STATE OF MICHIGAN

COURT OF APPEALS

In re ESTHER KRATZER REVOCABLE TRUST

REBECCA SHEETS,

Appellee,

and

RACHEL NEELEY and ROGER KRATZER,

Interested Persons,

v

RICHARD KRATZER, Successor Trustee for the ESTHER KRATZER REVOCABLE TRUST,

Appellant.

UNPUBLISHED
March 23, 2023

No. 357860
Hillsdale Circuit Court
LC No. 16-035651-TT

In re WENDELL KRATZER REVOCABLE TRUST

REBECCA SHEETS,

Appellee,

and

RACHEL NEELEY and ROGER KRATZER,

Interested Persons,

v

RICHARD KRATZER, Successor Trustee for the WENDELL KRATZER REVOCABLE TRUST,

Appellant.

No. 357861
Hillsdale Circuit Court
LC No. 18-035924-TT

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

PER CURIAM.

In these consolidated appeals, respondent Richard Kratzer, the successor trustee and a beneficiary of his deceased parents' respective trusts, appeals the probate court's order requiring him to add $28,014.56 to the Wendell Kratzer Revocable Trust as a surcharge for improper expenditures, and awarding attorney fees and accounting fees to petitioner-appellee, respondent's sister and a trust beneficiary, to be paid from trust assets, plus denying respondent payment of his attorney fees from the trust.[1] We affirm in part, vacate in part, and remand this case to the probate court for further proceedings consistent with this opinion.

I. FACTS

Wendell and Esther Kratzer were married and had four children—petitioner Rebecca Sheets, Rachel Neeley, Roger Kratzer, and respondent. Wendell and Esther each owned farmland that for decades respondent farmed with Wendell in the family farming business. Wendell turned the business over to respondent in the 1990s and since then respondent operated and managed the business. Respondent communicated with Wendell regarding the farm business and he and Wendell divided the business income.

Respondent testified that he accounted for the expenses of and proceeds from the farm operation in one business bank account referred to as the "farm account" held by respondent and his wife. Respondent wrote and signed the checks from that account. For managing the farm business, respondent and his wife resided at a farmhouse owned by Wendell and Esther. He paid his wife $2,000 per month from the farm business account for their living expenses, and transferred the surplus monies or profits from the farm business account into Wendell's personal bank account.

Wendell and Esther each executed a revocable trust on January 24, 2001, the terms of which are similar but not identical. Wendell's trust provided that he would be the initial trustee during his lifetime and designated respondent as the successor trustee upon his death, incapacitation, or resignation. Esther's trust designated her and Wendell as co-trustees and upon her death designated Wendell as the successor trustee until his death, incapacitation, or resignation with respondent designated as the successor trustee upon Wendell's death, incapacitation, or resignation. Wendell and Esther's respective trusts each provided for the distribution and administration of the trust after the grantor's death and required the allocation of trust assets to a marital trust for the benefit of the grantor's spouse with payment of net income during the surviving spouse's lifetime, and allocation to a family trust with income and principal to be paid to the grantor's spouse during the surviving spouse's lifetime. The trusts directed the successor trustee, upon the trustees' deaths, to distribute the trusts' assets to the children, and specified that respondent receive all of the grantor's interest in "all cattle or other livestock, all farm machinery, equipment, tools, feed and farm supplies," and certain real property located in Hillsdale County,

[1] This Court consolidated these appeals "to advance the efficient administration of the appellate process." *In re Kratzer Trusts*, unpublished order of the Court of Appeals, entered September 21, 2021 (Docket Nos. 357860 and 357861).

including growing crops. The trusts required that the "rest, residue and remainder" be distributed in equal shares to the children. The Kratzers' trusts contained provisions requiring the trustee to "maintain full and accurate books of account and records of receipt and disbursement and other financial transactions relative to the trust estate, all of which shall be available for inspection at any reasonable time by any beneficiary of this Trust." Each trust required the trustee to "render to each of the income beneficiaries of this Trust an annual accounting of all receipts and disbursements in relation to the trust account, including an inventory of the trust estate held in trust for such beneficiary."

Esther died on March 8, 2012, after which Wendell became the successor trustee under the terms of her trust. Respondent testified that, because Wendell resided at an assisted-living facility, respondent "more or less" handled most of the financial affairs and managed the trust property with Wendell's knowledge. According to respondent, although Wendell "wasn't that hands-on," he was mentally competent and asked respondent "what was going on, . . . , what we'd done and everything," and they had discussions about financial affairs and otherwise communicated. After Esther's death with money from the farm business bank account, respondent had a garage and breezeway constructed at the farmhouse where he and his wife lived, and traded in a pickup truck and purchased a new one. Respondent and his wife also renovated the kitchen, but respondent's wife paid for it with her own money from her personal bank account. According to petitioner, Wendell granted respondent power of attorney.

Wendell died on November 29, 2014, after which respondent became the successor trustee of the trusts. Respondent continued to farm the land he inherited from his parents and to use the farm business bank account for farm operations. After Wendell's death, respondent accepted the office of successor trustee of the trusts and had his attorney prepare and send to respondent's siblings an accounting of the trusts and an inventory of the trusts' assets. A bank account was opened for Esther's trust into which monies from property sales and rents from her land were deposited. Respondent then distributed Esther's trust assets to respondent and his siblings.

