornton passed away in late 1991, and Cecil passed away in 1997. Thereafter, Calvin and Corwin served as co-trustees of the Trusts, but they decided not to divide the Trusts into separate shares for each child. Calvin died in July 2014, and Coleen replaced him as co-trustee. Surviving Calvin were his wife and five children, one of whom is petitioner. Petitioner was named personal representative of Calvin's estate.

In February 2016, petitioner filed a complaint/petition for accounting of the Trusts. In Count I, petitioner requested an order compelling respondents to provide petitioner an accounting of the Trusts. In Count II, petitioner alleged various breach-of-trust claims against respondents as trustees of the Trusts. Petitioner requested (1) damages for the breaches of the fiduciary duties, (2) the court to remove Corwin and Coleen as trustees, and (3) the court "[t]o order proper distribution of income and of assets of the Trusts[.]"

In October 2017, petitioner moved for summary disposition on her breach-of-trust claims. At the hearing on petitioner's motion, she clarified that, in addition to her request for damages on her breach-of-trust claims, she was requesting attorney fees for having to review respondents' accounting of the trust. Petitioner argued that she was entitled to such fees because her reviewing the accounting was necessary to ensure that respondents fulfilled their obligations to the Trusts, even though she found no evidence of wrongdoing. Petitioner also asked the trial court to deny respondents' trustee fees and attorney fees, arguing that they were not appropriate in light of respondents' alleged breaches of trust.

After hearing both sides' arguments, the trial court ruled that respondents were "required . . . by the Trust itself" to "be completely forthcoming to [Calvin's] successors upon Calvin's death," and that respondents breached their "duty to be forthright." The trial court noted, however, that it was "not clear . . . what the consequences of that" breach were, "[e]specially as it relates to" the attorney fees. The trial court, in clarifying its ruling, stated on the record that it was granting summary disposition to petitioner "as it relates to the initial breach of the duty to fully notify [Calvin's children]," and that "[t]he other issues," including petitioner's allegations of other breaches of trust and whose attorneys were entitled to what fees, "remain[ed] unresolved."

Those unresolved matters proceeded to a jury trial. At issue during trial were (1) what, if any, fees petitioner's attorneys were entitled to from the Trusts, (2) what, if any, fees respondents'

attorney was entitled to from the Trusts, (3) whether respondents breached any further fiduciary duties, and (4) what the damages were for respondents' breaching the duty found by the trial court, and, if additional breaches were found by the jury, what the damages were for those breaches. During trial, petitioner's attorney presented evidence that his fees were $75,000, and respondents' attorney presented evidence that her fees were $52,457.19. Jurors were instructed that an attorney—whether petitioner's attorney or respondents' attorney—was entitled to fees only if the jury found that the attorney performed necessary legal services for the Trusts.

The three-day jury trial concluded on December 1, 2017, and the jury issued its verdict that same day. As to petitioner's request for attorney fees, the jury found that (1) petitioner's attorney performed necessary legal services to preserve and protect the Trusts and (2) the reasonable value of those services was $75,000. For respondents' request for attorney fees, the jury found that (1) respondents' attorney performed necessary legal services to preserve and protect the Trusts, and (2) the reasonable value of those services was $52,457.19. The jury further found that petitioner failed to establish any of her "additional breach of trust claims," and that petitioner did not suffer any damages "over and above the attorney fees incurred" as a result of respondents' previously-found breach of trust.

In February 2018, the trial court entered an order reflecting the jury's verdict. The order also provided that the court would "retain jurisdiction over the administration of" the Trusts "until further order," that distributions would be made to Calvin's children, and that the order was "final . . . as to the breach of trust but does not close the case."

After little movement was made on the case, petitioner, in May 2018, filed a motion to compel a final accounting and proposed distribution of the Trusts' assets. On June 12, 2018, the trial court entered an order requiring respondents "to file and serve a final accounting and proposed complete distribution for" the Trusts by June 30, 2018.

