STATE OF MICHIGAN

COURT OF APPEALS

In re EDMUND WILLIAM ROSS II IRREVOCABLE TRUST.

EDMUND WILLIAM ROSS II IRREVOCABLE TRUST, by ANNETTE M. LEROUX, Trustee,

Appellee,

v

CORRINE BREER,

Appellant,

and

WILLIAM J. ROSS III,

Appellee.

UNPUBLISHED
September 16, 2021

No. 349679
Oakland Probate Court
LC No. 2006-307607-TV

In re WILLIAM JAMES ROSS IV IRREVOCABLE TRUST.

WILLIAM JAMES ROSS IV IRREVOCABLE TRUST, by ANNETTE M. LEROUX, Trustee,

Appellee,

v

CORRINE BREER,

Appellant,

No. 349680
Oakland Probate Court
LC No. 2006-307608-TV

and

WILLIAM J. ROSS III,

Appellee.

In re EDMUND WILLIAM ROSS II IRREVOCABLE TRUST.

EDMUND WILLIAM ROSS II IRREVOCABLE TRUST, by ANNETTE M. LEROUX, Trustee, and RICHARD CONNORS,

Appellees/Cross-Appellants,

v

CORRINE BREER,

Appellant/Cross-Appellee,

and

WILLIAM J. ROSS III,

Appellee.

Nos. 349917; 351355; 351823
Oakland Probate Court
LC No. 2006-307607-TV

In re WILLIAM JAMES ROSS IV IRREVOCABLE TRUST.

WILLIAM JAMES ROSS IV IRREVOCABLE TRUST, by ANNETTE M. LEROUX, Trustee, and RICHARD CONNORS,

Appellees/Cross-Appellants,

v

CORRINE BREER,

Appellant/Cross-Appellee,

Nos. 349926; 351356; 351839
Oakland Probate Court
LC No. 2006-307608-TV

and

WILLIAM J. ROSS III,

Appellee.

In re EDMUND WILLIAM ROSS II IRREVOCABLE TRUST.

EDMUND WILLIAM ROSS II IRREVOCABLE TRUST, by ANNETTE M. LEROUX, Trustee,

Appellant,

v

No. 351981
Oakland Probate Court
LC No. 2006-307607-TV

CORRINE BREER, WILLIAM J. ROSS III, and RICHARD CONNORS,

Appellees.

In re WILLIAM JAMES ROSS IV IRREVOCABLE TRUST.

WILLIAM JAMES ROSS IV IRREVOCABLE TRUST, by ANNETTE M. LEROUX, Trustee,

Appellant,

v

No. 351982
Oakland Probate Court
LC No. 2006-307608-TV

CORRINE BREER, WILLIAM J. ROSS III, and RICHARD CONNORS,

Appellees.

In re EDMUND WILLIAM ROSS II IRREVOCABLE TRUST.

EDMUND WILLIAM ROSS II IRREVOCABLE TRUST, by ANNETTE M. LEROUX, Trustee,

Appellee,

v

No. 354298
Oakland Probate Court
LC No. 2006-307607-TV

CORRINE BREER,

Appellant,

and

WILLIAM J. ROSS III and RICHARD CONNORS,

Other Parties.

In re WILLIAM JAMES ROSS IV IRREVOCABLE TRUST.

WILLIAM JAMES ROSS IV IRREVOCABLE TRUST, by ANNETTE M. LEROUX, Trustee,

Appellee,

v

No. 354303
Oakland Probate Court
LC No. 2006-307608-TV

CORRINE BREER

Appellant,

and

WILLIAM J. ROSS III and RICHARD CONNORS,

Other Parties.

Before: GADOLA, P.J., and JANSEN and O'BRIEN, JJ.

PER CURIAM.

These 12 consolidated appeals arise out of two highly contentious trust proceedings in the probate court, which ultimately resulted in an award of sanctions against the trustee, Annette M.

Leroux (the "trustee"), and her attorney, Richard Connors, in favor of Corrine Breer.[1] The court also entered an order partially suspending the trustee and appointing a special fiduciary. Breer, the trustee, and Connors claim various appeals and cross-appeals from the probate court's orders.[2] We affirm in part, vacate in part, and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

These contentious trust cases arise out of familial litigation following a divorce. As explained by the probate court:

> William James Ross III [the "settlor"] and Annette LeRoux [i.e., the trustee] have two children: Edmund William Ross II and William James Ross IV. On December 30, 1987, two separate Trusts were created: (1) the Edmund William Ross II [Irrevocable Trust]; and (2) the William James Ross IV [Irrevocable Trust] (the "Ross Trusts" [or "subject trusts"]). William James Ross III was the settlor and the initial trustee of both trusts. Annette LeRoux . . . is one of the Successor Trustees of the trusts. . . . Leroux is [the settlor's] ex-wife. Corinne Breer ("Breer") is [the settlor's] elderly mother.

In 2006, following her divorce from the settlor, the trustee initiated two cases in the probate court—one for each of the subject trusts—by filing petitions for an accounting, to remove the settlor as the acting trustee, and to surcharge him for alleged breaches of trust. As noted by the probate court:

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[1] In her claims of appeal and various appellate briefs, Breer spells her first name as "Corrine," but her name is sometimes spelled as "Corine" or "Corinne" in other parts of the record. Breer's deceased husband, William Z. Breer, will be referred to as "Mr. Breer."

[2] In Docket Nos. 349679 and 349680, Breer appeals the probate court's June 17, 2019 scheduling order regarding the sanction proceedings below. In Docket Nos. 349917 and 349926, Breer appeals the probate court's July 23, 2019 order granting in part and denying in part her motion for sanctions against the trustee and Connors, and the trustee and Connors each cross-appeal that same order. In Docket Nos. 351355 and 351356, Breer appeals the probate court's October 15, 2019 opinion and order, following a bench trial, awarding her certain sanctions—in an amount not then determined—jointly and severally against the trustee and Connors, who claim cross-appeals from that same order. In Docket Nos. 351981 and 351982, the trustee appeals the probate court's December 2, 2019 order partially suspending the trustee and appointing a special fiduciary. In Docket Nos. 351823 and 351839, Breer appeals as of right the probate court's December 4, 2019 order determining the amount of sanctions awarded to Breer against the trustee and her counsel, who each cross-appeal that same order. Finally, in Docket Nos. 354298 and 354303, Breer appeals the probate court's July 14, 2020 order denying her motion for additional sanctions and instead granting the trustee's competing motion for summary disposition.

> On January 25, 2009, [the probate court] entered a Settlement Order resolving all matters. One of the provisions of the settlement was the removal of [the settlor] as the initial trustee of the Ross Trusts and the appointment of a Successor Trustee. Comerica Bank became the Successor Trustee. On March 16, 2009, a Judgment was entered against [the settlor].[3] Consequently, collection proceedings began in multiple states: Michigan, Florida[,] and Illinois, as well as courts with different subject matter jurisdiction, including a bankruptcy court in Florida and a Florida appellate court. LeRoux's claims against Breer have been previously dismissed twice by Florida courts.

In February 2019, the trustee, acting through her counsel, Connors, filed a petition seeking reinstatement of these cases and the issuance of a subpoena directing Breer to appear before the probate court to be examined under oath concerning the assets then in the settlor's possession. As relevant here, the February 11, 2019 petition alleged that the trustee had become the acting trustee of both trusts in July 2013, after Comerica "resigned" that position, and that the settlor had recently transferred two checks, made payable to him in a total amount exceeding $37,000, to Breer, in hopes of avoiding the trustee's collection efforts against the settlor. In reaction, Breer filed an emergency motion seeking, among other things, leave to intervene in these cases. Following a hearing, the probate court granted Breer leave to intervene, holding that she would thereafter be "a party to the post-judgment proceedings."

Initially, it appeared that a settlement of the instant litigation between Breer and the trustee was imminent. On April 8, 2019, the parties stipulated to the entry of a judgment against Breer under MCR 2.405. At a hearing the next day, the parties informed the probate court of their settlement, and the trustee's counsel, Connors, indicated that the trustee no longer had any known claims against Breer. Thus, there was "nothing more that Ms. Breer [wa]s required to be in this case for," and the trustee moved to have her "dismissed as a party." Also, when the probate court asked Connors whether his request for the issuance of a subpoena against Breer was "off the table," Connors replied: "Oh, absolutely." However, Connors also foreshadowed the events that would follow by suggesting that the trustee might yet "be bringing additional requests for discovery, maybe on [Breer], maybe not[.]"