Petitioner became concerned about respondent's management of the trusts, objected to respondent's proposed final distribution of the assets, and ultimately petitioned the probate court to take jurisdiction over the administration of the trusts. Pertinent to this appeal, petitioner alleged that respondent failed to provide a proper accounting, particularly in connection with the farm business bank account, and that during Wendell's lifetime respondent improperly used trust assets to improve the property he would inherit by expending approximately $26,000 to add the breezeway and garage to the farmhouse and $35,000 for the new pickup truck. Petitioner further alleged that after Wendell's death respondent spent $90,000 to build a pole barn. Petitioner sought the removal of respondent as trustee or that the court order him to provide the financial information required under the trust, and to review the trustee fees, plus settle the account.

In response to the petition's allegations, respondent explained that the expenditures were made from the farm business bank account, which he did not consider a trust account. He believed that the trust authorized anything he needed for the farm, including improvements. He further asserted that he had provided the requisite inventory and accounting to the trust beneficiaries.

The probate court assumed jurisdiction over the administration of the trusts, and ordered respondent to provide a complete accounting of all deposits and withdrawals, including checks

and deposits, relating to the farm business bank account. Throughout the proceedings, petitioner complained that respondent failed to disclose or cooperate respecting accounting for the farm business bank account, and failed to comply with the court's orders requiring him to provide financial information including bank statements and cancelled checks in connection with the trusts and the farm business bank account. Respondent turned over documents and maintained that all farm-related assets had been disclosed and properly inventoried, and that the required financial information had been provided.

Following the trial on the trust administration matters, the probate court surcharged respondent for certain expenditures, mainly the farmhouse improvements which were made before Wendell's death, and ordered him to pay $28,014.56 to Wendell's trust for distribution to the beneficiaries. The court also awarded petitioner attorney fees and accounting fees to be paid from trust assets, and declared that respondent could not have his attorney fees paid from the trust. Respondent now appeals.

II. STANDARDS OF REVIEW

> This Court reviews for an abuse of discretion a probate court's dispositional rulings and reviews for clear error the factual findings underlying a probate court's decision. An abuse of discretion occurs when the probate court chooses an outcome outside the range of reasonable and principled outcomes. A probate court's 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. We review de novo matters of statutory interpretation. The probate court necessarily abuses its discretion when it makes an error of law. [*In re Portus*, 325 Mich App 374, 381; 926 NW2d 33 (2018) (quotation marks and citation omitted).]

"We review a trial court's decision whether to award attorney fees for an abuse of discretion, the trial court's findings of fact for clear error, and any questions of law de novo." *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). We also review for an abuse of discretion the trial court's decisions whether to award expert witness fees, *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466; 633 NW2d 418 (2001), to enforce a scheduling order, see *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993), or to impose sanctions, *Casey v Auto Owners Ins Co*, 273 Mich App 388, 404; 729 NW2d 277 (2006).

Further, the interpretation of a trust agreement presents a question of law that we review de novo. *Brown Trust v Garcia*, 312 Mich App 684, 693; 880 NW2d 269 (2015). "A court must ascertain and give effect to the settlor's intent when resolving a dispute concerning the meaning of a trust." *Id*. (quotation marks and citation omitted). We review "a trial court's findings of fact in a bench trial for clear error . . . ." *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). "A finding is clearly erroneous where, although there is evidence to support the finding, the reviewing court is left with the definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted). "Because this case was heard as a bench trial, the court was obligated to determine the weight and credibility of the evidence presented." *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008). In reviewing this matter, we defer to such determinations because of "the trial court's

superior ability to judge the credibility of the witnesses who appeared before it." *Glen Lake-Crystal River Watershed Riparians*, 264 Mich App at 531 (quotation marks and citations omitted).

III. ANALYSIS

A. FARMHOUSE IMPROVEMENTS

Respondent argues that the probate court erred in surcharging him for the farmhouse improvements. We agree.[2]

Respondent asserts that he was not the trustee when the farmhouse improvements were made and that they were undertaken with Wendell's consent. Under the terms of the Kratzers' trusts, during Wendell's lifetime, when respondent added the breezeway and garage to the farmhouse, Wendell was the trustee of his own revocable trust and the successor trustee of Esther's trust. Esther's trust designated respondent the successor trustee if Wendell ceased being her trust's successor trustee. Wendell's trust designated respondent as successor trustee upon Wendell's death, incapacitation, or resignation from the office of trustee. The trusts defined incapacity as becoming "incapable of managing [his] own affairs."

At the time of the farmhouse improvements, Wendell held the offices of trustee for his trust and successor trustee of Esther's trust. No evidence established that Wendell suffered from incapacitation that made him incapable of managing his own affairs. Respondent testified that, although Wendell late in life could not walk and required continuous care, he remained mentally competent and involved in his own affairs. Respondent further testified that Wendell and respondent discussed the financial affairs related to the farming business and the subject property. Petitioner testified that she visited Wendell regularly after Esther's death and admitted that Wendell's mental state appeared to be "normal" enabling him to "meaningfully" discuss his farming operation, becoming unaware and confused only during his last month of life.

Respondent could not have been the successor trustee of Wendell's trust when he expended monies from the farm business bank account for the farmhouse improvements. Wendell remained living and competent and under the trusts' terms he continued to be the trustee of the trusts. The record indicates that Wendell never designated respondent as a co-trustee. Although respondent generally managed the affairs of the farm business, the record indicates that he did so in consultation with Wendell. Moreover, the record establishes that respondent accepted his appointment as successor trustee only after Wendell's death.