After respondents filed the proposed final accounting and distribution, petitioner filed several objections. Petitioner objected to certain attorney fees charged to the Trusts by respondents' attorney, the payment of trustee fees, and the proposed distribution of the Trusts. As it relates to the proposed distribution, petitioner objected because the distribution provided "$19,000 and $7,000 to each Trustee in excess of what is proposed for the remaining beneficiary without explanation as to why an equalization is necessary and which is clearly contrary to the terms of the Trusts and best interests of all beneficiaries." Petitioner asserted that the Trusts should be distributed equally.

In response, respondents asserted that the Trusts were permitted to pay attorney fees in excess of what was awarded by the jury. Respondents also contended that petitioner was aware that there would be an unequal distribution of the Trusts because Calvin received more distributions during his lifetime than either Coleen or Corwin, and the unequal final distribution was to account for those greater distributions to Calvin.

On September 26, 2018, the trial court held a hearing on petitioner's objections. At the hearing, petitioner clarified that she had multiple objections to attorney fees being paid by the Trusts. First, she was objecting to the payment from the Trusts of $52,457.19 in attorney fees on top of the $52,457.19 in attorney fees awarded by the jury. Petitioner explained that, after

discussing matters with respondents' attorney, there had apparently been some confusion at trial, and the amount requested by respondents "reflect[ed] only one trust," and so was only ½ of their attorney fees. Nonetheless, petitioner was objecting to the payment of the additional $52,457.19 in attorney fees because those fees "would be covered" by the jury award.

Second, petitioner was objecting to other attorney fees on top of the extra $52,457.19 that also "cover[ed] litigation costs." Petitioner characterized these as "trial prep and trial related costs" that "were not submitted to the jury," as well as post-trial "litigation costs."

Third, petitioner was objecting to the trustee fees because petitioner did not "think those should be allowed."

Lastly, petitioner objected to the unequal distribution because petitioner believed the distribution should be equal. Petitioner argued that there was no evidence in the record that Calvin received greater distributions during his lifetime, and that respondents should have put that issue before the jury if they wanted to contest it. Petitioner contended that they were "hashing out issues that should have been wrapped up when we were litigating this in the first place rather than have to come back and argue."

Respondents, in response, argued that they did not have to put all of their attorney fees before the jury, and that the fees charged "were necessary fees for litigation." Respondents also argued that an undisclosed amount of the attorney fees that would be excluded if petitioner's objection succeeded "covered administrative costs." Lastly, respondents argued that the disproportionate distributions to Calvin were proper because Calvin received greater distributions in his lifetime, and petitioner failed to prove otherwise.

At the end of the hearing, the trial court ruled that it was not allowing any attorney fees related to the litigation beyond what the jury awarded. It also denied trustee fees, and ruled that Calvin's distribution could not be "readjusted post trial" because that issue should have been presented to the jury.

Roughly one month later, on October 29, 2018, respondents filed a motion for sanctions against petitioner, arguing that there was no basis in law or fact for some of the allegations that petitioner had brought against them. One week later, on November 6, 2018, petitioner moved for entry of judgment because the case still had not wrapped up.

Both motions were before the trial court at a December 12, 2018 hearing. During the hearing, respondents continued to argue that Calvin received greater distributions during his lifetime so the final distributions should be equalized. The trial court continued to deny respondents' request, explaining that "due process was executed" and "[t]he parties had notice and opportunity to be heard on any and all claims they have against each other." The court further explained that it was not going to allow the parties to continue litigating matters that should have been previously addressed.

Respondents then addressed their motion for sanctions. After hearing respondents' argument, the trial court denied the motion. The court reasoned that the relief sought by

respondents was subsumed in the jury's award of attorney fees because that award included the cost of addressing petitioner's claims.

Following the hearing, the trial court entered the judgment now on appeal. First addressing the additional $52,457.19 in attorney fees, the court ordered that Calvin's children were "entitled to an additional distribution of $17,485.73 representing one-third of the" $52,457.19. Second, the court ordered that "all attorney fees incurred by [the Trusts] related to the litigation between the parties in this matter since the jury trial are hereby disallowed . . . ." Third, the trial court disallowed "all Trustee fees" requested by respondents. Fourth, the trial court disallowed any "offset . . . for any access [sic] distributions that Calvin D. Parker received . . . during his lifetime . . . ." Lastly, as relevant to this appeal, the court denied respondents' request for sanctions.

