PROBATE LAW CASE SUMMARY

BY ALAN A. MAY

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.

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 2007-2021 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© 2022 in the fields of Trusts and Estates as well as Litigation – Trusts & Estates (Copyright 2021 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. Additionally, he has been designated a "Leading Lawyer" in Trust, Will & Estate Planning Law for the years 2013 to the present (a distinction granted to the top 1% of attorneys in Michigan). Kemp Klein is a member of LEGUS a global network of prominent law firms.

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

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

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DT: November 10, 2021

RE: ***In re Spitza Testamentary Trust***

STATE OF MICHIGAN COURT OF APPEALS

Kemp Klein Law Firm represents Elder Law of Michigan, a charitable organization and Trustee of the Elder Law of Michigan Pooled Account Trust. Through this relationship, our attorneys administer the Pooled Account Trust for Elder Law of Michigan on a long-term contract. If interested, please contact Cindy Fedewa at 248-528-1111 or cindy.fedewa@kkue.com.

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Alan, you cannot write about baseball all your life.

Mrs. Pollinger

12th Grade English Comp

Mumford High —1959

BASEBALL STATS:

Best Lead Off Hitters

We have learned about the eighth batters and the best 3rd, 4th and 5th hitters. It's the job of the lead-off batter to get on base.

Here is my ranking as to who were best lead-off of batters in baseball.

1. Ricky Henderson – Yes, I have personally seen him hit over .280 as a lead-off batter. He had 81 lead-off homers. He was number two in lifetime walks behind Barry Bonds, a power hitter. The difference is Bonds didn't try to walk.
2. Ichiro Suzuki had 2,539 hits as a lead-off batter for a .323 average. This is more than the total stats for all hitters.
3. Pete Rose had a .379 on base percentage as a lead-off batter; 2,924 were hits; a .308 average. Did he try harder when he bet on the Reds?
4. My favorite "The Walking Man," Eddie Yost ranked 11 in total walks all time. Hit 28 homers in the first inning alone. Saw him a lot as a Tiger.
5. Craig Biggio, 53 lead-off homers. I like him because once he got on, he was a threat to steal second. Allowed himself to be hit by the pitcher 285 times.

Who do you remember?

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 Spitza Testamentary Trust*

- Substantial Justice
- Complaint v Petition – Surcharge
- Attorney Binding Client Trustee
- Liability Opponent Attorney Fees
- Adjournment Denial – Due Process

Appellee and Appellant were co-trustees of parents' trust. I assume either could act on behalf of the trust as one. Appellant, did. Appellant's attorney sold timber rights for a certain amount. An evidentiary hearing held on a Petition for Surcharge found that the sale was substantially below market. Surcharge was entered against Appellant and Appellee's fees were assessed against her personally.

I. Complaint v. Petition.

As the action was against a fiduciary, the proper way to proceed was by complaint, not petition. But the Court of Appeals did not reverse, as EPIC had a section on fiduciary surcharge, therefore, a Petition for Surcharge gave Appellant "Substantial Justice." Authority to surcharge and enter a judgment, therefore was approved.

II. Attorney signing for fiduciary.

Allowed if there is actual or apparent authority. Law was cited that "an attorney often acts as client's agent."

This bothers me. I wouldn't do it without documentation authorizing same.

III. Attorney fees of winning party paid by loser.

When the breach caused the action, you can be held liable.

I wouldn't rely upon this as absolute. I would look at that qualitatively and quantively. How much was the damage in dollars and percentage? How broad were the exculpation and discretionary provisions of the trust? Did due diligence precede the alleged error, etc.

R E V I E W   O F   C A S E :

IV. Adjournment – Failure to Appear.

When the Judge won't adjourn under the instant circumstances is not a denial of due process even if proceedings go forward to your detriment.

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

In re SPITZA TESTAMENTARY TRUST.

MAXINE SPITZA,

Appellant,

v

DEBRA SPITZA, Trustee of the JAMES SPITZA TESTAMENTARY TRUST,

Appellee.

UNPUBLISHED
October 21, 2021

No. 355571
Antrim County Probate Court
LC No. 19-013833-TT

Before: REDFORD, P.J., and K. F. KELLY and LETICA, JJ.