Evidence established that respondent managed Wendell's business and financial affairs—he testified that he managed and operated the farming business since the early 1990s, wrote the checks and deposited the proceeds of the farm operations using the farm business bank account, and transferred a portion of the profits to Wendell's personal bank account from which he paid Wendell's expenses. Wendell's trust documents indicate that, in addition to the farmland held in

[2] We reject petitioner's argument that respondent abandoned this issue for want of citation of authority in its support. Although respondent provided limited legal authority, we deem his argument sufficiently developed for appellate review.

his trust, Wendell assigned and conveyed all of his tangible personal property, then owned or thereafter acquired, to his trust, including his "right, title and interest in and to cattle or other livestock, all farm machinery, equipment, tools, feed, farm supplies, growing crops, household goods and personal belongings, by way of example and not limitation." Wendell's trust indicates that he intended for his trust to hold the farm business property. The farmhouse in which respondent and his wife resided was held by the trust. Respondent testified that the farmhouse improvements were paid out of the farm business account with monies earned by the farming business. Respondent, therefore, used trust funds for trust property. Wendell's trust provided that the "[t]rustee shall, after paying the necessary expenses of the management and preservation of the trust property, pay over to or for the benefit of Grantor during Grantor's lifetime so much of the annual net income and such amount or amounts of principal as the Grantor may from time to time request." The record indicates that respondent did so during Wendell's lifetime. The record reflects that the farm business's and Wendell's trust's banking were managed through the farm business bank account during Wendell's lifetime.

Respondent also testified that he handled the affairs and managed Esther's trust property after her death. Respondent testified that Wendell knew that he "managed" Esther's trust property, but that he and Wendell discussed pertinent financial affairs and otherwise communicated regarding such. Despite some confusion and apparent lack of legal sophistication respecting trustee status and his own status, respondent acknowledged that Wendell held the office of Esther's successor trustee. Although the record indicates that respondent undertook and performed trustee-like functions during Wendell's life, evidence established that he did so with Wendell's knowledge and apparent delegation of authority to him. Petitioner testified that she and her other siblings did not know "a lot of things," because much "of it was between [respondent] and Dad." Petitioner also testified that Wendell granted respondent power of attorney.[3] Respondent, however, did not become the successor trustee until after Wendell's death.

A power of attorney creates a fiduciary relationship. *In re Susser Estate*, 254 Mich App 232, 235; 657 NW2d 147 (2002). Our Supreme Court observed that a "fiduciary relationship" is

> "[a] relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships [usually] arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or to give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer." [*In re Karmey Estate*, 468 Mich 68, 74 n 2; 658

[3] Petitioner did not elaborate regarding the nature or scope of that power of attorney and the probate court made no findings in this regard.

NW2d 796 (2003), quoting *Black's Law Dictionary* (7th ed) (alterations in original).]

A fiduciary is required to act with the utmost faith and loyalty on matters within the fiduciary relationship. See *In Re Karmey Estate*, 468 Mich 74 n 2.

The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., applies to "[t]he affairs and estate of a decedent, missing individual, or protected individual," MCL 700.1301(a), "[a]n incapacitated individual . . . ," MCL 700.1301(c), or "[a] trust subject to administration in this state," MCL 700.1301(e). The EPIC also provides guidance on fiduciary duties, decreeing that "[a] fiduciary stands in a position of confidence and trust with respect to each . . . beneficiary . . . for whom the person is a fiduciary." MCL 700.1212(1). A fiduciary must "discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity." MCL 700.1212(1). Further, the Michigan Trust Code (MTC), MCL 700.7101 *et seq*., which is part of the EPIC, sets forth specific obligations of a trustee to beneficiaries, including the duties of care, MCL 700.7803, loyalty, MCL 700.7802(1), good faith, MCL 700.7801, and stewardship, MCL 700.7810, to refrain from self-dealing, MCL 700.7802(2), and to keep beneficiaries informed, MCL 700.7814. Overall, trustees have "the fiduciary duties of honesty, loyalty, restraint from self-interest and good faith" in connection with trust beneficiaries. *In re Green Charitable Trust*, 172 Mich App 298, 313; 431 NW2d 492 (1988) (citations omitted).

Analysis of the facts of this case with these principles in mind, we conclude that respondent, who acted in some capacity as Wendell's fiduciary in managing his financial affairs and the trust property, undertook those activities with the duties of trust and confidence owed to Wendell. Under the law of agency, "a person who undertakes to act as an agent for another may not pervert his powers to his own personal ends and purposes without the consent of the principal after a full disclosure of the details of the transaction." *Vander Wall v Midkiff*, 166 Mich App 668, 677-678; 421 NW2d 263 (1988). It is evident that Wendell "reasonably reposed faith, confidence, and trust in" respondent regarding managing his business and personal affairs, including the farm, finances, and trust property. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 469; 646 NW2d 455 (2002) (quotation marks, citation, and emphasis omitted).

A surcharge imposed on a fiduciary is properly based on the harm to the trust and the fiduciary's wrongful conduct. See MCL 700.7902(a) (a "trustee who commits a breach of trust is liable to the trust beneficiaries affected" for 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"). Fiduciaries "may not be liable for mere mistakes or errors of judgment where they have acted in good faith and within the limits of the law and of the trust." *In re Green Charitable Trust*, 172 Mich App at 314. Although bad faith does not equate with "negligence or bad judgment, so long as the actions were made honestly and without concealment," it might exist if "motivated by selfish purpose or by a desire to protect its own interests at the expense of" the person to whom there is a fiduciary duty. *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 137; 393 NW2d 161 (1986).