On April 10, 2019, the probate court entered an order awarding a judgment against Breer consistent with the parties' stipulation. In addition, the probate court dismissed Breer as a party and dismissed the trustee's February 11, 2019 "petition regarding . . . Breer[.]"

On April 19, 2019, however, the trustee moved to compel discovery, which would ultimately be the impetus of the sanction proceedings now at bar. In pertinent part, that motion to compel stated:

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[3] Under that judgment, each of the subject trusts was awarded approximately $1.254 million, "inclusive of interest," against the settlor.

2. This case stems from a Judgment from this Court against the Judgment Debtor [the settlor], . . . because [the settlor] stole money from his son's Trusts while he was the Trustee.

3. Petitioner domesticated the Judgment in . . . Florida in approximately September 2009.

4. As part of the discovery process in the Florida case, Petitioner secured a Break Order from the Florida Court ordering the Sheriff to execute on the personal property of [the settlor] from the residence where he was then living. As part of the execution of that Break Order certain papers and documents were seized by the Sheriff.

5. Pursuant to an Agreed Order the [trustee] and [the settlor] agreed that [the settlor's] attorneys would review the documents and mark those that they claimed were entitled to a privilege and allow [the trustee] access to the remaining documents.

6. The documents for which [the settlor] claimed a privilege [were] submitted to a Special Magistrate for an in camera review and a determination whether they were entitled to a privilege exemption.

7. The Special Magistrate issued his Report No. 1 on March 25, 2019 . . . and recommended that the Court overrule [the settlor's] claim of privilege on all but nine (9) documents. The Florida Court entered its Order accepting and confirming the Special Magistrate's Report No. 1 on April 16, 2019 . . . . The Order provided that [the settlor] was to produce the documents to [the trustee] within 15 days.

8. [The trustee] has received the documents from [the settlor] and they contain a copy of the William Z. Breer Trust, Under Agreement Dated December 13, 2004, as Amended And Restated. William Z. Breer was the step father of [the settlor] and the husband of Corinne H. Breer. See attached EXHIBIT "A", copy of the Trust. Mr. Breer died in May 2014.

9. *Mr. Breer's Trust provided that a trust was to be established for the benefit of [the settlor] and funded with assets from Mr. Breer's estate*.

10. The Trustee of Mr. Breer's Trust is William A. Beluzo, Jr. ("Beluzo").

11. A trust was established by Corinne H. Breer on January 22, 2016 and known as the Corinne M. Breer Irrevocable Trust f/b/o William J. Ross III U/A/D January 22, 2016. See attached EXHIBIT "B", copy of Trust. The Trust named Frank D. Paolini as the Trustee.

* * *

15. The subject matter of the pending action is the existence of, and location of, any assets of the Judgment Debtor, not exempt from execution.

16. Based upon the recently discovered Trust Agreement of Mr. Breer, it is reasonable and necessary to conduct discovery and take the deposition of Mr. Beluzo to determine if [the settlor] received money or property from Mr. Breer upon his death, or if any assets are being held in trust for [the settlor]. It is also necessary to determine if any money or property placed into the Corinne H. Breer Irrevocable Trust were assets from Mr. Breer's Trust.

WHEREFORE, [the trustee] respectfully requests that this honorable Court:

1. Issue an Order compelling William A. Beluzo, Jr. to appear for a deposition at a time and place to be negotiated . . . .

* * *

I declare under the penalties of perjury that this Petition has been examined by me and that its contents are true to the best of my information, knowledge, and belief. [Emphasis added.]

This petition was signed by Connors, as attorney for the trustee.

In reaction, Breer filed a renewed motion to intervene, also requesting a protective order precluding the trustee from seeking to compel Beluzo to appear for a deposition, sanctions, and an order quashing the trustee's motion. On May 13, 2019, two days before the scheduled hearing on the trustee's April 19, 2019 motion to compel discovery, the trustee filed notices withdrawing that motion "without prejudice to re-filing said motion in the future if necessary."

At the ensuing motion hearing, the trial court inquired why the parties had appeared, given that the trustee was withdrawing her April 19, 2019 motion to compel discovery. Appearing pro hac vice, Breer's Chicago-based attorney, Anders C. Wick, indicated that he had not been informed of the withdrawal of the motion before the hearing. Wick also indicated that, regardless of such withdrawal, Breer's request for sanctions against the trustee and Connors remained to be adjudicated. In response, Connors argued that he had withdrawn the April 19, 2019 motion to compel discovery only because, in light of Breer's argument that the motion was procedurally improper, he had wished to reexamine the matter and ensure that it had been filed in a procedurally proper manner. However, Connors also indicated that, in one form or another, he intended to file a similar motion seeking to compel discovery from Beluzo after researching the matter further.

Thereafter, the probate court began to question the attorneys regarding the specific language of "Mr. Breer's trust" and why the trustee would be entitled to discovery concerning that trust from Beluzo. Connors argued that the proposed discovery was necessary to determine whether the settlor had any current vested interest to receive distribution of assets under Mr. Breer's trust, such that the trustee could attach that interest as a means of satisfying the settlor's debt to the subject trusts. After Wick indicated that Mr. Breer's trust contained "no such provision"

as had been alleged in ¶ 9 of the trustee's April 19, 2019 motion to compel discovery,[4] the probate court asked Connors if Wick was correct. Connors replied: "We don't know your Honor. We don't know if we have all the documents." Ultimately, the probate court declined to rule on Breer's request for sanctions or her motion to intervene at that time, reasoning that the record before the court was insufficient to address those matters. Instead, the court instructed the parties to file supplemental briefs specifically addressing such issues.

After the parties did so, another motion hearing was held. At that hearing, Connors continued to maintain that the disputed statements in ¶ 9 of the trustee's April 9, 2019 motion to compel discovery were "absolutely true[.]" When asked what specific portion of Mr. Breer's 97-page trust supported those statements, Connors cited § 8(B). However, § 8 of Mr. Breer's trust provides, in pertinent part:

> Distribution of My Trust Property
>
> Subject to paragraph EIGHTH A, *following the death of the survivor of the Grantor* [i.e., Mr. Breer] *and Grantor's spouse* [i.e., Breer], the Successor Trustee shall pay all necessary debts, taxes, and expenses of the Grantor's estate and trust *and then shall make the following distributions* as provided in this paragraph EIGHTH.
>
> A. Charitable Distributions. If and only if federal estate tax is due and payable upon the death of the second to die of my spouse and I, my Trustee shall provide payment . . . outright, free and discharged of the trust hereof an amount to reduce the federal estate tax upon the death of the second to die of my spouse and I to zero, to the following designated charities.
>
> * * *
>
> B. Division Into Separate Shares. My Trustee shall allocate the remaining Trust property to three (3) separate trusts created for each beneficiary under this paragraph EIGHTH as follows:
>
> | Beneficiary | Relationship | Share |
> | --- | --- | --- |
> | To William A. Beluzo Jr. *as Trustee for the trust created herein for the benefit of William J. Ross, III* [i.e., the settlor] | Stepson | One-half (1/2) |
>
> * * *

[4] Later, the settlor's counsel also indicated that no such provision existed in Mr. Breer's trust, further indicating that, as "an attorney who is familiar with trusts" and who had access to all of the pertinent trust documents, Connors should have recognized as much.

> It is the intent and material purpose of the Trust established for the benefit of William J. Ross, III, without limiting, restricting, or compelling the exercise of a Trustee's (or a Special Power Holder's) discretionary authority as set forth in this Agreement to (i) *retain assets in trust for his benefit*, (ii) *to provide creditor and asset protection*, (iii) to provide spendthrift protection, (iv) to provide for the orderly and professional management and investment of trust assets, (v) *to protect William J. Ross, III now and in the future from in-laws, ex-spouses, creditors and predators*, (vi) *to provide a financial "safety-net" for William J. Ross, III*, ...
>
> * * *
>
> In keeping with the *wholly discretionary* nature of my Trust and all separate Trusts created in my Agreement, *no beneficiary, except as regards to any irrevocable vesting in the beneficiary's favor, shall have any ascertainable, proportionate, actuarial or otherwise fixed or definable right to or interest in all or any portion of any trust or its property*. It is my intent that my Trustee have all the discretion of a natural person, and that *a distribution beneficiary holds nothing more than a mere expectancy*. . . . [Emphasis added.]