Respondents now appeal as of right.[1]

II. ATTORNEY FEES

Respondents first argue that the trial court abused its discretion when it denied respondents' request for an additional $52,457.19 in attorney fees for work done prior to the jury trial,[2] as well as its denial of respondents' request "for attorney fees incurred after the jury trial." We disagree.

We review for an abuse of discretion a trial court's decision whether to award attorney fees. *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012).

MCL 700.7904 concerns litigation-related attorney fees that can be paid from a trust, and provides:

> (1) In a proceeding involving the administration of a trust, the court, as justice and equity require, may award costs and expenses, including reasonable

[1] Petitioner argues that we do not have jurisdiction to hear this appeal. We disagree. The December 12, 2018 probate court order is appealable as of right under MCR 5.801(A)(2)(u) (allowing a party to appeal as of right an order related to an estate or trust that directs or denies "the making or repayment of distributions") and MCR 5.801(A)(2)(x) (allowing a party to appeal as of right an order related to an estate or trust that allows or disallows "an account, fees, or administration expenses")

[2] The parties agreed to the wording of the trial court's final order, but it is unclear why they decided on the wording that they did. We presume that the "additional distribution [to Calvin's children] of $17,485.73 representing one-third of" $52,457.19 was because the trial court disallowed the $52,457.19 in attorney fees already paid from the Trusts, and this was how the parties agreed to effectuate that ruling. By challenging the trial court's decision to disallow the $52,457.19, respondents are effectively challenging the portion of the trial court's final order granting Calvin's children an additional distribution of $17,485.73.

attorney fees, to any party who enhances, preserves, or protects trust property, to be paid from the trust that is the subject of the proceeding.

(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.

In the lower court, petitioner challenged the propriety of respondents' attorney fees. See MCL 700.7207 (allowing for court review of (1) "the propriety of the employment of a person by a trustee including an attorney" and (2) "the reasonableness of the compensation of the person so employed"). Petitioner argued that respondents' attorney fees from Calvin's death through the date of trial should be denied under MCL 700.7904(3) because those fees were caused by respondents' breach of trust and would not have been incurred had respondents not breached their fiduciary duties. Petitioner submitted this argument to the jury. If the jury rejected this argument and found that awarding respondents' attorney fees was proper, it was asked to decide the "reasonable value" of respondents' attorney's services.[3] The jury determined that respondents' attorney fees were proper, and the reasonable value of those fees was $52,457.19.

After the jury rendered its verdict and the trial court awarded attorney fees in accordance with that verdict, respondents paid from the Trusts double the attorney fees awarded by the jury. Respondents explained that they paid double the attorney fees that the jury awarded because they mistakenly presented only ½ of their attorney fees to the jury. Respondents argue that, despite this mistake, they should be permitted to pay their full attorney fees because the jury awarded them the full amount they requested, and it is reasonable to assume that, had respondents requested the amount of attorney fees they actually paid, the jury would have awarded that amount to them. But it is well established that "[r]eversible error cannot be error to which the aggrieved party contributed by plan or negligence." *Harville v State Plumbing & Heating Inc*, 218 Mich App 302, 323-324; 553 NW2d 377 (1996) (citation and quotation marks omitted). Any argument about what the jury may have ruled had respondents not made a mistake is unpersuasive because any error in that respect is attributable to respondents' negligence.

Respondents also argue that, regardless of what the jury awarded, respondents had the right, as trustees, to pay attorney fees under MCL 700.7817(w), which is all they were doing by paying the additional $52,457.19 in attorney fees. MCL 700.7817(w) states that a trustee has the power

[3] Respondents contend that the jury was not actually asked to determine the reasonable value of attorney fees. This assertion is belied by the jury's decision; the verdict, as read by the jury, stated that it was finding "the reasonable value of the legal fees performed and costs incurred" by respondents' attorney.

> [t]o employ an attorney to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties, even if the attorney is associated with the trustee, and to act without independent investigation upon the attorney's recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment.