In this case, the probate court surcharged respondent for the cost of the farmhouse improvements, concluding that Wendell did not benefit from them, they were "unnecessary for farming operations," and were "self-serving." Although respondent's actions in spending surplus monies from the farm business to improve the farmhouse that he would eventually inherit might be considered a self-interested transaction that could give rise to the appearance of a breach of the trust and confidence he owed to Wendell in his fiduciary capacity, the record in this case reveals no evidence of any fraud, misrepresentation, concealment, undue influence, or any other discernable misconduct on the part of respondent in relation to Wendell.[4] Indeed, the only testimony on the matter indicated that respondent informed Wendell about the farmhouse improvements and Wendell consented to them. Petitioner presented no testimony to controvert respondent's testimony and no evidence established that Wendell did not know of the improvements, did not consent to them, was pressured or otherwise unduly influenced by respondent, or ever complained about the improvements or expenditures for them. Moreover, the evidence indicates that Wendell remained mentally competent and involved in and exercised some control over his business and financial affairs at times relevant to the improvements made to the property.

Under the circumstances, the improvements did not constitute a breach of respondent's fiduciary duties to Wendell. While a trust is revocable, as was Wendell's when he permitted the improvements, the trustee—in this case Wendell—may follow the direction of the settlor—Wendell again—even when contrary to the trust's terms. MCL 700.7808. Further, "while a trust is revocable, rights of the trust beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." MCL 700.7603(1). Wendell's trust states, "No beneficiary, during the administration of the Initial Trustee or during the administration of the Successor Trustee, shall have any right to question or challenge the actions of the Initial Trustee." Further, a successor trustee of a revocable trust upon the death "of a trustee who was also the trust settlor is not liable for an action of the settlor, while the settlor was serving as trustee." MCL 700.7603(4). These rules covered respondent's improvements to the farmhouse, which constituted making improvements on trust property. Given the unrebutted evidence establishing that respondent was not the trustee when the farmhouse improvements were made and that those improvements were undertaken with Wendell's knowledge and consent upon trust property, we hold that the probate court erred by ordering respondent to pay into the trust a surcharge respecting the farmhouse improvements. Further, respondent could not and did not commit a breach of trust because he did not hold the office of trustee at the time.

[4] "A presumption of undue influence exists when evidence establishes (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) that the fiduciary or an interest represented by the fiduciary benefits from the transaction, and (3) that the fiduciary had an opportunity to influence the grantor's decision in the transaction." *Brown Trust*, 312 Mich App at 700-701. However, the "ultimate burden of proof regarding undue influence remains with the party who alleges that it occurred." *Id*. at 703. In this case, no evidence established that respondent exerted undue influence over Wendell nor did the trial court conclude this had taken place.

Moreover, although respondent had fiduciary duties to Wendell, petitioner has not shown how such duties extended to the future contingent trust beneficiaries while Wendell remained alive and active as the trustee of the trusts. To maintain a claim of breach of fiduciary duty, the petitioner must establish the existence of respondent's duties of trust and confidence to the trust beneficiaries. First, any duty respondent had to the trust beneficiaries could not have derived from the trust, because Wendell served as the trustee at the time of the alleged breach.[5] And, as noted, under MCL 700.7902(a) it is "[a] *trustee* who commits a breach" who is "liable to the trust beneficiaries affected." (Emphasis added.) That is not the case here.

The EPIC defines "trustee" as "an original, additional, or successor trustee, whether or not appointed or confirmed by the court." MCL 700.1107(o). "Where . . . a statute supplies its own glossary, courts may not import any other interpretation, but must apply the meaning of the terms as expressly defined." *Detroit v Muzzin & Vincenti, Inc*, 74 Mich App 634, 639; 254 NW2d 599 (1977). Because respondent was not the original trustee or yet a successor trustee when the farmhouse improvements were made, he cannot be held liable to the trust or the trust beneficiaries for breach of trust in the matter.

Further, MCL 700.1308(1) provides that "[a] violation by a fiduciary of a duty the fiduciary owes to an heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary is a breach of duty." And "fiduciary" is defined as including, but not limited to, "a personal representative, funeral representative, guardian, conservator, trustee, plenary guardian, partial guardian, and successor fiduciary." MCL 700.1104(e). As discussed, respondent was not a trustee at the time of the alleged breach, nor did he have the status of any of the other types of fiduciaries. The record, therefore, does not support the conclusion that respondent was a fiduciary to the future contingent beneficiaries while Wendell served as the trustee of his revocable trust and remained mentally competent.

Negligence law recognizes the "voluntary assumption of a duty" principle, according to which, "[w]hen a person voluntarily assumes a duty not otherwise imposed by law, the person is required to perform it carefully, not omitting to do what an ordinarily prudent person would do in accomplishing the task." *Id.* (quotation marks and citation omitted). *Zine v Chrysler Corp*, 236 Mich App 261, 277; 600 NW2d 384 (1999).[6] We need not consider the rule's application in this case, however, because Wendell was the grantor, settlor and trustee of his revocable trust, from which the alleged breach derived at the time of the farmhouse improvements, and "while a trust is revocable, [the] rights of the trust beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor." MCL 700.7603(1). Thus, even if we were to conclude

[5] The MTC provides that "a violation *by a trustee* of a duty the trustee owes to a trust beneficiary is a breach of trust." MCL 700.7901(1) (emphasis added).