PER CURIAM.

This case involves a dispute between former cotrustees of the James Spitza Testamentary Trust. Petitioner, Debra Spitza, prevailed on a petition in the probate court to remove respondent, Maxine Spitza, as cotrustee and to surcharge her for damage to the trust brought about by alleged breaches of her fiduciary duties. Respondent appeals as of right from the probate court's order requiring her to pay the attorney fees and costs incurred by petitioner in bringing the petition, as well as a trustee fee arising from petitioner's investigation of respondent's alleged breach of fiduciary duties. Respondent also challenges the probate court's order which, after a hearing at which neither respondent nor her attorney was present, removed her as cotrustee and surcharged her $132,000. We affirm.

I. RELEVANT FACTS AND PROCEEDINGS

The trust was established by James A. Spitza's Last Will and Testament. Respondent and petitioner are the decedent's widow and daughter respectively, and respondent is petitioner's stepmother. The will named respondent as the decedent's personal representative and trustee, and gave her a life estate in the decedent's residuary estate in trust. Sometime thereafter, petitioner and respondent entered into a settlement agreement, which provided for the control and use of three parcels of real property: one gravel pit and two additional parcels. The two additional parcels

contained a substantial amount of standing timber. Under the settlement agreement, "[petitioner] will be responsible for retaining a consulting forester, cruising the property with him and soliciting bids, with the consultant's assistance, and letting a contract to the best offer." The settlement agreement also made petitioner and respondent cotrustees.

In December 2019, petitioner filed a petition in probate court claiming that, without petitioner's knowledge, respondent had breached her fiduciary duty, as well as the settlement agreement, by executing a "Standing Timber Contract" with Lon Sparks Timber, LLC, to conduct logging on the two forested parcels. According to the contract, respondent had sold the timber for $32,000, and the proceeds from the sale went directly into the IOLTA account of respondent's attorney, Gregory Bell.

Bell filed an appearance on behalf of respondent in January 2020. After several adjournments, one of which was attributable to the COVID-19 pandemic, a hearing on the petition was held on July 21, 2020. At the outset, it was noted that attorney Josie Lewis had called the court and left a message explaining that respondent had called her the night before, upset, and wanted to possibly hire her. Lewis said that she had not had an opportunity to review respondent's file and was not sure she was going to take the case. Lewis reported that Bell had had a medical issue and had closed his office. Petitioner's attorney confirmed as much, stating that when he called Bell's work telephone number, he heard a message saying that the number was no longer accepting calls. He further noted that he had been e-mailing Bell almost daily because Bell asked for a teleconference to resolve the remaining two issues, but he had heard nothing in the two weeks leading up to the hearing. The probate court observed that Bell had not contacted the court, no substitute attorney had filed an appearance, the case had been pending for a considerable time, multiple adjournments had been entered at the parties' request while good-faith efforts were made to resolve the dispute, and there was no motion to adjourn. The court decided not to delay the matter any further, but to take the testimony of the available witnesses and "see where we're at."

Ralph Kingsley, the owner of Ralph's Excavating, testified about the cost of cleaning up the properties after the forestry operations. He said that he inspected the properties and that it was a "mess," with "tree limbs, branches[,] and tress all over the place." He estimated that it would take approximately two months and would cost approximately $1,000 a day, $60,000 total, for equipment and labor to clean up the properties. Asked if that was typical for the industry, Kingsley indicated that he had given petitioner "a little better price" because he knew her and the decedent.

Carl Eklund, Jr., a forestry consultant and owner of a logging company, testified that he was familiar with the two properties at issue. Eklund explained that the loggers "just high graded it, took all the high value timber and there's really not much left of any value." He also confirmed Kingsley's testimony that the property was left a "mess." He said that in better timber harvests, the harvesters would remove, chip, or pile up the wood debris instead of leaving it behind to be cleaned up later; cleaning up after a logging event was very labor intensive. On a scale of 1 to 10, with 1 being the worst, Eklund estimated that the loggers left the property at a 1 or 2, and he said that there would not be another timber sale there for 50 years.