Respondents' argument that MCL 700.7817(w) allowed them to pay the additional $52,457.19 in attorney fees is unpersuasive. MCL 700.7817(w) allows compensation to an attorney for either (1) "perform[ing] necessary legal services" or (2) "assist[ing] the trustee in the performance of the trustee's administrative duties." First addressing whether the $52,457.19 was for "necessary legal services," we acknowledge that litigation-related expenses could readily be considered necessary legal services. Yet litigation-related attorney fees are specifically addressed by MCL 700.7904. Because MCL 700.7904 is the more specific statute, it controls. See *In re Kostin*, 278 Mich App 47, 57; 748 NW2d 583 (2008) (explaining that when two statutes conflict, the more specific statute controls). Thus, respondents' litigation-related attorney fees were awardable under MCL 700.7904, not MCL 700.7817(w).

Respondents argue, however, that some of the $52,457.19 in attorney fees were for work "unrelated to the litigation at all," and thus were compensable under MCL 700.7817(w). Yet respondents do not specify what amount of the $52,457.19 was for work unrelated to the litigation. In effect, then, respondents are requesting *all* of the $52,457.19 to be paid under MCL 700.7817(w) because *some* undisclosed amount of that total was for work unrelated to the litigation. This ignores that other portions of that $52,457.19 were for litigation-related expenses, and those attorney fees are controlled by MCL 700.7904. While respondents could pay attorney fees under MCL 700.7817(w) for work unrelated to the litigation, it was their burden to establish what those fees were. See *Safdar v Aziz*, 327 Mich App 252, 268; 933 NW2d 708 (2019) (explaining that "[t]he party requesting the attorney fees has the burden of showing facts sufficient to justify the award") (quotation marks and citation omitted). Respondents failed to establish how much, if any, of the $52,457.19 in attorney fees was for work unrelated to the litigation. In light of respondents' failure to carry their burden to show what amount of the $52,457.19 in attorney fees was for work unrelated to the litigation, we cannot conclude that the trial court's denial of the additional $52,457.19 in attorney fees was an abuse of discretion.

Still, this does not fully resolve the issue. Respondents contend that under MCL 700.7904(2), they, as trustees, were "entitled to receive" their attorney fees because they participated in the litigation "in good faith." However, MCL 700.7904(2) is, by its terms, subject to MCL 700.7904(3), which allows the trial court to "reduce or deny" a trustee's attorney fees "with respect to a breach of trust." Respondents contend that subsection (3) does not apply to them because the jury did not find any breaches of trust. This ignores that the trial court granted summary disposition to petitioner on one of her breach-of-trust claims, and the jury was asked to determine damages as a result of that breach. Thus, MCL 700.7904(3) applied to respondents' request for litigation-related attorney fees, and contrary to respondents' belief, they were not entitled to reasonable attorney fees under MCL 700.7904(2). Respondents do not explain how the trial court abused its discretion by refusing respondents' an additional $52,457.19 in attorney fees when the court was permitted to deny those attorney fees under MCL 700.7904(3). See *Petraszewsky v Keeth*, 201 Mich App 535, 540; 506 NW2d 890 (1993) (explaining that the party seeking reversal on appeal has the burden to provide the reviewing court with the basis for

appellate relief). We therefore conclude that the trial court did not abuse its discretion by refusing to grant respondents' request for an additional $52,457.19 in attorney fees.

In this same issue, respondents contest the trial court's refusal to grant litigation-related attorney fees that were incurred after trial ended. Respondents contend that they "obviously could not present [these] fees to the jury," and conclude that "denying those post-trial fees on [that] basis . . . was completely meritless."

Yet the trial court did not deny litigation-related fees incurred after trial because they were not presented to the jury; it stated that

> the reality is, is that all I ever see [in this case] is lawyers arguing about how the lawyers are getting paid. And that works for awhile. But it's done. The attorney fees since then, since the jury trial related to the litigation are denied.