[6] Similarly, some jurisdictions have recognized that "a person is a de facto trustee, and can be liable for breach, where the person has (1) assumed the office of trustee under a color of right or title and (2) exercised the duties of the office." *In re Mask Trust*, 312 Neb 94, 106 n 11; 977 NW2d 919 (2022) (citing cases that have recognized a de facto trustee). "Caselaw from other states is not binding on this court, but may be "instructive" and used as a guide." *Wells Fargo Bank, N.A. v Null*, 304 Mich App 508, 533; 847 NW2d 657 (2014).

that respondent assumed any trustee functions, respondent, nevertheless, answered exclusively to Wendell, the trustee and settlor, during Wendell's lifetime, not the future contingent trust beneficiaries. Accordingly, if Wendell approved of the expenditures at issue, as uncontroverted evidence demonstrated in this case, in the absence of undue influence or wrongdoing, no fiduciary duties were owed to the future contingent trust beneficiaries, and they cannot claim that a breach occurred.

The probate court, therefore, improperly surcharged respondent $27,150.57 for the farmhouse improvements to be returned to the trust for distribution to the trust beneficiaries. Respondent could not have been in breach of trust for this transaction to support a surcharge because he was not the trustee at the time. Although respondent acted in a fiduciary capacity respecting Wendell in managing his business and personal affairs and the trust property, no evidence established that respondent failed to disclose to Wendell the improvements or expenditures, that Wendell ever challenged these expenditures, complained about them, had been unduly influenced by respondent, or that he lacked mental competence or the ability to manage his own affairs. Accordingly, the probate court erred by surcharging respondent $27,150.57 and its order in that regard is vacated.

B. ACCOUNTING

Respondent next argues that the probate court erred in finding a breach of trust by way of respondent's failure to account to the beneficiaries. We disagree.

Respondent correctly asserts that he had no duty to provide accountings to the beneficiaries before he became the trustee. See *In re Goldman Estate*, 236 Mich App 517, 523-524; 601 NW2d 126 (1999). Respondent became the successor trustee after Wendell's death in November 2014, and only then assumed fiduciary duties and obligations to the trust and its beneficiaries. See MCL 700.7801 to MCL 700.7821 (trustee's duties and powers); MCL 700.7901 to MCL 700.7914 (trustee's liability).

"In general, the duties imposed on [a] trustee are determined by consideration of the trust, the relevant probate statutes and the relevant case law." *In re Green Charitable Trust*, 172 Mich App at 312 (citation omitted). The Kratzer Trusts obligated the trustee to "maintain full and accurate books of account and records of receipts and disbursements and other financial transactions relative to the trust estate, all of which shall be available for inspection at any reasonable time by any beneficiary," and required the trustee to "render to each of the income beneficiaries . . . an annual accounting of all receipts and disbursements in relation to the trust account, including an inventory of the trust estate held in trust for such beneficiary." The MTC also imposes accounting requirements on a trustee. Under MCL 700.7811(1), "[a] trustee shall keep adequate records of the administration of the trust." Under MCL 700.7811(2), "[a] trustee shall keep trust property separate from the trustee's own property." MCL 700.7814 requires that "[a] trustee shall keep the qualified trust beneficiaries[7] reasonably informed about the

[7] A "qualified beneficiary" is defined, in part, as one who "is a distributee or permissible distributee of trust income or principal." MCL 700.7103(g)(*i*). The Kratzers' children became qualified beneficiaries after Wendell died because they then acquired distributable interests.

administration of the trust and of the material facts necessary for them to protect their interests." Under MCL 700.7814(3), the trustee must provide distributees of trust income or principal an annual report "of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust property and, if feasible, their respective market values . . . ." "[C]ourts will strictly enforce a trustee's duty to keep and render a full and accurate accounting of his trusteeship to the cestui que trust . . . ." *In re Goldman Estate*, 236 Mich App at 523.

In this case, the probate court found that respondent breached his trustee duties by failing to provide the required accountings to the beneficiaries and failed to keep appropriate records which served as the impetus for petitioner's demand for an accounting. After reviewing the record, and giving deference to the court's superior ability to judge the credibility of the witnesses, we are not left with a definite and firm conviction that the probate court made a mistake in this regard.

Under the trusts, respondent, as successor trustee, had the duty to provide annual accountings "of all receipts and disbursements in relation to the trust account, including an inventory of the trust estate." He also had statutory duties as set forth in MCL 700.7814. In many respects the record is not the model of clarity. Evidence indicates that respondent, with the aid of his counsel, provided the trust beneficiaries an inventory and accounting of some sort once after Wendell died. The record, however, does not indicate that respondent did so annually thereafter. The record, therefore, supports the probate court's finding that respondent failed to provide trust beneficiaries annual accountings after respondent became the trustee.

The record indicates that during Wendell's lifetime the farming business consisting of trust property did banking through a single joint bank account held by Wendell, respondent, and later respondent's wife, and since the 1990s respondent managed and operated the business. The record does not indicate that Wendell did not approve of this arrangement, the manner in which the bank account was managed or how funds were transferred to his personal account, how he and respondent treated farming income and expenses, or respondent's management and operation of the farming business. After Wendell's death, however, respondent became the trustee with duties to the trust and its beneficiaries respecting the trust estate, record keeping, and providing beneficiaries annual accountings and inventory reporting. The record indicates that respondent did not open a separate bank account for Wendell's trust when he became successor trustee to segregate trust funds from the farm business. Respondent appears to have carried on business and Wendell's trust as usual. The probate court did not err by finding that Wendell's trust funds were commingled with those of the farm business after Wendell's death.

Because of the lack of segregation, apparent lack of record keeping or reporting, beneficiaries were not informed regarding Wendell's trust after his death. Petitioner sought disclosure, apparently without full cooperation from respondent. Although respondent could not be held liable for a breach of trust over matters that preceded his trusteeship, this did not relieve him of his obligation once he became trustee to account to the beneficiaries, including by providing annual inventories and accountings of the trust estate, once he became successor trustee upon Wendell's death. In a challenge to the accounts, the trustee "has the burden of establishing the correctness of his account and the propriety of his charges." *In re Green Charitable Trust*, 172 Mich App at 311. "This burden has also been described as the trustee having to show the absence of an irregularity or of any personal benefit to the trustee." *Id*. at 312 (quotation marks and citation omitted). Here, it is evident that the lack of accurate accounting and the failure to provide full and

complete information to petitioner and other beneficiaries precluded the beneficiaries from having a full accounting. On this record, the probate court's finding that respondent failed to properly account to the beneficiaries, and thus breached the trust, therefore, was not clearly erroneous.

The record, however, does not indicate that petitioner proved mismanagement or irregularities giving rise to damages beyond the transfer of the closing balance of $863.99 in Wendell's personal bank account to the farm business bank account. Further, the record indicates that once respondent became the successor trustee of Esther's trust, respondent appropriately opened a bank account for Esther's trust, sold the trust property, and distributed the proceeds to the trust beneficiaries.

C. TRIAL BRIEF AND SCHEDULING ORDER

Respondent next argues that the probate court abused its discretion by permitting the breach-of-trust claim arising from the farmhouse improvements to proceed in violation of its scheduling order. We disagree.

Control is "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006). "Trial courts possess the inherent authority to sanction litigants and their counsel, including the right to dismiss an action." *Id*. at 388. "An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion." *Id*. (quotation marks and citation omitted). "Dismissal is a drastic step that should be taken cautiously." *Vicencio v Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

In this case, the probate court issued a pretrial scheduling order, which stated, "Briefs shall specifically outline in clear and unambiguous language their theory of the case, including citations to statutes or specific trust provisions supporting their position, a brief factual basis to support each party's position, and the relief requested." It specified that the failure to comply "may result in application of sanctions against the offending party and/or counsel, including attorney fees and may result in dismissal of the case or default."

Although petitioner's trial brief did not specifically outline the issue of the farmhouse improvements, it did generally set forth her allegations regarding the propriety and accuracy of the trust accounts, specifically asserting that respondent should be required to disburse to the beneficiaries all monies inappropriately used for his own purposes for determination at trial. The allegations of improper expenditures for the farmhouse improvements came under that broad category. Further, the petitions in both cases generally raised the issue regarding the lack of explanation, disclosure, and a complete accounting for the checks written from the trust account, including the failure to disclose records showing the expenditures in the farm business bank account.

Moreover, respondent could not have been unfairly surprised by petitioner's claim regarding the farmhouse improvements. The record revealed that the expenditures from the farm business bank account, and specifically for the breezeway and garage additions, were not novel issues. Petitioner raised these issues throughout the lengthy proceedings. Thus, the record does not support respondent's assertion that he suffered unfair prejudice by petitioner's "ambush claim at trial." The probate court's decision not to preclude petitioner from pursuing her claim regarding

the farmhouse improvements fell within the range of reasonable and principled outcomes, and thus did not constitute an abuse of discretion.

D. PROOF OF DAMAGES

Respondent next argues that the probate court erred by ordering the parties, posttrial, to present evidence of the breezeway and garage expenditures. We disagree.

Following closing argument, the probate court ordered the parties to submit the costs incurred to improve the breezeway and garage, with supporting documentation. Essentially, the court reopened the proofs so that the parties could document these costs. A trial court's decision to reopen proofs is within the sound discretion of the court. *Bonner v Ames*, 356 Mich 537, 541; 97 NW2d 87 (1959); *People v Keeth*, 193 Mich App 555, 560; 484 NW2d 761 (1992). "The relevant factors are whether any undue advantage would be taken by the party moving to reopen the proofs and whether there is any showing of surprise or prejudice to the nonmoving party." *Keeth*, 193 Mich App at 560.

The record in this case does not indicate that petitioner gained an undue advantage or respondent suffered a disadvantage by the probate court's decision to require the parties to present evidence of the precise amounts expended for the farmhouse improvements. Respondent testified at trial that he used monies from the farm business bank account to pay for the breezeway and garage additions, and agreed that he recalled that checks, totaling approximately $26,000 for those improvements, had been disclosed to petitioner. Thus, it appears that the probate court, in ordering the attorneys to submit the costs incurred, sought to ascertain the exact amount for purposes of surcharging respondent for the farmhouse improvements. See MCL 700.7901(2)(c); MCL 700.7902(a). The record indicates that at trial neither party presented the trial court adequate evidence from which it could render a decision. Moreover, objective analysis of the trial record establishes that the parties provided the probate court little evidence on this and many issues from which the court could gain clarity.

The probate court is a court of equity. MCL 700.1302(b). "[A] court of equity molds its relief according to the character of the case." *Loutts*, 298 Mich App at 35 (quotation marks and citation omitted). For these reasons, we conclude that the probate court did not abuse its discretion by asking the parties posttrial to document the costs of the farmhouse improvements. We reiterate that the probate court erred in surcharging respondent the cost of the farmhouse improvements for the reasons previously stated in this opinion, but such error did not preclude the court from requiring the parties to submit posttrial briefing and evidence to clarify matters to enable the court to render its decision.

E. BANK ACCOUNT BALANCE

Respondent next argues that the probate court erred in decreeing that the closing balance of $863.99 in Wendell's personal bank account was trust property subject to distribution to the beneficiaries. We disagree.

Respondent offers only cursory argument in this regard, and that failure to develop the issue constitutes abandonment of it. See *Mitchum v Detroit*, 355 Mich 182, 203; 94 NW2d 388

(1959). Regardless, no error on the part of the probate court is apparent. The evidence supported the probate court's findings that Wendell had a personal bank account into which respondent transferred money from the farm business bank account, and that respondent deposited Wendell's account's closing balance into the farm business bank account after Wendell's death. Thus, the court's ruling that the closing account balance was trust property subject to distribution to the beneficiaries was not clearly erroneous, nor was the court's exercise of its equitable power to remedy that irregularity fall outside the range of reasonable and principled outcomes.

F. RESPONDENT'S ATTORNEY FEES

Respondent also argues that the probate court erred in denying him attorney fees to which he claims entitlement under MCL 700.7817(x) and the terms of the trusts. We agree.

The Kratzer Trusts provide authority to the trustee, respecting the management of the trust estates, "[t]o employ accountants, attorneys, investment advisors, brokers, or other agents . . . as the Trustee may deem advisable," and "to pay reasonable compensation for their services" chargeable to the trust. Likewise, MCL 700.7817(w) provides a trustee with the authority "[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[.]" MCL 700.7817(x) specifically provides the trustee authority to prosecute or defend a claim or proceeding, and specifies that the "trustee may act under this subdivision for the trustee's protection in the performance of his duties." Thus, respondent acted within his authority under the trust, and by statute, by retaining an attorney to defend the challenge to his trust administration.

Section 9.3 of the Kratzer Trusts contained the following specific provision broadly permitting fees and expenses incurred in the administration and management of the trust:

> The Trustee shall be reimbursed for all reasonable expenses incurred in the administration and management of the Trust and trust estate and shall be entitled to receive a fair and reasonable compensation for its services. The appraisers, accountants, attorneys, and other persons retained and hired by the Trustee shall also be reimbursed for all reasonable expenses incurred in rendering services to the trust and Trustee and shall receive fair and reasonable compensation for such services. The Trustee may pay from and charge the trust estate with such fees, compensation, and expenses at such times and intervals as may be established by the Trustee.

MCL 700.7904, which the probate court cited, provides as follows:

> (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.

Thus, MCL 700.7904 permits a trustee's reasonable attorney fees to be paid from the trust if the trustee defends the action in good faith, subject to reduction or denial for a breach of trust.

The probate court ruled that respondent was not entitled to attorney fees paid from the trust assets. The court reasoned that petitioner brought the action because respondent breached his duties as successor trustee by failing to provide accountings, even after litigation began, and that respondent's "lack of accountings and inability to provide a thorough and accurate accounting, and the misuse and commingling of Trust assets depleted the Trust's property." It is not entirely clear under what authority the court based its decision. The court generally cited MCL 700.7904(2) and MCL 700.7901(2)(j), but did not refer to § 9.3 of the Kratzer Trusts, which specifically governs the reimbursement of attorney fees. MCL 700.7105(1) provides, "Except as otherwise provided in the terms of the trust, this article governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a trust beneficiary." Subsection (2) provides, "The terms of a trust prevail over any provision of this article," and is followed by a list of exceptions, none of which concerns attorney fees incurred in litigation. Accordingly, the court should have considered and applied the trust provision § 9.3 of the Kratzer Trusts.

"When interpreting the meaning of a trust, this Court must ascertain and abide by the intent of the settlor. We must look to the words of the trust itself." *In re Miller Osborne Perry Trust*, 299 Mich App 525, 530; 831 NW2d 251 (2013). Respecting the trustee, as noted, § 9.3 of the Kratzer Trusts provide that the trustee shall be "reimbursed for all reasonable expenses incurred in the administration and management of the Trust," and is entitled to receive fair and reasonable compensation for his services, chargeable to the trust estate. Section 9.3 further provides that the "attorneys . . . retained and hired by the Trustee shall also be reimbursed for all reasonable expenses incurred in rendering services to the trust and Trustee and shall receive fair and reasonable compensation for such services." "Shall" generally indicates mandatory action. See *In re Kostin Estate*, 278 Mich App 47, 57; 748 NW2d 583 (2008). As noted, the Kratzer Trusts expressly authorize the trustee, respecting management of the trust estate, to employ an attorney, and to pay fair and reasonable compensation for rendering services to the trust and trustee, chargeable to the trust. While the trusts do not directly address litigation-related expenses, such services logically fall within the scope of the management of the trust estate. See *In re Gerber Trust*, 117 Mich App 1, 14; 323 NW2d 567 (1982) (in litigation to remove the trustee, the attorneys employed to defend the trustee's actions were incurred in administration of the estate). Further, although the trustee's general powers enumerated in the trusts do not specify the power to defend a lawsuit, the trusts provide the power to "sue on, defend, or abandon demands of or against the trust estate wherever situated" and authorize the trustee to exercise all the powers set forth in the EPIC. Defending an action is explicitly provided under MCL 700.7817(x), including "for the trustee's protection in the performance of the trustee's duties." See *In re Butterfield Estate*, 418 Mich 241, 259; 341 NW2d 453 (1983) (a court properly refers to the trust instrument to ascertain a trustee's power and duties).

Accordingly, under the trusts, respondent had the authority to defend the petitions and to employ an attorney for that purpose. Providing legal assistance to the trustee in defending petitions

challenging respondent's administration and management of the trust is a service rendered to the trust and the trustee, and thus, under § 9.3, were compensable from the trust, if fair and reasonable.

We hold that the probate court erred by concluding that respondent lacked entitlement to have attorney fees incurred in this matter paid from trust assets. The probate court should have considered and applied the trusts' provisions governing payment of attorney fees and expenses incurred in rendering services to the trust and the trustee. The "terms of a trust prevail over any provision" of the MTC. MCL 700.7105(2). In addition to MCL 700.7904(2), the trial court briefly cited MCL 700.7901, which provides the trial court with various remedies for a breach of trust, specifically subsection (j), which provides that the court may "[o]rder any other appropriate relief." But it is not entirely clear under what statutory provision the probate court denied respondent's attorney fees request, or whether, in so deciding, the court considered the governing trust provisions. Therefore, we vacate the probate court's order in this regard and remand this case to the court with instructions to reconsider the issue.

G. PETITIONER'S ATTORNEY FEES AND ACCOUNTING FEES

Respondent next argues that the probate court abused its discretion by awarding petitioner attorney fees and accounting fees under MCL 700.7904(1). Although such an award may be appropriate, we remand for reconsideration of the issue in light of the reduced enhancement to the trust property resulting from this appeal.

MCL 700.7904(1) provided clear statutory authority for the probate court to award petitioner attorney fees and expenses to be paid from the trust if her actions enhanced, preserved, or protected trust property. In awarding petitioner attorney fees and accounting fees, the court relied in part on the trust's enhancement resulting from the court's surcharging respondent for the farmhouse improvements. Because that surcharge was improper, petitioner's making issue of respondent's having made those improvements using funds from the farm business account did not ultimately enhance the trust. The court also cited the return of Wendell's bank account balance to the trust as support for petitioner's fee award, but that amount, $863.99, was minor compared with the $27,150.27 improper surcharge for the farmhouse improvements. Thus, in light of the significantly reduced enhancement, we remand for the probate court's reconsideration of petitioner's attorney fees and accounting fees award. An award of reasonable attorney fees and expenses may still be appropriate, as justice and equity require, if the court on remand finds that petitioner enhanced, preserved, or protected the trust property. MCL 700.7904(1).[8]

Respondent also contends that petitioner's accountant provided no relevant or competent evidence, and that those services could not have enhanced the trust property warranting payment from the trust. Analysis of the record indicates that, during the trial, despite opportunities granted

[8] Respondent, relying on *In re Temple Estate*, 278 Mich App 122, 140-141; 748 NW2d 265 (2008), argues that an attorney fee award is properly limited to cases in which the services were necessary by reason of laches, negligence, or fraud. However, *Temple* was decided in 2008, thus before MCL 700.7904(1)'s enactment, which became effective on April 1, 2010, see 2009 PA 46, and the latter contains no such limitation. Therefore, this argument lacks merit.

by the probate court to petitioner's counsel to elicit admissible testimony from the accountant, petitioner failed to do so. Petitioner failed to establish a proper foundation for the accountant's testimony. The substance of the accountant's analysis never became part of the record. The accountant provided no substantive testimony in the trial proceedings. The probate court's order frankly indicates that the accountant's accounting was not introduced at trial and the court was left with numerous unanswered questions. The record before us does not reveal that the accountant's services assisted the trier of fact or in any manner enhanced the trust. The probate court's order does not indicate the authority under which it ordered respondent to pay out of the trust funds the amount petitioner paid to the accountant, nor does it state the court's rationale or justification for so ordering other than petitioner sought the accountant's services because of misgivings regarding management of the trusts. The record, however, does not support that expenditures for accounting services elucidated any issue or could be said to have enhanced the trusts. Accordingly, we vacate that portion of the probate court's order and remand for the court to reconsider its decision.

H. PREJUDICIAL TRIAL BRIEF

Respondent next argues that the trial court abused its discretion by deciding not to dismiss the petitions as a sanction against petitioner or her counsel for filing a prejudical trial brief. We disagree.

As stated previously, "[t]rial courts possess the inherent authority to sanction litigants and their counsel, including the right to dismiss an action." *Maldonado*, 476 Mich at 388. "Dismissal is a drastic step that should be taken cautiously." *Vicencio*, 211 Mich App at 506.

Petitioner filed a trial brief that contained inadmissible hearsay statements purportedly made by Wendell to her and her sister. The record, however, reflects that respondent suffered no prejudice because the probate court explained that it did not consider the offending statements as evidence. The court's decision not to impose sanctions did not constitute an abuse of its discretion and fell within its inherent authority to decide such matters.

IV. CONCLUSION

For the reasons stated in this opinion, we affirm in part, vacate the probate court's order regarding the surcharge of respondent for the costs of the farmhouse improvements, vacate the court's decision denying respondent attorney fees, and vacate the court's award to petitioner her attorney fees and accounting fees. We remand this case to the probate court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Mark T. Boonstra
/s/ James Robert Redford