When the trial court asked Connors why he had withdrawn the April 19, 2019 motion to compel if he believed it was well-grounded factually, Connors initially gave the same essential explanation that he had provided at the May 15, 2019 motion hearing, explaining that he had withdrawn the motion in response to Breer's argument that it was procedurally improper, wishing to review the matter more thoroughly before refiling. However, when the probate court later instructed Connors to explain "again why [he] withdrew [the] motion to compel," his response was more complex. Connors again indicated that he had withdrawn the motion out of concern regarding its procedural propriety. But he also expanded on that explanation, indicating that he had originally decided to seek the requested discovery from Beluzo, who he believed to be a resident of Oakland County, in *these* proceedings because the probate court had personal jurisdiction over Beluzo, while the Florida courts did not. Connors explained that he had subsequently changed his mind, deciding to seek such discovery from Beluzo in the Florida proceeding, having learned that Michigan had a statutory provision under which it would "honor foreign subpoenas." On further questioning by the court, however, Connors admitted that he had been aware of that statutory provision *before* he filed the April 19, 2019 motion to compel discovery from Beluzo.

After considering the matter, the probate court partially granted Breer's motion for sanctions under MCR 1.109(E),[5] stating its related reasoning on the record. The court refused to award Breer any sanctions for conduct preceding the parties' "settlement agreement," reasoning that such an award would be improper given that the parties had stipulated to the entry of a

[5] In light of its reliance on MCR 1.109(E), the probate court declined to consider or decide whether these proceedings qualified as a form of "civil action," such that sanctions would also have been permissible under MCL 600.2591. The court also declined to award sanctions under its "inherent authority over attorneys in cases before it," reasoning that although it had such authority, Connors's conduct did not "rise to a level where the Court would take such action."

judgment against Breer—and her dismissal from this case—under MCR 2.405. But the court found that ¶ 9 of the April 19, 2019 motion to compel was, for purposes of MCR 1.109(E)(5), not "to the best of [the trustee's and Connors's] knowledge, information and belief formed after reasonable inquiry . . . well-grounded in fact[.]" Specifically, the court found that, given that the death of both Breer and Mr. Breer was a "condition precedent" to any form of distribution to the settlor under § 8(B) of Mr. Breer's trust—including the formation of the trust described in ¶ 9 of the April 19, 2019 motion to compel—and given that the trustee and Connors had known that Breer was not deceased, the allegations in ¶ 9 of the April 19, 2019 motion were "simply false." Moreover, after noting that Connors had "given two separate explanations" regarding why he withdrew the April 19, 2019 motion, the probate court suggested that it could not credit those explanations, finding that "the most obvious reason" for the withdrawal was that, in Breer's response, "it was pointed out to [Connors] very clearly" that the allegations in ¶ 9 were plainly false. Based on those findings, the court concluded that it "must" impose sanctions under MCR 1.109(E)(6).[6] Finally, the probate court held that it would entertain further proceedings concerning the precise *amount* of sanctions to be awarded.

At the probate court's instructions, Breer subsequently filed a bill of costs detailing her requested costs and fees as sanctions under MCR 1.109(E). After the trustee filed objections, the matter proceeded to a two-day bench trial. Ultimately, the probate court issued a lengthy opinion and order addressing the matter, stating the following factual findings and conclusions of law:

> As set forth below, this Court finds that [the trustee] and her attorney, Richard Connors are jointly and severally liable for attorney fees and costs associated with [the trustee's] April 19, 2019 Motion to Compel. Attorney Wick is directed to recalculate the amounts awarded in accordance with this opinion.
>
> * * *
>
> During the two-day evidentiary hearing, the parties agreed that these trust matters have been contentious. I do find that the amount of contention has unreasonably increased the litigation costs. For instance, the April 19, 2019 discovery motion was filed after a settlement was agreed to, after a proposed order regarding the settlement agreement was objected to and a hearing was held, and after an Order dismissing the supplemental proceedings was entered. Further, the April 19, 2019 motion filed by [the trustee] and Connors is more than a simple discovery matter.

[6] MCR 1.109(E)(6) provides:

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction, which *may* include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. . . . [(Emphasis added).]

This matter was more than a simple discovery matter. Indeed, these "trust" actions involve issues of trust litigation, civil litigation, professional responsibility and multijurisdictional litigation; they also contain elements of criminal law, fraud, conspiracy and bankruptcy.

a. The Wood v DAIIE and Smith v Khouri Factors

I have considered many factors in arriving at a reasonable attorney fee and hourly rate. These factors include the eight factors listed in MRPC l.5(a), *Wood v DAIIE*, 413 Mich 573, 588[; 321 NW2d 653] (1982)[,] and *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008) . . . .

* * *

I have weighed some factors more heavily than other factors in making my determination. The factors that are weighed more heavily are:

> i. the professional standing and experience of attorneys Wick, Harrell, Waxler and Foley;
>
> ii. the difficulty of the case;
>
> iii. the nature and length of the professional relationship with the client;
>
> iv. the fee customarily charged in the locality for similar services; and
>
> v. the contentious nature of the parties and counsel.

Sufficient credible testimony was elicited during the hearing to support the professional standing of attorneys Wick, Harrell, Waxler and Foley. Wick and Harrell bring more than 20 years of litigation experience to the case. Harrell testified that she is experienced in probate litigation as well as complex commercial litigation. Wick and Harrell are partners in their respective firms. Attorney Waxler is an associate that works with Wick in the Chicago office. She has been practicing law for eight years and has experience working as a judicial law clerk for a Federal District Judge. Ms. Waxler demonstrated exceptional trial skills during the two day evidentiary hearing.

The difficulty level in these trust matters is above average. Mr. Lennon believed this matter to be a simple post-judgment discovery matter. However, the scope of the matter is actually well beyond a discovery issue. To begin, Breer is not an interested party in these Trust proceedings. Testimony at the hearing demonstrated that there were multiple other proceedings litigated in Florida bankruptcy court as well as other Florida courts. [The trustee's] pleadings imply alleged theories spanning through civil, criminal, state[,] and federal jurisdictions. Thus, familiarity with areas of the law outside of probate litigation was utilized.

Testimony at the hearing was sufficient to demonstrate a difficulty level higher than the defense of an ordinary discovery matter.

The fee customarily charged in the locality for similar services, or the hourly attorney rate in Oakland County and greater Detroit is addressed in another section in this Opinion.

The trust proceedings were opened in 2006; Wick has been representing Breer in other litigation against [the trustee] and Connors for approximately three years. Thus, Wick has had a significant professional relationship with his client, Breer. As such, it is reasonable that Breer would retain Wick to represent her in the proceedings before this Court.

Finally, I find that [the trustee], Connors, Breer and Ross have had an ongoing contentious relationship for years. Testimony elicited during the hearing supports the claim that Connor's actions have increased the cost of litigation. Even after the parties resolved the February 2019 Petition, [the trustee] and Connors filed a Motion to Compel Discovery. There was also testimony that Connors initiated a grievance proceeding against Paolini, and Connors threatened to initiate another grievance proceeding against Wick.

b. The Applicable Time Period for Accumulation of Sanctions

The subject of the trial is the "reasonable and actual fees and expenses incurred because of the filing of [the trustee's] April 19, 2019 Motion to Compel". As such, the applicable time period that this Court is reviewing begins on April 19, 2019 and ceases on July 23, 2019, the date that an Order was entered granting in part Breer's request for sanctions. This Court denies the request for all services rendered before April 19, 2019 and after July 23, 2019.

c. The Michigan Bar Association's 2017 Economics of Law Survey

I agree with Lennon and Buttiglieri that the State Bar association's Economics of Law Practice Survey has some limitations. The Survey is not the most reliable measure of a reasonable hourly attorney rate. However, it is a starting point that can be adjusted based on a number of facts. I also find that the Peer Monitor reports are persuasive.

d. The Hourly Rates for Attorneys Harrell, Wick, etc...[7]

After successfully defending Breer in Florida, and charging an hourly rate that may have been consistent in the Florida market, Breer and Wick were

[7] Ellipsis in original.

effectively forced to accept the jurisdiction of this Court when [the trustee] filed her Petition and Motion here in Oakland County.

With respect to expert witness Lennon, I find that Connors simply did not make good use of his expert witness. Connors did not adequately support his argument that the hourly rate for Wick and Harrell should be $300.00. I find that Lennon was persuasive that reasonable attorney rates for Oakland County should be utilized, and not the mean or median rates for a "national attorney", or the median rates in Chicago.

Through Lennon's testimony and applicable case law, [the trustee] has carried her burden of establishing that the 2017 Economics of Law Survey constitutes a sufficient basis to *begin* a reasonable hourly rate analysis. As Lennon opined, the Survey is one of many factors to be considered. Lennon also opined that the Florida proceedings were not relevant to the issue at bar—sanctions for filing the April 2019 Motion. As such, he believes that the amount of attorney fees and costs sought by Breer as sanctions are excessive. I do agree that some of the attorney fees and costs, as requested in the itemized bill of costs, are excessive. However, some of the excessive fees and costs were either reduced or waived during the hearing.

Buttiglieri testified that he did his own research in support of his opinion. One aspect of his research entailed speaking directly with partners in local Oakland County firms and inquiring about hourly rates charged by partners and associates. According to this research, Buttiglieri found an hourly attorney rate for "top litigators" in the Detroit metro area to be in the range of $600.00 to $750.00. I further find persuasive the Peer Monitor reports, and the testimony regarding the reports. However, the Peer Monitor reports have flaws, such as the subject group. Only those firms and attorneys that utilize Thomson Rueters services are included in the reporting group.

I find Buttiglieri's testimony criticizing the 2017 Economics of Law Survey persuasive. The low response rate of the Survey is troubling. Historically, the response rate to prior years' surveys has been very low. [The trustee] has not met her burden [of] establishing the reliability of the 2017 Survey, and similarly, that the hourly rates published in the Survey are the same hourly rates that should be used in this case. I find that the hourly rates published in the 2017 Survey are but one factor to consider. The 2017 Survey results are not dispositive.

The mean hourly rate for a Detroit attorney under the Peer Monitor Report is $504.00. Weighing the evidence presented and assessing the credibility of the witnesses, I find that an hourly rate of $504.00 is reasonable for attorney Wick. Attorney Harrell's actual rate of $410.00 per hour is reasonable, and Maddin Hauser's associate attorney rate of $220.00 per hour is reasonable. $330.00 per hour is a reasonable rate for attorneys Waxler and Foley.

e. Multiple Attorneys

Initially, I thought that it was not necessary to bring Wick, a Chicago based attorney, into this action. However, as the testimony and other evidence was admitted at the two day evidentiary hearing, I found that it was reasonable to have Wick admitted pro hac vice. Further, considering the number of years that [the trustee] has been litigating against Ross and Breer and the fact that the litigation has occurred in multiple jurisdictions, I find that [the trustee] and Connors should have reasonably expected Breer to retain at least one attorney involved in the Florida litigation to represent her before this Court. I also find that it is reasonable to have more than one attorney (Wick and Harrell) representing Breer.

Additionally, there was sufficient credible testimony placed on the record to justify Harrell and Wick's presence at the court hearings. Fees for multiple lawyers are permissible. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 328-329; 602 NW2d 633 (1999).

f. [The Trustee's] & Connors[']s] Remaining Specific Objections to the Itemized Billing Statement

I find the spreadsheet utilized by Breer in the hearing and set forth in her Proposed Findings of Fact and Conclusions of Law helpful in addressing the remainder of [the trustee's] objections. As set firth [sic] below and in the testimony, I find the applicable services provided and time doing so are reasonable.

* * *

g. Travel and Hotel Costs

* * *

h. Other Costs

The Westlaw costs will be allowed except for $2,317.05 which testimony did not support. . . .

VI. Conclusion

* * *

[The trustee] and her attorney, Richard Connors are jointly and severally liable for sanctions to be recalculated by Attorney Wick in accordance with this opinion. Wick is directed to recalculate the amount due, and then submit a proposed Order under the seven day rule, MCR 2.602(6)(3).

The probate court later entered an order awarding Breer just over $86,749 in sanctions.

In November 2019, Breer filed a petition under MCL 700.1302 seeking limited supervision of the subject trusts, removal of the trustee from that fiduciary role, and the appointment of a special fiduciary to administer the trusts. After entertaining oral argument, the probate court

entered an order partially suspending the trustee until further order of the court. The court also appointed attorney Joseph Ehrlich to serve "as Special Fiduciary to administer the trusts during [the trustee's] suspension, including but not limited to investigating, authorizing, and prosecuting any potential claims for legal malpractice[.]"

Also in November 2019, Breer moved for sanctions in addition to those she had already been awarded. In support of that request, Breer offered two alternate theories of recovery. First, she argued that, under MCR 1.109(E), she was entitled to recover "fees for fees," specifically, the fees that she had incurred in seeking an award of costs and fees as sanctions. Second, Breer argued that she was entitled to additional sanctions because, even if the award of "fees for fees" was not permissible under MCR 1.109(E), Connors's "Post June 17, 2019 Conduct" was independently sanctionable under that same rule. In particular, Breer argued that the trustee's July 16, 2019 objections to Breer's itemized bill of costs had, as relevant here, been factually inaccurate and based "on statutes that Mr. Connors simply made up."

The parties subsequently filed competing motions for summary disposition regarding Breer's "claim" for additional sanctions. After twice entertaining oral arguments on the matter, the probate court took the matter under advisement, indicating that it would issue its opinion orally at a subsequent hearing. The court subsequently did so, denying Breer's motions for additional sanctions and her related motion for partial summary disposition, and instead granting the trustee's competing motion for summary disposition.

In these consolidated appeals, the parties now challenge the probate court's various orders.

II. STANDARDS OF REVIEW AND PRINCIPLES OF CONSTRUCTION

The parties raise numerous claims of error, which we review under varying standards. We review for an abuse of discretion a lower court's decision whether to award sanctions, *Kaftan v Kaftan*, 300 Mich App 661, 668; 834 NW2d 657 (2013), its decision whether to exercise its "inherent authority to sanction litigants and their counsel," *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), and its decision concerning the amount of costs and attorney's fees awarded, *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). We also review for an abuse of discretion a lower court's decision whether to admit or exclude expert testimony, *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016), its decision regarding a motion to quash a subpoena, *Fette v Peters Constr Co*, 310 Mich App 535, 547; 871 NW2d 877 (2015), and its decisions concerning the appointment or removal of a fiduciary, *In re Conservatorship of Shirley Bittner*, 312 Mich App 227, 235; 879 NW2d 269 (2015). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes," and "[a] trial court necessarily abuses its discretion when it makes an error of law." *Pirgu*, 499 Mich at 274.

Any related conclusions of law are reviewed de novo, and any related factual findings are reviewed for clear error. *In re Conservatorship of Brody*, 321 Mich App 332, 336; 909 NW2d 849 (2017). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made[.]" *Id*. (quotation marks and citation omitted). "The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding

witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *Id.* (quotation marks and citation omitted).

The proper "interpretation and application of court rules present questions of law to be reviewed de novo using the principles of statutory interpretation." *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012). As our Supreme Court explained in *Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999):

> The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. This task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of its intent[.] If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.
>
> In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. As far as possible, effect should be given to every phrase, clause, and word in the statute. [(Quotation marks and citations omitted).]

III. ANALYSIS

As noted, the parties have raised numerous claims of error on appeal. We address each in turn.

A. INHERENT AUTHORITY TO SANCTION

"Trial courts possess the inherent authority to sanction litigants and their counsel[.]" *Maldonado*, 476 Mich at 388. Breer argues that the probate court erred by failing to recognize that it had such authority. We disagree.

Breer simply misstates the record. At the June 2019 hearing on her motion for sanctions, the probate court expressly recognized that it did, in fact, have "inherent authority" to sanction, but the court declined to exercise that authority under the circumstances, reasoning that Connors's disputed conduct did not "rise to a level where the Court would take such action." Instead, the probate court decided to award sanctions to Breer "[p]ursuant to MCR 1.109(E) only[.]" Thus, we reject Breer's instant claim of error.

Moreover, given that the probate court ultimately awarded Breer sanctions of approximately $86,749 against the trustee and Connors under MCR 1.109(E), we cannot conclude that the court abused its discretion by refusing to *also* sanction them under its inherent authority. Because a trial court's inherent powers to sanction "are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995); accord *Swain v Morse*, 332 Mich App 510, 522; 957 NW2d 396 (2020). Given the probate court's conclusion that both the trustee and Connors were subject to sanctions

provided for by court rule, its decision to sanction them under those rules only, rather than assessing additional sanctions under its inherent authority, fell well within the range of principled outcomes. Thus, the court did not abuse its discretion.

B. REASONABLENESS OF THE SANCTION AWARD

Breer argues that the probate court either erred or abused its discretion by basing its fee award for her attorneys on hourly rates then prevailing in Oakland County. Contrastingly, the trustee argues[8] that the probate court abused its discretion by awarding Breer "$86,749.38 in costs and attorney fees that were allegedly incurred as a result of a 4-page, 16-paragraph motion to compel discovery, which was withdrawn before it even went to motion hearing."

On this record, however, we are unable to properly analyze the parties' respective arguments concerning the reasonableness of the probate court's disputed sanction award. Because the probate court fundamentally misapplied the reasonableness test set forth by our Supreme Court in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008) (opinion of TAYLOR, C.J.), and recently clarified in *Pirgu*, 499 Mich at 281-283, and the court also failed to state certain necessary findings under that test, we vacate the disputed sanction award and remand with instructions for the probate court to reconsider the award and make the requisite findings.

A proper analysis under the *Smith/Pirgu* reasonableness test involves several steps. In determining the reasonableness of requested attorney fees, "a trial court should begin its analysis by determining the fee customarily charged in the locality for similar legal services." *Smith*, 481 Mich at 530. To do so, trial courts generally rely "on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan." *Id.* at 531. "The trial court must then multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure." *Pirgu*, 499 Mich at 281. Finally, the court must consider "*all*" of the following nonexclusive factors (along with any other relevant factors) "to determine whether an up or down adjustment is appropriate":

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
>
> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
>
> (3) the amount in question and the results obtained,
>
> (4) the expenses incurred,

[8] Connors, who is a cross-appellant in Dockets No. 349917, 349926, 351355, 351356, 351823, and 351839, filed a single brief joining and adopting the trustee's brief as cross-appellant in those dockets. Nevertheless, for ease of reference, we refer to their joint arguments simply as arguments raised by "the trustee."

(5) the nature and length of the professional relationship with the client,

(6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,

(7) the time limitations imposed by the client or by the circumstances, and

(8) whether the fee is fixed or contingent. [*Id*. at 281-282.]

"In order to facilitate appellate review, the trial court should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors." *Id*. at 282.

In this instance, the probate court's application of the *Smith/Pirgu* test was erroneous in several distinct ways. First, rather than initially determining the "baseline figure" by multiplying "the reasonable hourly rate customarily charged in the locality for similar services" by "the reasonable number of hours expended in the case," see *Pirgu*, 499 Mich at 281, the probate court held that it would base its hourly fee analysis on "[t]he mean hourly rate for a Detroit attorney" of $504. The probate court stated no finding that $504 was the hourly rate customarily charged in this locality for *similar services*. Moreover, the probate court never multiplied *any* hourly rate by the reasonable number of hours expended on this case. In other words, the court failed to determine the baseline figure at all, let alone to do so as described in *Pirgu*.

Second, although the probate court indicated that it had considered all of the reasonableness factors described in *Pirgu*, *id*. at 281-282, and had "weighed some factors more heavily," the court only stated its analysis concerning *some* of those factors; it failed to "briefly discuss its view of *each* of the factors . . . on the record." See *id*. at 282 (emphasis added). Furthermore, because the probate court had failed to calculate a "baseline figure," it neither could nor did use the reasonableness factors "to determine whether an up or down adjustment" to the baseline figure was appropriate. See *id*. at 281.

Finally, although the probate court initially recognized—correctly—that "the burden of proving reasonableness rests with the party requesting the fees," see *id*. at 281 n 45, in its ensuing analysis, the probate court at least twice indicated that "LeRoux," the trustee, bore the "burden" concerning certain aspects of the reasonableness inquiry. In that respect, also, the probate court erred. As the party moving for an award of reasonable costs and fees, it was Breer, not the trustee, who bore the burden of proof concerning the requested award's reasonableness. See *id*.

Because the probate court failed to duly apply the appropriate legal test, we vacate its fee award and remand for further proceedings. A fee award based on such an erroneous analysis "necessarily" constitutes an abuse of discretion. *Id*. at 282-283 ("The trial court erred by not starting its analysis by multiplying a reasonable hourly rate by the reasonable number of hours expended. Further, although it acknowledged some of the [reasonableness] factors, the trial court also erred by primarily relying on only one factor—the amount sought and results achieved—and failing to briefly discuss its view of the other factors. Therefore, the trial court necessarily abused its discretion, and . . . the Court of Appeals erred by affirming the . . . fee award."). Additionally, when a trial court fails to properly analyze a fee award on the record, an appellate court cannot duly analyze whether the trial court abused its discretion by ruling as it did. *Id*. at 283 n 50. Consequently, we vacate the probate court's disputed sanction award and remand with instructions

for the court to make the specific findings required under the applicable legal test and this opinion. See *id*. at 283.

C. EXPERT TESTIMONY

Breer argues that, under MRE 702, the probate court erred or abused its discretion by permitting the trustee's expert, Edward Lennon, to offer "expert" opinion testimony on behalf of the trustee and Connors concerning "what constitutes a reasonable attorney rate and . . . the overall amounts charged." In particular, Breer contends that Lennon's expert opinions in those regards were not based on reliable methods or principles because they were admittedly premised, in part, on the State Bar of Michigan's 2017 Economics of Law Practice Survey. Breer further argues that because the trustee did not introduce sufficient evidence to demonstrate that the 2017 survey was reliable, the probate court abused its discretion by considering that survey as part of its reasonableness analysis.

As an initial consideration, we agree that the probate court abused its discretion by permitting Lennon to offer expert-opinion testimony concerning several pure questions of law, such as whether *Smith* controlled the court's fee analysis and whether, under controlling caselaw, the court should utilize "attorney rates for Oakland County" rather than "the mean or median rates for a 'national attorney', or the median rates in Chicago." It is axiomatic that witnesses may not offer an expert opinion "regarding a question of law, because it is the exclusive responsibility of the trial court to find and interpret the law." *Lenawee Co v Wagley*, 301 Mich App 134, 161; 836 NW2d 193 (2013) (quotation marks and citation omitted). Thus, on remand, the probate court shall disregard all "expert" opinions on questions of law that were introduced into evidence at the two-day bench trial in this matter.

On the other hand, we are not persuaded by Breer's argument under MRE 702. Trial courts have a "gatekeeping obligation" under MRE 702, which obliges them "to review *all* expert opinion testimony" for admissibility under that rule. *Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004). "This gatekeeper role applies to *all* stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). "While a party may waive any claim of error by failing to call this gatekeeping obligation to the court's attention, the court *must* evaluate expert testimony under MRE 702 once that issue is raised." *Craig*, 471 Mich at 82.

Breer argues that the probate court abused its discretion by relying on Lennon's expert opinions, which were based in part on the 2017 Economics of Law Practice Survey, despite Breer's challenge that the survey was not sufficiently reliable to pass muster under MRE 702. However, it is "not improper for [a] trial court to consider the State Bar of Michigan Economics of Law Practice Survey when evaluating the reasonableness of . . . attorney fees." *Vittiglio v Vittiglio*, 297 Mich App 391, 409; 824 NW2d 591 (2012). On the contrary, a "court *should* use reliable surveys or other credible evidence of the legal market" as part of such an analysis because "[t]he fees customarily charged in the locality for similar legal services can be established by testimony or empirical data found in *surveys and other reliable reports*." *Smith*, 481 Mich at 530-532 (emphasis added); accord *Pirgu*, 499 Mich at 281. Indeed, because of its "unquestionable reliability," it is

proper for trial courts to take judicial notice of the State Bar of Michigan Economics of Law Practice Survey. See *Vittiglio*, 297 Mich App at 409 (quotation marks and citation omitted).

In light of such authority, and of Lennon's testimony that the figures contained in the 2017 Economics of Law Practice Survey were consistent with the fees customarily charged in both Detroit and southern Oakland County, and of his familiarity with the local legal market after 30 years of litigating fee disputes in Metropolitan Detroit, the probate court did not abuse its discretion by rejecting Breer's challenge to the survey's reliability. In fact, the probate court did not *fully* embrace the survey as reliable; it only did so *partially*, explaining that although the "Survey has some limitations" and is "not the most reliable measure of a reasonable hourly attorney rate," it was nevertheless "a starting point" that could be used, in conjunction with the "Peer Monitor reports" and witness testimony from trial, as part of the *Smith/Pirgu* reasonableness analysis. Indeed, the probate court arguably *aided* Breer by considering the 2017 survey despite her challenge to it under MRE 702. To reiterate, as the party seeking a fee award, Breer bore the burden of proving the reasonableness of her requested fees under the *Smith/Pirgu* test. See *Pirgu*, 499 Mich at 281 n 45. That is, Breer bore the burden of producing sufficient "reliable surveys or other credible evidence of the legal market" to establish "[t]he fees customarily charged in the locality for similar legal services[.]" See *Smith*, 481 Mich at 530-532.

For essentially those same reasons, the probate court did not abuse its discretion by considering those expert opinions of Lennon that were based on the disputed survey, at least to the extent that those opinions did not attempt to answer pure legal questions. Given that *Vittiglio*, 297 Mich App at 409, recognized the "unquestionable reliability" of the empirical data contained in such surveys, and given that Lennon's opinions were based not only on the survey but also on his decades of experience litigating fee disputes in the region, we cannot conclude that the probate court's decision to consider Lennon's disputed expert opinions fell outside the range of reasonable, principled outcomes. See *Elher*, 499 Mich at 24-25 (observing that, "depending on the nature of the issue, the expert's expertise, and the subject of the expert's testimony," "the relevant reliability concerns may focus upon personal knowledge or experience," and "it is within a trial court's discretion how to determine reliability") (quotation marks and citations omitted).

D. BREER'S MOTION FOR ADDITIONAL SANCTIONS

Under the heading of a single issue, Breer raises two distinct arguments for reversal of the probate court's order denying her motion for additional sanctions. We do not find either argument persuasive.

Breer first argues that the probate court abused its discretion by refusing to sanction Connors under MCR 1.109(E) for certain objections contained in the trustee's July 16, 2019 objections to Breer's itemized bill of costs. In particular, Breer contends that because Connors admittedly signed those objections, which were based on unspecified "statutes" that Connors was subsequently unable to cite, the issuance of a sanction against Connors was mandatory—not discretionary—under former MCR 1.109(E)(6). We perceive no abuse of discretion in the probate court's ruling.

In *Kelsey v Lint*, 322 Mich App 364, 379; 912 NW2d 862 (2017), this Court examined MCR 1.109(E)(5)'s textual precursor, former MCR 2.114(D),[9] holding that,

> [u]nder th[at] rule, an attorney is under an affirmative duty to conduct a reasonable inquiry into both the factual and legal basis of a document before it is signed. The reasonableness of the inquiry is determined by an objective standard and depends on the particular facts and circumstances of the case. The filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions . . . . [(Quotation marks and citations omitted).]

Breer is correct that, in light of MCR 1.109(E)(6)'s use of the mandatory phrase "shall impose . . . an appropriate sanction," if a violation is proven, then an award of sanctions is "mandatory." See *Guerrero v Smith*, 280 Mich App 647, 678; 761 NW2d 723 (2008). But as noted in *Kelsey*, 322 Mich App at 379, 381, when an attorney's signature is concerned, a proper analysis under MCR 1.109(E)(5) involves whether the attorney signed the "document" only after conducting "a reasonable inquiry into both the factual and legal basis" for it. Also, it is a question of fact, reviewed for clear error, whether the attorney performed a "reasonable" inquiry before signing the document in question, and the reasonableness of the inquiry performed depends "on the facts and circumstances of th[e] particular case." *Id*. at 379, 381-382.

In this instance, Connors explained to the probate court that, in light of the relatively recent relocation of the pertinent portions of former MCR 2.114(D) and (E) to MCR 1.109(E), he had difficulty locating any binding authority construing or applying the relevant portions of MCR 1.109(E). In his research, he located an article, MacWilliams & Mendel, *Recovering Attorney Fees and Costs: What You Need to Know*, 93 Mich B J 34 (Sep 2014), which discussed various provisions under which costs and attorney fees might be awarded as sanctions, including MCR 2.403(O), various statutes, and former MCR 2.114. Connors further explained that his disputed objections in this case had been premised on the statutes mentioned in that article. When he signed the disputed objections, he "believed, to the best of his knowledge, information, and belief formed after reasonable inquiry"—albeit perhaps mistakenly—that the statutes discussed in the article were a proper legal basis for the objections at issue here.

After considering the matter, the probate court credited Connors's assertion that, when he signed the disputed objections, he had honestly believed—based on his legal research—that the statutes in question supported his legal position. On that basis, the probate court found that Connors had not violated the signature requirement of MCR 1.109(E) by signing the objections, and the court therefore declined to sanction him under that rule.

On the record now before us, we cannot conclude that the probate court clearly erred by finding no violation of MCR 1.109(E) with regard to the trustee's July 16, 2019 objections. To begin with, the probate court's finding in that regard seemingly rests, at least in part, on a

[9] The relevant portions of MCR 1.109(E) include language that was relocated from former MCR 2.114(D) and (E). *New Covert Generating Co, LLC v Twp of Covert*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 348720); slip op at 31. Thus, it is appropriate to consider decisions construing those subparts of former MCR 2.114.

credibility judgment: its decision to credit Connors's explanation. We see no basis for disturbing that credibility judgment here. Also, it is true that the recent reshuffling of provisions from former MCR 2.114 to MCR 1.109(E) made legal analysis and research concerning such provisions more complex and difficult. And crediting Connors's explanation, after researching the matter, he relied on the statutes discussed in the bar journal article as the basis for his disputed objections, mistakenly believing that those statutes supported the disputed objections. Under the circumstances at bar, and deferring to the probate court's factual findings, it appears that Connors made an objectively reasonable inquiry into the legal basis for his disputed objections before signing them. His mere *mistake* of law, formed after reasonable inquiry, does not constitute grounds for sanctioning him under MCR 1.109(E). Therefore, we are not definitely and firmly convinced that the probate court made a mistake by finding no violation of MCR 1.109(E) in this regard.

We turn now to Breer's other argument concerning her motion for additional sanctions. She argues that the probate court abused its discretion by relying on an erroneous construction of MCR 1.109(E) to deny her request for sanctions in the form of "fees for fees." Specifically, Breer argues that because an award of sanctions is mandatory once a violation of MCR 1.109(E) is proven, under the plain meaning expressed by the text of MCR 1.109(E)(6), she was entitled to recover sanctions including *all* "reasonable expenses incurred because of the filing of" the trustee's April 19, 2019 motion to compel discovery, including those costs and fees she incurred in litigating the amount of sanctions to be awarded. We disagree.

Again, Breer is correct that, in light of the use in MCR 1.109(E)(6) of the mandatory phrase "shall impose . . . an appropriate sanction," if a violation is proven, then an award of sanctions is "mandatory." See *Guerrero*, 280 Mich App at 678. However, her expansive proposed construction of MCR 1.109(E)(6) ignores that, within a single sentence, that provision employs both the term "shall" and the term "may."

It is well settled that the term " 'may' is typically permissive," *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008), while the term "shall" generally denotes something mandatory, see, e.g., *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006), citing *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005) ("the Legislature's use of the word 'shall' indicates a mandatory and imperative directive"). Indeed, those terms have long been *presumed* to carry such denotations, and "[a] necessary corollary to the plain meaning rule is that courts should give the ordinary and accepted meaning to the mandatory word 'shall' and the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v Int'l Fid Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). It is particularly appropriate to afford the terms "shall" and "may" their ordinary meanings when they are used in contrast, and in discerning whether such meanings were intended, a court should employ the doctrine of *noscitur a sociis*, construing the terms by reference to their context. See, e.g., *People v Couzens*, 480 Mich 240, 250; 747 NW2d 849 (2008) (using the doctrine of *noscitur a sociis* to construe a statutory provision with subsections that alternately used the term "may" and the term "shall"); see also *In re Medina*, 317 Mich App 219, 233; 894 NW2d 653 (2016) (observing that statutory language must not be construed "in a vacuum, heedless of context.").

To reiterate, MCR 1.109(E)(6) provides that when a violation of the rule is proven, "the court . . . *shall* impose . . . an appropriate sanction, which *may* include an order to pay to the other party or parties the amount of the *reasonable expenses incurred because of the filing of the document, including reasonable attorney fees*." (Emphasis added.) Hence, under the meaning plainly expressed by the text of MCR 1.109(E)(6), although a court "shall" (i.e., must) impose an appropriate sanction when a violation is proven, it has discretion concerning what sanction, exactly, is appropriate. A court "may" award another party the reasonable expenses that party incurred "because of the filing of" the sanctionable document, including reasonable attorney fees, but such an award is not *mandatory*. See *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 727; 591 NW2d 676 (1998) (holding that, under former MCR 2.114(E), a trial court had discretion to "fashion an 'appropriate sanction' "). A contrary construction of MCR 1.109(E)(6), construing the term "may" as mandatory (i.e., as synonymous with the words "shall" and "must"), would impermissibly ignore the drafters' decision to use those different words within a single sentence of the same court rule. See *In re AGD*, 327 Mich App 332, 347; 933 NW2d 751 (2019) ("To arrive at petitioners' contrary interpretation, one is forced to ignore the plain meaning that is expressed by the Legislature's decision to use 'or' in the disjunctive sense and 'and' in the conjunctive sense at different times").

Under such a construction of MCR 1.109(E)(6), we are not persuaded that the probate court abused its discretion by declining to award Breer her requested "fees for fees." To begin with, as an exception to the American rule[10] that is in derogation of the common law, MCR 1.109(E) must be construed narrowly. See *Matras v Amoco Oil Co*, 424 Mich 675, 695; 385 NW2d 586 (1986); *Fleet Bus Credit v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). See also *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 649; 662 NW2d 424 (2003) ("it is well established that statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law.") (quotation marks and citation omitted). MCR 1.109(E) does not expressly sanction the award of "fees for fees"; rather, it grants a probate court discretion to fashion "an appropriate sanction," which "may" include those reasonable expenses, including attorney fees, incurred by another party "because of" the filing of the sanctionable document. Under a narrow construction of MCR 1.109(E)(6), because a party need not seek sanctions in the first instance, fees incurred in litigating the amount of sanctions are arguably incurred "because of" the court's decision to sanction and the party's decision to litigate the matter, not the filing of the sanctionable document itself. Accordingly, we question whether an award of "fees for fees" might be permissible under MCR 1.109(E) under any circumstances.

We need not consider or decide that question to properly adjudicate these appeals, however. Assuming, without deciding, that the trial court did have discretion to include "fees for fees" in fashioning an appropriate sanction under MCR 1.109(E), the probate court did not abuse such discretion by refusing to do so under the circumstances at bar. Notably, at the time the probate court considered Breer's request for "additional sanctions," it had already granted her a relatively

[10] "Michigan generally follows the 'American rule' regarding attorney fees, which provides that fees are not generally recoverable unless a statute, court rule, or common-law exception provides otherwise." *Silich v Rongers*, 302 Mich App 137, 147-148; 840 NW2d 1 (2013).

sizable amount of sanctions related to the trustee's April 19, 2019 motion to compel discovery—just more than $86,749 in costs and fees. It is true that this litigation was highly contentious, involved issues more complex than those found in most garden-variety probate proceedings (at least indirectly), regarded substantial sums of money, and involved parties with significant financial means. But it is also true that the trustee's offending motion to compel was only four pages long, that its sanctionable content (i.e., its misrepresentation concerning Mr. Breer's trust) was easy to ascertain, and that the motion was withdrawn before a hearing on it ever took place. Under the unique circumstances, a different jurist might well have concluded that "an appropriate sanction" under MCR 1.109(E) was either considerably more or less than $86,749. But "[a]n abuse of discretion is not simply a matter of a difference in judicial opinion, rather it occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011). Therefore, we find no abuse of discretion in the probate court's refusal to award Breer "fees for fees" on top of the $86,749 in sanctions that she had already been awarded.

E. QUASHED SUBPOENAS AND PERSONAL LIABILITY

Breer argues that the probate court abused its discretion by quashing certain nonparty subpoenas and refusing to grant her any discovery regarding whether the trustee could be held personally liable for sanctions in this matter. However, in Breer's principal brief on appeal, she also acknowledges that, if this Court rejects her claim of error concerning the denial of "additional sanctions" (as discussed in § III(D) of this opinion), then her instant claims of error will be rendered moot. We agree. "A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy." *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) (quotation marks and citation omitted). Given our conclusion that the probate court did not abuse its discretion by denying Breer's motion for additional sanctions, it is a moot point whether the trustee might have been held personally liable for such sanctions had they been awarded. It is also a moot question whether the probate court should have permitted discovery concerning the trustee's potential personal liability. The resolution of such questions here would be purely academic; it could not have any practical legal effect on an existing controversy in these cases. Therefore, we decline to consider such questions on the merits.

F. PROPRIETY OF AWARDING SANCTIONS UNDER MCR 1.109(E)

The trustee argues that, for several reasons, the probate court erred or abused its discretion by awarding Breer sanctions under MCR 1.109(E) as a result of the April 19, 2019 motion to compel discovery. We find the trustee's arguments unavailing.

The trustee first argues that the probate court erred by issuing sanctions under MCR 1.109(E)(6) on the basis of its finding that a single paragraph of the trustee's April 19, 2019 motion to compel discovery "was false." The trustee contends that because MCR 1.109(E)(5)(b) focuses on whether "the document is well grounded in fact" and law, the probate court's analysis was improper insofar that it focused only on ¶ 9 of the disputed motion, not whether the document as a *whole* was well grounded in fact and law.

The trustee's argument is founded on her assertion that the probate court did, in fact, fail to state any finding that the April 19, 2019 motion was not well grounded in fact and law when

viewed as a whole. We disagree. In rejecting this same argument below, the probate court reasoned:

> Mr. Connors has repeatedly made the argument that well, it was just one erroneous paragraph in a whole motion, but *the whole motion* . . . depended on that erroneous—obviously erroneous statements—the whole—*the whole project* that he was engaging in there with his motion to compel deposition and discovery and so on were *all* based on that. [(Emphasis added).]

Thus, we reject the trustee's instant argument. The probate court did not err in its application of MCR 1.109(E) by failing to consider whether the April 19, 2019 motion to compel discovery was improper under that rule when viewed as a comprehensive whole.

Second, the trustee argues that the probate court was "wrong" when it found that ¶ 9 of the disputed motion was actually false. The trustee contends that, at most, ¶ 9 omitted a material fact, i.e., "that Mr. Breer's trust provided for a trust to be created for Mr. Ross only after Ms. Breer's death or if Ms. Breer disclaimed her interest in the assets." The trustee further argues that the omission of a material fact is not the same as an affirmative false *statement*. We remain unpersuaded.

Paragraph 9 of the trustee's April 19, 2019 motion to compel discovery stated that "Mr. Breer's Trust provided that a trust *was* to be established for the benefit of [the settlor] and funded with assets from Mr. Breer's estate." (Emphasis added.) In other words, the trustee and Connors affirmatively represented that, under the terms of Mr. Breer's trust, the creation and funding of a trust for the settlor's benefit "was" to occur without qualification. But the trustee and Connors admit that they were then in possession of a copy of Mr. Breer's trust, and even a cursory review of § 8 of that trust makes it abundantly clear that the creation and funding of a trust for the settlor's benefit is expressly conditioned on *several* conditions precedent. Among others, those conditions include Breer's death, and both the trustee and Connors were plainly aware that Breer was not deceased when they filed the motion at issue here—they were involved in active litigation against Breer at the time. In addition, § 8 of Mr. Breer's trust plainly provides that, until "any irrevocable vesting" occurred in favor of the settlor, the settlor lacked "any ascertainable, proportionate, actuarial or otherwise fixed or definable right to or interest in all or any portion of any trust or its property" under that document. Thus, the document made clear that the settlor could not possess any attachable interest under it unless and until, at a minimum, both Breer and Mr. Breer first died. Accordingly, we are not definitely and firmly convinced that the probate court made a mistake by finding that ¶ 9 of the April 19, 2019 motion to compel contained an affirmative misstatement—one that Connors would have discovered easily by simply reading § 8 of Mr. Breer's trust.

Finally, the trustee argues that because Breer was a "non-party" to these probate proceedings, the probate court "abused its discretion" by awarding sanctions to Breer under MCR 1.109(E). We find no merit to that claim of error.

It is true that MCR 1.109(E)(6) provides: "If a document is signed in violation of this rule, the court, on the motion of *a party* or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the *other party or parties* the amount of the reasonable expenses incurred because of the filing

of the document, including reasonable attorney fees." (Emphasis added.) But the trustee's argument ignores that when the trustee filed her April 19, 2019 motion to compel, Breer *had been* a party to these proceedings, having been granted leave to intervene as a party on March 13, 2019. Although the probate court dismissed Breer from these proceedings on April 10, 2019, as part of its order entering a stipulated judgment against Breer and dismissing the trustee's petitions, even after the probate court dismissed Breer from these proceedings, it continued to accept her filings as if she was still a party, and she is listed as an "INP"—presumably an abbreviation for "interested person"—on the probate court's register of actions. And regardless, the trustee cites no authority for the proposition that a party previously dismissed from probate proceedings cannot nevertheless be considered a "party" for purposes of MCR 1.109(E)(6), and we are not aware of any such authority.

Nor does the trustee cite any authority indicating that a trial court cannot, as part of its discretion to fashion "an appropriate sanction" under MCR 1.109(E)(6), decide to award such sanctions to a *non*party. MCR 1.109(E)(6) plainly states that sanctions may be awarded under that rule on the court's "own initiative," and thus it is not strictly necessary for a "party" to file a motion requesting such an award. Moreover, although a trial court's award of sanctions under MCR 1.109(E)(6) "*may* include an order to pay to *the other party or parties* the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees," a court has significant discretion concerning what constitutes an "appropriate sanction" under that rule. Under certain circumstances, a party may engage in conduct toward a nonparty that clearly violates MCR 1.109(E)'s signature requirements, but which is prejudicial to only the nonparty, not any named parties to the action. For instance, a party might file a motion, signed by his or her attorney, that requests the issuance of a nonparty subpoena based on factual allegations that the party and counsel both know to be false. In such instances, an award of sanctions to the nonparty might constitute all or part of an "appropriate sanction" under MCR 1.109(E)(6). In any event, we conclude that the text of MCR 1.109(E)(6) does not support the trustee's proposed construction here. In consequence—regardless of whether Breer qualified as a "party" to these proceedings at the time—the probate court did not err or abuse its discretion by ordering the trustee and Connors to pay sanctions to Breer under MCR 1.109(E)(6).

G. THE TRUSTEE'S PARTIAL SUSPENSION

Finally, the trustee argues that the probate court abused its discretion by either removing or suspending her for a breach of trust. Specifically, the trustee's argument of this issue is premised on her contention that the probate court either removed or suspended her as trustee for a breach of trust under MCL 700.7706(2)(a) (providing that a probate court "may remove a trustee" for "a serious breach of trust") or MCL 700.7901(2)(f) (providing that a probate court may "remedy a breach of trust" by "[s]uspend[ing] the trustee"). The trustee argues that she committed no breach of trust under the pertinent provisions of the Estates and Protected Individual Code, MCL 700.1101 *et seq.*, and thus it necessarily follows that the probate court abused its discretion by removing or suspending her for such a breach. The trustee also argues that the probate court abused its discretion by failing to recognize that Breer lacked "standing" to petition for the trustee's removal, given that Breer was not a beneficiary of the subject trusts. We are again unpersuaded.

To begin with, it is immaterial whether Breer had standing to file her November 1, 2019 petition, which sought, among other things, removal of the trustee and the appointment of a special

fiduciary. Regardless, the probate court had authority to do *either* of those things sua sponte. See MCL 700.7706(1) ("a trustee may be removed by the court on its own initiative"); MCR 5.204(A) ("The court may appoint a special fiduciary . . . under MCL 700.1309 on its own initiative"); MCL 700.1309(a) (providing that "[u]pon reliable information received from an interested person, county or state official, or other informed source, including the court's files, the court may enter an order in a proceeding to" "[a]ppoint a special fiduciary to perform specified duties"). Therefore, we reject the trustee's argument concerning Breer's standing.

We also reject the trustee's breach-of-trust argument. In short, the argument is a strawman, by which the trustee seeks reversal on the basis of a ruling the probate court never actually made. The trustee contends that the probate court either removed or suspended her for a breach of trust under MCL 700.7706(2)(a) or MCL 700.7901(2)(f). We acknowledge that the probate court orally stated at the November 20, 2019 hearing that it was inclined to appoint a special fiduciary and temporarily suspend some of the trustee's powers because the court was (1) "concerned" whether the trustee was "abusing her authority" as a fiduciary; (2) had been unable to locate, in the court file, either an order appointing the trustee as a fiduciary or an acceptance of appointment; and (3) wanted an independent inquiry by the special fiduciary into Breer's allegations that the trustee had committed a "breach of fiduciary duties . . . that put assets of the trust at risk" before deciding whether to continue the trustee in that role. "[H]owever, a court speaks through its written orders and judgments, not through its oral pronouncements." *In re KMN*, 309 Mich App 274, 287; 870 NW2d 75 (2015) (quotation marks and citation omitted).

In this instance, the probate court's disputed order, which partially suspended the trustee until further order of the court, did not indicate that she was being suspended for committing a breach of trust. Indeed, no such finding was necessary to effectuate the trustee's suspension. Under MCR 5.204(B), "[a]ppointment of a special fiduciary suspends the powers of the *general fiduciary* unless the order of appointment provides otherwise." (Emphasis added.) Put differently, in light of the probate court's order appointing a special fiduciary, *all* of the trustee's powers would have been automatically suspended by operation of law under MCR 5.204(B) had the probate court not decided to order otherwise. Hence, it is clear that the probate court never actually made the ruling that the trustee seeks to challenge here. The court did not rule that it was suspending her for a proven breach of trust; it ruled that she would *retain* certain powers as trustee despite the court's appointment of a special fiduciary. We therefore reject the trustee's instant claim of error.

IV. CONCLUSION

In sum, although the majority of the parties' various claims of error lack merit, we conclude that the probate court did abuse its discretion in certain respects. Of particular import, the probate court failed to duly apply the *Smith/Pirgu* reasonableness test on the record. Therefore, we affirm in part, vacate the disputed fee award and the probate court's related judgment, and remand for the trial court to make the specific findings required.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Michael F. Gadola
/s/ Kathleen Jansen
/s/ Colleen A. O'Brien

Court of Appeals, State of Michigan

ORDER

Michael F. Gadola
Presiding Judge

Kathleen Jansen

Colleen A. O'Brien
Judges

In re Edmund William Ross II Irrevocable Trust; In re William James Ross IV Irrevocable Trust

Docket Nos. 349679; 349680; 349917; 349926; 351355; 351356; 351823; 351839; 351981; 351982; 354298; 354303

LC No. 2006-307607-TV; 2006-307608-TV; 2006-307609-TV

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we remand for the trial court to provide the specific findings required under the test provided in *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), and *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016), to determine reasonable attorney fees. The proceedings on remand are limited to these issues.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings shall be prepared and filed within 21 days after completion of the proceedings.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

September 16, 2021
Date

Chief Clerk