It therefore appears to us that the trial court denied litigation-related attorney fees incurred after trial concluded because those fees concerned only how much to compensate the attorneys. Again, the trial court had discretion under MCL 700.7904(3) to deny respondents' attorney fees as it related to petitioner's breach-of-trust claims. We conclude that the trial court did not abuse its discretion by denying respondents' request for post-trial attorney fees related to petitioner's breach-of-trust claims based on its finding that those fees were incurred only to decide how much to compensate the attorneys. See *In re Sloan Estate*, 212 Mich App 357, 362-363; 538 NW2d 47 (1995) (explaining that charging attorney fees for an attorney's attempt to calculate and collet attorney fees—also known as "fees for fees" claims—are disfavored in Michigan because "the ordinary fees and costs incurred in establishing and defending a fee petition are inherent in the normal course of doing business as an attorney").

III. TRUSTEE FEES

Respondents next argue that the trial court abused its discretion by disallowing respondents' requested trustee fees. We disagree.

A trial court's decision whether to allow trustee fees will not be overturned on appeal absent an abuse of discretion. *In re Eddy's Estate*, 354 Mich 334, 347-348; 92 NW2d 458 (1958).

MCL 700.7708 (1) states, "If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances." Under MCL 700.7207, the court may review the reasonableness of a trustee's compensation upon objection to that compensation by an interested person. And under MCL 700.7904(3), "A court may reduce or deny a trustee's claim for compensation, expenses, or disbursements with respect to a breach of trust."

Respondents contend that they are entitled to trustee fees because petitioner "never challenged the reasonableness of Respondents' proposed compensation[.]" It is unclear why respondents make this assertion, because petitioner clearly objected to respondents' trustee fees. Once objected to in the context of the parties' breach-of-trust-claims litigation, the trial court had the authority under MCL 700.7904(3) to deny respondents' trustee fees based on petitioner's

successful breach-of-trust claim. We conclude that the trial court did not abuse its discretion by exercising this authority and denying respondents' requested trustee fees.

IV. UNEQUAL DISTRIBUTION

Respondents next argue that trial court erred when it ordered equal distribution of the remaining trust assets without considering respondents' proofs that Calvin had received an unequal and greater distribution during his lifetime. We agree.

We review a probate court's dispositional rulings for an abuse of discretion. *In re Jajuga Estate*, 312 Mich App 706, 711; 811 NW2d 487 (2015).

MCL 700.7201(2) provides that distributions of a trust "shall proceed . . . free of judicial intervention, and without court order or approval or other court action," unless "an interested person" invokes the court's jurisdiction by objecting to the distribution.

In her complaint, petitioner requested the court "[t]o order proper distribution of income and of assets of the Trusts[.]" After the parties went to trial on petitioner's complaint, petitioner requested—and respondents provided—a final accounting and proposed distribution of the Trusts' assets. This proposed distribution provided more to Coleen and Corwin. Petitioner objected, arguing that the distributions should be equal. By the terms of the Trusts, the original settlors clearly contemplated an equal distribution of assets at the time of their deaths to their children, Calvin, Coleen, and Corwin. But, according to respondents, dividing the remaining Trusts assets equally would not be in accordance with the terms of the Trusts because Calvin had received a disproportionate share of distributions during his lifetime. Thus, according to respondents, an equal distribution of the Trusts' assets now would result in Calvin receiving a larger overall distribution than Coleen and Corwin. In ruling that respondents must divide the remaining Trusts assets equally, the trial court explained that respondents should have presented evidence of Calvin's disproportionate distributions at trial.

This ruling was, in our opinion, erroneous. Under MCL 700.7201(2), distributions proceed free of judicial intervention absent objection.[4] Petitioner did not object to respondents' proposed distribution until after trial. And when petitioner objected, she proposed a distribution that differed from the one proposed by respondents. Petitioner and respondents each argued that their side's proposed distribution was in accordance with the terms of the Trusts. Clearly, they could not both be right. But instead of deciding whose proposed distribution actually effectuated the terms of the Trusts, the trial court seemed to arbitrarily decide that respondents bore the burden of establishing that their proposed distribution was proper. It did so despite petitioner making the same claim as respondents—that her proposed distribution was in accordance with the terms of the Trusts. It is simply nonsensical to require respondents to prove that their proposed distribution effectuated the

[4] Petitioner equates the unequal distribution to a setoff, and argues that respondents had to plead their "setoff claim" as an affirmative defense. Yet the unequal distribution was not a setoff; it was a proposed distribution that allegedly effectuated the terms of the Trusts. Respondents did not have to plead anything about their proposed distributions because those distributions would proceed without judicial intervention unless objected to. See MCL 700.7201(2).

terms of the Trusts, and then conclude that, if they fail to do so, petitioner's proposed distribution was de facto in accordance with the terms of the Trusts. The only way to properly resolve the parties' competing claims was to consider evidence and determine whose proposed distribution actually effectuated the terms of the Trusts.