Petitioner asked Eklund to determine the value of timber that had been removed from the properties. Eklund said that he typically looked at properties after they had been cut and that he had been doing this kind of work for about 30 years. He explained that his manner of calculating

the value of the timber involved determining the volume of wood per acre, the number of acres, and the market value of the wood at the time. He spent approximately four hours on the property counting the stumps that were cut. Eklund testified that the $32,000 contract price was "grossly under" what would be a fair price for the timber removed; it might be 20% to 25% of the timber's value. Eklund estimated the timber's value at $104,325. Eklund testified that Lon Sparks sold the timber from the trust to Buskirk Lumber, and although Buskirk would not reveal what it paid Lon Sparks, "[t]hey concurred that that value [$104,325] was pretty close to what he got paid."

Petitioner's testimony about the timbering activity was consistent with the allegations in the petition. Petitioner also requested that the court order respondent pay for her fees as trustee associated with her time spent dealing with the timber issue in addition to her attorney fees. The probate court found that respondent had breached her fiduciary duties to the trust beneficiaries under various provisions of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. Consequently, the probate court removed respondent as cotrustee and named petitioner as sole trustee. The court also found respondent liable to the trust beneficiaries for $132,000, which included $60,000 in cleanup costs and $72,000 for the difference between the contract price and the estimated value of the timber. The probate court entered an order reflecting its findings and scheduled another hearing to determine the amount of petitioner's trustee fee and attorney fees. Petitioner thereafter filed documents supporting the amount of her trustee fee and attorney's fees.

On August 21, 2020, newly retained counsel for respondent filed an appearance and via a stipulated order was substituted in place of Bell. At a September 2020 hearing, the probate court awarded petitioner's requested attorney fees and costs and trustee fee, for which the court indicated that respondent would be personally liable. Subsequently, petitioner submitted an order reflecting the probate court's ruling from the bench under the seven-day rule. See MCR 2.602(B)(3). Respondent objected to the order because it indicated that respondent would be personally liable for petitioner's attorney fees and trustee fee, despite the probate court's silence regarding whether petitioner or the trust would be liable for the fees. Respondent submitted a proposed order indicating that those fees would be charged to the trust. A hearing to settle this dispute was held and the probate court entered the order prepared by petitioner. Because petitioner's order did not indicate that it was a final order, as required by MCR 2.602(A)(3), the probate court entered a consent order indicating that it was a final order that resolved all issues and closed the case. Respondent now appeals.

II. DISCUSSION

A. ADJOURNMENT

Respondent argues that the probate court abused its discretion by allowing the July 21, 2020 hearing to proceed once reliable evidence indicated that respondent's counsel had abandoned her case. Consequently, respondent argues, the probate court deprived her of a reasonable opportunity to obtain and be represented by counsel. We disagree.

Respondent did not raise this issue or move for an adjournment in the probate court. Therefore, this issue is unpreserved. *City of Fraser v Almeda Univ*, 314 Mich App 79, 104; 886 NW2d 730 (2016). We may "overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of

the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 192-193; 920 NW2d 148 (2018) (quotation marks and citations omitted). "This Court, however, exercises its discretion sparingly and only where exceptional circumstances warrant review." *In re Conservatorship of Murray*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 349068); slip op at 4. The circumstances that led to respondent not being represented at a hearing that resulted in her removal as cotrustee and a $132,000 surcharge against her seem sufficiently exceptional to warrant our review.

Unpreserved claims of error are subject to plain error review. See *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* (quotation marks and citation omitted). "To merit relief, the injured party must show prejudice, i.e., that the error affected the outcome of the [lower court] proceedings." *Total Armored Car Serv, Inc v Dep't of Treasury*, 325 Mich App 403, 412; 926 NW2d 276 (2018).

"A [probate] court has the inherent authority to control its own docket." See *Baynesan v Wayne State Univ*, 316 Mich App 643, 651; 894 NW2d 102 (2016). The probate court in this case declined to delay the July 21 hearing because Bell had not contacted the court, presumably to inform the court of his situation and intentions, the petition had been pending for nearly six months, there had been three adjournments already (albeit one resulting from the COVID-19 pandemic), there was no indication that a substitute attorney was ready to step in, and no motion for adjournment was pending.

Petitioner's attorney additionally told the court that Bell asked to have a teleconference to resolve the parties' two outstanding issues, but petitioner's attorney had heard nothing from Bell in the two weeks leading up to the hearing, and Bell's office telephone number was not accepting calls. Presumably, respondent would also have tried to get in touch with Bell as the hearing approached and would also have had the same experience, which would have put her on notice that she needed to consult another attorney to find out how to proceed. Respondent evidently contacted another attorney the night before the hearing in an attempt to hire her. But the attorney did not have an opportunity to read over the file, and regardless, she stated that she was not sure that she would represent respondent. In light of these circumstances, the probate court did not plainly err when it proceeded with the hearing.

B. JURISDICTION

Respondent next contends that Michigan's court rules required petitioner to file a civil complaint rather than a petition. Respondent argues that petitioner's failure to file a civil action and to follow the court rules applicable to civil actions deprived respondent of her due-process rights and the probate court of its jurisdiction to enter a money judgment against respondent. We disagree.

We review de novo whether the probate court possessed subject-matter jurisdiction. *In re Lager Estate*, 286 Mich App 158, 162; 779 NW2d 310 (2009). Questions of statutory construction

and the interpretation of the court rules are reviewed de novo. *Bint v Doe*, 274 Mich App 232, 234; 732 NW2d 156 (2007).

Subject-matter jurisdiction is "a court's power to hear and determine a cause or matter." *In re Lager*, 286 Mich App at 162 (quotation marks and citation omitted). The jurisdiction of probate courts is statutorily defined. *Id.* The probate court has exclusive legal and equitable jurisdiction over:

> (b) A proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do all of the following:
>
> (*i*) Appoint or remove a trustee.
>
> (*ii*) Review the fees of a trustee.
>
> * * *
>
> (*v*) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust.
>
> (*vi*) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right. [MCL 700.1302(b).]

The current proceeding involves questions arising from respondent's administration of the trust, such as whether she breached her duties to the trust's beneficiaries, and a request to remove respondent as a cotrustee. These issues fall under MCL 700.1302(b).

The gravamen of respondent's argument is that petitioner's act of filing a petition rather than a civil action deprived the probate court of subject-matter jurisdiction. The plain language of MCR 5.101 supports respondent's position that this matter should have been filed as a civil action. Addressing how to begin an action in the probate court, MCR 5.101 states that "[t]here are two forms of action, a 'proceeding' and a 'civil action.' " MCR 5.101(A). A proceeding is initiated by filing an application or proceeding with the court. MCR 5.101(B). Civil actions, on the other hand, are "commenced by filing a complaint and are governed by the rules applicable to civil actions in circuit court." MCR 5.101(C).

There are two types of actions that must be filed as civil actions: (1) "[a]ny action against another filed by a fiduciary or trustee"; and (2) "[a]ny action filed by a claimant after notice that the claim has been disallowed." MCR 5.101(C)(1) and (2). MCR 5.101(C) uses the mandatory term "must." See *Vyletel-Rivard v Rivard*, 286 Mich App 13, 25; 777 NW2d 722 (2009) ("The term 'must' indicates that something is mandatory."). Petitioner was a cotrustee of the trust when she commenced this action. Therefore, under the plain and unambiguous language of MCR 5.101(C)(1), this matter should have been filed as a civil action.

On the other hand, the probate court has concurrent legal and equitable jurisdiction to "[h]ear and decide a claim by or against a fiduciary or trustee for the return of property" in regard

to a trust. MCL 700.1303(1)(h). MCL 700.1303(1)(h) confers jurisdiction over a petition to surcharge a fiduciary and surcharges may be sought through petitions. See, e.g., *In re Conservatorship of Murray*, ___ Mich App at ___; slip op at 2 (petitioner seeking a surcharge by filing a petition in the probate court); *In re Monier Khalil Living Trust*, 328 Mich App 151, 155; 936 NW2d 694 (2019) (same); *In re Baldwin Trust*, 274 Mich App 387; 733 NW2d 419, aff'd but criticized sub nom 480 Mich 915 (2007) (same). Thus, the probate court had the authority to enter an order surcharging respondent and then to grant a motion to enter judgment on its surcharge order.

Respondent also fails to carry her point that commencing this matter as a proceeding rather than a civil action deprived her of her constitutional right to due process. "The Fourteenth Amendment to the United States Constitution and Article 1, § 17 of Michigan's 1963 Constitution provide that the state shall not deprive a person of life, liberty, or property without due process of law." *In re Keyes Estate*, 310 Mich App 266, 274; 871 NW2d 388 (2015). When a protected property right is at stake, due process generally requires notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* (quotation marks and citation omitted). Respondent does not argue that she did not receive the petition and notice of the allegations against her or that she was not provided a meaningful opportunity to be heard. Bell's abandonment of the case is not attributable to petitioner having filed the case as a proceeding rather than a civil action.

Even if petitioner should have filed a civil action, this Court will not reverse an erroneous decision when the resulting error was harmless. MCR 2.613(A); *Chastain v Gen Motors Corp*, 254 Mich App 576, 586; 657 NW2d 804 (2002). Applying a harmless-error analysis, this Court will not disturb a judgment or order unless it appears that failing to do so would be "inconsistent with substantial justice." MCR 2.613(A). In this case, respondent has failed to demonstrate that refusing to disturb the probate court's orders on the basis that petitioner filed a petition rather than a civil action would be inconsistent with substantial justice. Because respondent fails to show that filing the underlying action as a petition rather than a civil action deprived the probate court of subject-matter jurisdiction or denied respondent her right to due process, we deem harmless any error in the way the action was titled.

C. SUFFICIENCY OF THE EVIDENCE

Respondent next contends that the probate court clearly erred by holding that respondent was liable for breaching her duties as a cotrustee.[1] We disagree.

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[1] Petitioner argues that this Court lacks jurisdiction to review respondent's challenge to the probate court's July 21, 2020 order because it was a final order under MCR 5.801(A)(2)(a) and (y), and respondent did not file a claim of appeal within 21 days after entry of the order, MCR 7.204(A). MCR 5.162 provides that a proposed judgment or order must be prepared in accordance with MCR 2.602(A) and MCR 1.109(D)(2). The first order that complies with MCR 2.602(A) is the order of November 24, 2020. Respondent's claim of appeal was timely, and this Court has jurisdiction to consider respondent's challenge.

We review a probate court's factual findings for clear error. *In re Koehler Estate*, 314 Mich App 667, 673-674; 888 NW2d 432 (2016). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. (quotation marks and citation omitted). A probate court's decision to remove a trustee, as well as its decision to surcharge a trustee, are reviewed for an abuse of discretion. *In re Conservatorship of Murray*, ___ Mich App at ___; slip op at 3. "A probate court abuses its discretion where the court's rulings fall outside the range of reasonable and principled outcomes." *Id*.

The probate court found that respondent breached her fiduciary duties to act with loyalty toward the trust beneficiaries, MCL 700.1212(1); to "administer the trust solely in the interests of the trust beneficiaries," MCL 700.7802(1); to "act as would a prudent person in dealing with the property of another," MCL 700.7803; to "protect the trust property," MCL 700.7810; and to "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," MCL 700.7814(1).

The preponderance of the evidence establishes that respondent breached her fiduciary duties to the trust beneficiaries. See *In re Conservatorship of Murray*, ___ Mich App at ___; slip op at 7 ("[T]he standard of proof for determining breach of duty and the appropriateness of a surcharge is a preponderance of the evidence."). Petitioner testified that while she was receiving medical treatment in Ann Arbor, Bell entered into a timber-harvest contract on respondent's behalf. The contract paid $32,000 for the timber, which according to Eklund, was grossly under the market value. At some point, petitioner became aware of the timber harvest through her sister, who is a qualified beneficiary under the trust and who apparently learned about the harvest as it was occurring. Kingsley and Eklund further testified that the property was left in a poor condition, necessitating a two-months clean-up process costing $60,000. This testimony was sufficient for the probate court to determine that respondent breached her fiduciary duties under MCL 700.1212(1), MCL 700.7802(1), MCL 700.7803, MCL 700.7810, and MCL 700.7814(1).

Respondent also argues that there was insufficient evidence to establish that the value of the harvested timber was $104,325, and consequently, that the damages for the breach of respondent's fiduciary duties was $72,000. At the hearing, Eklund, a forestry consultant with 30 years' experience who owned his own logging company, testified that he spent four hours at the properties. Eklund used a "mathematical formula to determine the volume [of timber] per acre times the number of acres and what the value of that wood is based on that market at the time," to arrive at the value of $104,325. Further, Eklund contacted the company that purchased the harvested timber from Lon Sparks. Although the company would not provide the exact amount that it had paid to Lon Sparks, the company "concurred that [$104,325] was pretty close to what [Lon Sparks] got paid," and that $104,325 "was in the ballpark."

On appeal, respondent argues that Eklund's testimony concerning the $104,325 value was flawed because it does not account for various costs that Lon Sparks incurred. Succinctly put, respondent argues that the value Eklund stated was the revenue, while the probate court should have considered the profit, i.e., revenue minus expenses. Although respondent's argument may have merit, it was not advanced in the trial court. Despite two hearings that respondent and her counsel attended, the issue concerning the valuation was never raised. Instead, respondent's counsel explicitly agreed with the amount of damages:

> I don't agree that [respondent] ripped off the trust. But I do agree this Court's order should be recognized that my client is personally liable to the tune of about $132,000 based upon the hearing on the petition. That is the order of this Court. And we're not here to disrupt that. We may not like it, but it is the order of the Court.

"A party cannot stipulate with regard to a matter and then argue on appeal that the resulting action was erroneous." *Hodge v Parks*, 303 Mich App 552, 556; 844 NW2d 189 (2014). Furthermore, the probate court reached its decision on the basis of the facts presented, which only included Eklund's testimony. Because Eklund's testimony concerning the value of the timber was based on his experience, which was confirmed as close to the actual value of the timber, the probate court's finding that the value of the timber was $104,325 was not clearly erroneous. Accordingly, the probate court properly measured the damages as the difference between the timber's value and the contract price, for a total of $72,000.

Respondent raises several additional arguments, most of which are without merit. Respondent asserts that Kingsley's testimony that he had once cleaned up property after a timber harvest was not sufficient to qualify him to give an expert opinion on this topic. This assertion mischaracterizes Kingsley's testimony. Petitioner did not call Kingsley to provide expert testimony, but to testify about the cost to clean up the "mess" left after the timber harvest. As the owner of the company that was going to perform the work, and having inspected the property to determine its condition, surely Kingsley was qualified to testify about what his company would charge the trust to clean up the property. Kingsley's testimony went primarily to damages, not to whether respondent breached her fiduciary duty.

Respondent also argues that the settlement agreement states that the provisions of the will remain unchanged, and, under that document, respondent was entitled to "use the income [of the Trust] and so much of the principal as she may need for her comfort and safety." Accordingly, respondent "was entirely free to sell, rent, or otherwise dispose of the real property held in trust, including the timber contained thereon." Even if respondent could "sell, rent, or otherwise dispose of the real property held in trust," she was still required to do so in conformity with her duties as a fiduciary that included keeping the qualified trust beneficiaries "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests," MCL 700.7814(1).

Respondent further argues that, because the qualified beneficiaries do not have the right to receive the real property in any particular condition, the probate court clearly erred by surcharging respondent for cleanup costs. Testimony at the hearing suggested that the property was being cleaned up because it was a "mess" and to provide a habitat for wildlife. No testimony was offered suggesting that cleaning up the property enhanced, preserved, or protected the value of the property, or that cleaning up the property was necessary in order to restore value to the trust. However, as cotrustee, respondent had a duty to protect and preserve the property. That respondent breached these duties is supported by the testimony of Eklund and Kingsley about the unusually poor condition of the property after the harvest, and Eklund's testimony that the harvest damaged the property and that there would not be another harvest there for 50 years.

Respondent also contends that the record does not establish that she entered into a timber contract because Bell, not respondent, signed the timber contract that was submitted to the probate court. This argument is without merit. Although it is true that Bell signed the timber contract with Lon Sparks, it is undisputed that Bell was respondent's attorney, and it appears from the contract that he signed "for Maxine Spitza." "An attorney often acts as his client's agent," *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004), and, generally, "a principal is bound by an agent's actions within the agent's actual or apparent authority," *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001). A preponderance of the evidence establishes that Bell negotiated and executed the contract at respondent's directive.

Respondent next contends that no evidence was presented establishing that she was responsible for the condition of the land after the timber harvest. Respondent speculates that the contractor may have cut more trees than specified in the contract or breached the contract by failing to clean up the property. But even the most cursory perusal of the timbering contract shows that it says nothing about cleanup. Moreover, respondent's speculation regarding how the loggers performed the harvest does not change the fact that respondent contracted for the type of harvest that would occur, and, in this case, it was of a type that left the property in unusually poor condition.

D. FEES AND COSTS

Lastly, respondent argues that the probate court lacked the authority to order her to pay petitioner's trustee and attorney fees personally. Instead, these should have been paid from the trust, if at all. Respondent also argues that the probate court erred by failing to hold an evidentiary hearing to determine the reasonableness of petitioner's attorney fees and by failing to address the factors required to be considered when determining whether petitioner's trustee and attorney fees were reasonable. We disagree.

This Court reviews a probate court's decision regarding a trustee's fees for an abuse of discretion. See *In re Baldwin's Estates*, 311 Mich 288, 311; 18 NW2d 827 (1945). With respect to an award of attorney fees, this Court reviews questions of law de novo and the court's decision to award attorney fees and the reasonableness of the fees for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). The court abuses its discretion when its decision "falls outside the range of reasonable and principled outcomes." *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012) (quotation marks and citation omitted). Issues of statutory construction are reviewed de novo. *In re Temple*, 278 Mich App at 128.

MCL 700.7901(2)(c) allows a probate court to remedy a breach of trust by, among other remedies, compelling "the trustee to redress a breach of trust by paying money, restoring property, or other means," and MCL 700.7901(2)(j) allows the probate court to "order any other appropriate relief." 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.

And MCL 700.7904 provides for attorney fees and costs:

> (1) In a proceeding involving the administration of a trust, the court, as justice and equity require, may award costs and expenses, including reasonable 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 instant case, the probate court explained as follows its reason for ordering respondent personally liable for petitioner's attorney fees:

> [T]he attorney's fees would not have been incurred but for the breach by [respondent] . . . . [T]o make the trust pay those attorney fees[,] that would eliminate or reduce the amount that's due and owing to the beneficiaries. And for me that is just totally inequitable.
>
> She is the one that caused this difficulty. She did this on her own, in violation of the trust and breach of her fiduciary duties. And equity certainly would require her to pay the attorney's fees and the cost associated with trying to rectify her breach. And MCL 700.7901, 7901(2)(j), (2)(c), 7902 and 7904 [authorize respondent to be personally liable].

The probate court did not specifically identify the statutory authority for ordering respondent personally liable for the attorney fees and costs and the trustee fee incurred in remedying the breaches of her fiduciary duties. However, the court's comments suggest that, by making respondent personally liable for the fees and costs, it was attempting to protect the trust from any additional diminution arising from respondent's conduct. Making respondent liable for petitioner's attorney fees falls within the broad range of remedies available to the court under MCL 700.7901(2)(j).

Turning next to respondent's argument that the probate court abused its discretion by failing to hold an evidentiary hearing to determine the reasonableness of petitioner's attorney fees, respondent waived this issue by agreeing with the probate court's plan to enter an order regarding attorney fees following the September 15, 2020 hearing, subject to respondent's chance to raise any fee-related issues later. See *Souden v Souden*, 303 Mich App 406, 415; 844 NW2d 151 (2013) ("When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services."). The express approval of the probate court's action extinguishes any claim of error regarding that action; accordingly, there is nothing to review. See *Hodge*, 303 Mich App at 556. Briefly, however, the record shows that respondent had a detailed statement of petitioner's attorney's fees and costs at least by September 28, 2020, and had ample time to raise specific objections to their

reasonableness before or during the November 5, 2020 hearing. Respondent did not challenge the reasonableness of the fees and signed a consent order stating that the issues had been resolved and the case closed. Despite having the means and the opportunity to do so, respondent failed to challenge the reasonableness of petitioner's attorney fees and costs. Therefore, the probate court was not obligated to conduct an evidentiary hearing and did not err by not conducting a hearing under the circumstances.

Affirmed.

/s/ James Robert Redford
/s/ Kirsten Frank Kelly
/s/ Anica Letica