The court had the authority to do this; after petitioner objected to the proposed distribution, the trial court could review the distribution and determine whether it effectuated the terms of the Trusts. See MCL 700.7201(2); MCL 700.1302(b). The trial court's ruling otherwise—that it could not consider respondents' evidence because respondents did not present the evidence to the jury—was an error of law, and an error of law is necessarily an abuse of discretion. See *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016).[5] Moreover, by ruling that it was precluded from considering respondents' evidence about whether the distributions were proper because respondents did not present that evidence to the jury, the trial court essentially refused to exercise its discretion to consider whether the proposed distribution effectuated the terms of the Trusts. "[F]ailure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion." *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998).

We therefore conclude that the trial court abused its discretion by refusing to consider respondents' evidence that Calvin received disproportionate distributions during his lifetime. We vacate the trial court's ruling that there would be no offset for excess distributions that Calvin allegedly received during his lifetime, and remand for an evidentiary hearing for the court to decide whose proposed distribution—respondents' or petitioner's—was in accordance with the terms of the Trusts.

V. SANCTIONS

Lastly, respondents argue that the trial court abused its discretion when it denied respondents' motion for sanctions. We disagree.

A trial court's decision whether to impose sanctions is reviewed for an abuse of discretion. *Fette v Peters Const Co*, 310 Mich App 535, 549; 871 NW2d 877 (2015).

Respondents moved for sanctions under MCR 1.109 (formerly MCR 2.114). MCR 1.109(E)(6) states that if a party signs a document in violation of MCR 1.109(E), the court shall order sanctions, "which may include an order to pay to the other party or parties the amount of the

[5] The trial court's ruling appeared to employ the doctrine of res judicata. "Michigan law defines res judicata broadly to bar litigation in the second action not only of those claims actually litigated in the first action, but also claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not." *Peterson Novelties, Inc v City of Berkeley*, 259 Mich App 1, 11; 672 NW2d 351 (2003). Res judicata cannot apply here because the parties could not have reasonably litigated the propriety of the proposed distributions during the trial on petitioner's breach-of-trust claims. Distributions proceed without judicial intervention unless objected to by an interested party. See MCL 700.7201(2). For respondents to have litigated the proposed distributions before petitioner objected would have required respondents to predict what petitioner would object to, which respondents cannot be reasonably expected to do.

reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." The rule clarifies, however, that "[t]he court may not assess punitive damages." MCR 1.109(E)(6).

Respondents were awarded $52,457.19 for their litigation-related expenses under MCL 700.7904. That award represented the reasonable value of the attorney fees respondents incurred for defending petitioner's claim. In considering respondents' claim for sanctions, the trial court ruled that because respondents had already been awarded the costs they incurred defending petitioner's claims, respondents' sanction claim was subsumed by the jury award. That is, even if petitioner violated MCR 1.109(E) by filing her complaint, the trial court could not grant respondents any further relief because they already received "the reasonable expenses incurred because of" petitioner's filing. Indeed, the trial court could not grant any further relief because, by its terms, the court was not permitted to assess punitive damages under MCR 1.109(E)(6). The trial court's reasoning was not improper, and we conclude that the trial court did not abuse its discretion by refusing to grant respondents' motion for sanctions.

VI. CONCLUSION

We vacate the trial court's order to the extent that it ruled "[t]hat there shall be no offset for either Trust for any access [sic] distributions that Calvin D. Parker received from either Trust during his lifetime," and remand for an evidentiary hearing for the court to decide whose proposed distribution—respondents' or petitioner's—effectuated the terms of the Trusts. In all other respects, we affirm. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Stephen L. Borrello
/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron