STATE OF MICHIGAN

COURT OF APPEALS

In re JOHN F. ERVIN TESTAMENTARY TRUST.

JANE PEARSON EVANS, a/k/a MARY JANE PEARSON EVANS,

Petitioner-Appellant/Cross Appellee,

v

BANK ONE TRUST COMPANY, NA,

Respondent-Appellee/Cross-Appellant,

and

ERVIN INDUSTRIES, JOHN PEARSON, NANCY P. RANDOLPH, and ANN E. JORGENSON,

Appellees.

UNPUBLISHED
February 28, 2008

No. 270498
Washtenaw Probate Court
LC No. 61-447121-TT

Before: Bandstra, PJ, and Donofrio and Servitto, JJ.

PER CURIAM.

Petitioner Jane Pearson Evans ("Evans") appeals as of right the probate court orders dismissing her objections to the 18th account of the John F. Ervin Testamentary Trust[1] and to the 18th and final account of the John F. Ervin Trust for the benefit of Mary Ervin Pearson (collectively referred to herein as "the 18th Accounts") submitted by respondent Bank One Trust

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[1] This trust, originally established by John F. Ervin for the benefit of his daughter and four grandchildren, including Evans, was divided into five separate trusts in 1987 so that each beneficiary had his or her own individual testamentary trust. The trust for Ervin's daughter terminated in 2005, following her death. For convenience, the four remaining testamentary trusts originating from the single trust established by John Ervin will be referred to in this opinion as the singular "Trust."

Company (now known as JPMorgan Chase Bank, N.A.) ("Bank One"), and awarding Bank One $375,000 in attorney fees and costs, payable from the income of Evans' testamentary and revocable inter vivos trusts. We reverse and remand for entry of a revised order regarding attorney fees and for further review and fact finding on whether Bank One's requested attorney fees and costs should be reduced, but otherwise affirm.

Evans first argues that the probate court erred by "peremptorily" dismissing her objections to the 18th Accounts, except to the extent that they related to Ervin Industries' acquisition of The Nanosteel Company ("Nanosteel"), at the January 12, 2006 hearing, in the absence of a pending motion for summary disposition, without adhering to the timing and notice requirements for those motions set forth in MCR 2.116, and without allowing any discovery. We disagree.

Res judicata bars a subsequent action between the same parties, or their privies, when the facts or evidence essential to the action are identical to those essential to a prior action. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001); *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). The purposes of res judicata are to relieve parties of the cost and vexation of multiple lawsuits, to conserve judicial resources, and to encourage reliance on adjudication by preventing inconsistent decisions. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999); *Richards v Tibaldi*, 272 Mich App 522, 530; 726 NW2d 770 (2006). Res judicata applies where: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007); *Baraga County v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002); *Richards, supra* at 531. The burden of establishing the applicability of res judicata is on the party asserting it. *Baraga County, supra*. The test to determine whether the two actions involve the same subject matter is whether the facts are identical in, or the same evidence would sustain, both actions. If so, the two actions are the same for the purpose of res judicata. *Adair v State*, 470 Mich 105, 123-124; 680 NW2d 386 (2004). Michigan courts take "a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.* at 121.

Similarly, collateral estoppel precludes relitigation of an issue in a subsequent action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006); *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). Much like res judicata, collateral estoppel, too, is intended to relieve parties of multiple litigation, conserve judicial resources, ease fears of prolonged litigation, prevent inconsistent decisions, and encourage reliance on adjudication. *Monat v State Farm Ins Co*, 469 Mich 679, 692-693; 667 NW2d 843 (2004); *Minicuci v Scientific Data Mgt, Inc*, 243 Mich App 28, 33; 620 NW2d 657 (2000). Generally, for collateral estoppel to apply (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment, (2) the same parties must have had a full and fair opportunity to litigate the issue, and (3) there must be mutuality of estoppel. *Mona, supra* at 682.

In Evans' prior probate court action, filed in 2001, Evans raised objections to certain transactions entered into by Ervin Industries in 1993, 1996 and 1998, and to loans from Bank One affiliates to Ervin Industries relating to the those transactions. Evans also asserted that Bank One had breached its legal duties as trustee by virtue of its lending relationship with Ervin Industries and alleged lack of due diligence regarding Ervin Industries' investments, and sought its removal as trustee. Those claims were resolved against Evans on a variety of grounds. Pertinent to the instant action, this Court specifically determined that loans made to Ervin Industries by Bank One affiliates were authorized by applicable law and were reasonable and prudent, and that Bank One had not breached its fiduciary duties as trustee in its management of the trust. *In re John F Ervin Testamentary Trust*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2006 (Docket No. 249974), slip op at 7-9.

Evans filed a second action in 2003, against Bank One, Ervin Industries, Pearson and others in federal court alleging various state-law claims relating to the three business transactions previously at issue in the probate court action. Those claims were also dismissed, on res judicata, collateral estoppel and statute of limitations grounds. *Evans v Pearson Enterprises, Inc*, 434 F3d 839, 845-846 (CA 6, 2006).

At the hearing on her objections to the 18th Accounts, Evans' counsel specifically indicated that Ervin Industries' acquisition of Nanosteel was the only material transaction to which Evans' objections pertained that took place during the time period covered by the 18th Accounts. Counsel also implicitly acknowledged that the other transactions and conduct complained of in Evans' objections occurred prior to the current accounting period and were raised, or could have been raised, in the prior actions.[2] Thus, the probate court did not err in dismissing the portion of Evans' objections pertaining to conduct prior to the period covered by the 18th Accounts; those objections were barred by the decisions issued in the prior probate court and federal court actions. *Washington, supra* at 419; *Sewell, supra* at 575; *Chestonia supra* at 429.

As for Evans' claim of procedural error, we note that Evans affirmatively requested that the court sustain her objections and take other action thereon on January 12, 2006, a date selected by her counsel for the hearing on her objections. Therefore, Evans cannot now be heard to complain that the court ruled on a portion of her objections at the hearing. Further, despite the representation that Evans' objections to the 18th Accounts raised "several" new issues never previously before a court, Evans' counsel repeatedly indicated that the only transaction and related conduct at issue to which Evans objected and which occurred during the relevant accounting period was the "Nanosteel transaction and loans."[3] Therefore, counsel effectively

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[2] Evans' counsel suggested that because Evans' prior actions were decided on statute of limitations and other procedural grounds, the prior issues, including loans that "continue to exist and make Bank One money," were "properly before the [c]ourt on the objections" to the 18th Accounts. However, because Evans' prior actions were dismissed with prejudice, those prior rulings constitute rulings on the merits, resolving those claims against Evans. *Washington, supra* at 417; MCR 2.504(B)(3). Any suggestion otherwise lacks merit.

[3] Evans' counsel did indicate that Evans wished to "explore whether or not the fact that [the (continued…)

conceded that the only conduct properly placed at issue by Evans' objections to the 18th Accounts was that relating to Ervin Industries' investment in Nanosteel.

This Court has explained, in the context of MCR 2.116(C)(10), that a trial court may grant summary disposition, without discovery, where the matter presents a question of law, where there is no factual dispute or where there is no reasonable likelihood that discovery will yield support for the position of the party against whom summary disposition is granted. *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 271; 715 NW2d 914 (2006); *Ensink v Mecosta Co General Hosp*, 262 Mich App 518, 540; 687 NW2d 143 (2004). Here, although no motion for summary disposition had yet been brought, the question whether res judicata and/or collateral estoppel applied to bar any or all of Evans' objections presented questions of law regarding which there was no factual dispute. *Washington, supra* at 417; *Adair, supra* at 121-122. Therefore, there was no reasonable likelihood that discovery would impact the appropriate resolution of these objections. Under MCR 2.116(I)(1), a court is affirmatively required to "render judgment without delay" when "the pleadings show that a party is entitled to judgment as a matter of law." *Sobiecki v Dept of Corrections*, 271 Mich App 139, 141; 721 NW2d 229 (2006). Therefore, the probate court did not err, proceedurally, by ruling on Evans' objections following the January 12, 2006 hearing.

Next, Evans asserts that the probate court erred in dismissing those objections to the 18th Accounts relating to Ervin Industries' acquisition of Nanosteel. Evans complained both that Bank One did not adequately disclose Ervin Industries' acquisition of Nanosteel in the 18th Accounts, and that Bank One's conduct relative to Ervin Industries' investment in Nanosteel itself violated the prudent investment rule set forth in MCL 700.7302. We disagree.

Courts refer to the trust instruments to determine the powers and duties of the trustees and the intent of the settlors regarding the purpose of trusts. *In re Butterfield Estate*, 418 Mich 241, 259; 341 NW2d 453 (1983) (*In re Butterfield II*). Relevant statutes and case law further define a trustee's duties. *In re Green Charitable Trust*, 172 Mich App 298, 312; 431 NW2d 492 (1988). Thus, trustees have a statutorily imposed duty to provide trust beneficiaries with an annual statement of account, MCL 700.7303(3)(b)(i), which reports, at a minimum, the trust assets, their market values where feasible, the trust liabilities, receipts and disbursements, and the source and amount of the trustee's compensation. MCL 700.7303(3)(d). Accordingly, Bank One was required to provide Evans, and the other Trust beneficiaries, with an annual report identifying the Trust assets, the value of those assets, the Trust's liabilities, receipts and

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loans addressed in the previous actions] exist through a subsidiary of Bank One, . . .have any influence on the objectivity of Mr. Meretta, . . . and what he does." However, counsel did not point to conduct by Meretta that was deficient, other than, perhaps, regarding the Nanosteel transaction. Counsel also expressed concern that Bank One had not "undertaken its responsibility as trustee . . . to review the [Ervin Industries'] investments for the benefit of the beneficiaries [of the trust]," to consider that the market for metal abrasives was shrinking, and to "diversify the investment." However, again, counsel did not point to any specific conduct by Bank One to which Evans objected, other than that relating to Ervin Industries' acquisition of Nanosteel. And, as discussed further, *infra*, Bank One has no duty to diversify the trust's holdings unless and until Ervin Industries' stock becomes "unproductive of income."

disbursements, and the source and amount of Bank One's compensation as trustee. *Id.* It is undisputed that Bank One's 18th Accounts listed the assets owned by the Trust, assigned a market value to those assets, described the Trust's liabilities, receipts and disbursements and stated the source and amount of Bank One's compensation as trustee. Evans asserts, though, that the 18th Accounts are deficient because Bank One failed to report that Ervin Industries' invested in Nanosteel during the accounting period. Of fundamental importance, however, the Nanosteel investment was not made by the Trust, but by Ervin Industries. Nothing in MCL 700.7303 requires that Bank One report on the assets, transactions, liabilities, receipts, disbursements, etc., of an *asset* of the Trust. Nor does Evans provide this Court with any authority requiring that Bank One do so. Indeed, in *In re Butterfield*, 108 Mich App 363, 368-369; 310 NW2d 381 (1981), rev'd on other grounds, 418 Mich 241 (1983) (*In re Butterfield I*), this Court upheld a trial court's determination that a trustee's account was sufficient although it did not include the transactions of two corporations majority-owned by the holding company that was the trust's prime asset, where – as here – the beneficiaries received the annual financial statements of the company.

In re Butterfield involved a trust, the corpus of which consisted solely of all of the stock of Bijou Theatrical Enterprise Company, a holding company, which itself was the majority owner of W.S. Butterfield Theatres, Inc. and of Butterfield Michigan Theaters Company. *In re Butterfield I, supra* at 365. One of the trust beneficiaries objected to the trustee's 37th account, complaining primarily about the amount of earnings retained by the two Butterfield companies and the trustee's failure to include information about the Butterfield companies in its account. *Id.* at 367-368. This Court concluded that the probate court had the authority to require the trustees to justify the retention of any amount of earnings in excess of 25% of the net income of the Butterfield companies, and agreed with the trial court that, as the beneficiaries received financial statements of the Butterfield companies at least annually, and as the "theatrical business is a highly competitive business . . . a more detailed accounting on the public record should not be required." *Id.* at 368-370.

On appeal, our Supreme Court reversed this Court's determination regarding the probate court's authority to require justification for retained earnings; it did not address the contention that the trustee was required to report on transactions of the Butterfield companies in its trust accounting. *In re Butterfield II, supra* 257-258. Evans correctly points out that in its decision in *Butterfield*, our Supreme Court noted that:

> In those situations where a corporation is wholly owned by the trust and directly holds and controls all of the corporation's assets, courts are less reluctant to ignore the corporate entity and to consider the corporation, which is usually a holding company, an adjunct of the trust.

However, the Court also explained that "each case must be evaluated on its own facts with due consideration given to the settlor's intent . . ." *Id.* Here, unlike in *In re Butterfield*, Ervin Industries is a separate corporation; it is not wholly owned by the Trust.[4] And, Ervin Industries

[4] While the Trust owns all of the voting shares of Ervin Industries' stock, it owns only about 8%
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is not merely a holding company, but rather is a fully operational manufacturing company. Thus, we find no basis to ignore the corporate form so as to treat Ervin Industries merely as an adjunct of the Trust in this case. Further, here, as in *In re Butterfield*, Evans receives Ervin Industries' audited financial statements, apprising her of the activities, transactions, and circumstances of the company. Indeed, it is from Ervin Industries' financial statements that Evans learned of the Nanosteel transaction. Therefore, both this Court's opinion and our Supreme Court's opinion in the *In re Butterfield* case instruct that Bank One had no duty to report on Ervin Industries' acquisition of Nanosteel in its statement of account for the Trust.

Evans also asserts that Bank One acted imprudently with regard to Ervin Industries' acquisition of Nanosteel. That is, Evans claims that the Nanosteel investment violates the prudent investor rule, because that investment did not generate a favorable return. Evans also argues that Bank One has imprudently failed to diversify the trust. However, even were Ervin Industries to be treated merely as an adjunct of the Trust, such that Bank One would be answerable for Ervin Industries' business activities, including its acquisition of Nanosteel, the documents creating the Trust exempt the trustee from the reach of the prudent investor rule. MCL 700.7302 provides:

> *Except as otherwise provided by the terms of the trust*, the trustee shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule. If the trustee has special skills or is named trustee on the basis of representation of special skills or expertise, the trustee is under a duty to use those skills. [Emphasis added.]

The document creating the Trust specifically allows the trustee "to invest and reinvest . . . in income-producing assets in accordance with [its] judgment, *not being limited by any present or future investment laws* . . . ." In other words, as allowed by the statute, the document creating the Trust makes the statute's prudent investor rule inapplicable to any evaluation of Bank One's management of the Trust assets.[5]

We observe further that the document creating the Trust specifically permits the trustee to retain Ervin Industries' stock "without liability for any loss that may be incurred thereby, and without regard to the proportion that [it] may bear to the whole" Trust unless and until "any substantial amount of [it] shall be or become unproductive of income," at which point the trustee "shall within a reasonable time either convert such property to income-producing property, or compensate the income beneficiary or beneficiaries out of the [T]rust corpus" Certainly, the Ervin Industries' stock held by the Trust is not currently "unproductive of income" and Evans does not assert otherwise. Therefore, Bank One has had no duty to diversify the Trust's holdings at any time, and there is no basis for Evans to complain that Bank One has failed to do so.

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of all outstanding shares.

[5] Consequently, there is no basis for Evans' argument on appeal that the probate court incorrectly applied the prudent investor rule by concluding that Evans could not challenge Ervin Industries' acquisition of Nanosteel because of Ervin Industries' overall positive return to the Trust.

We conclude that there is no legal basis for Evans' claims that Bank One has a duty to diversify Ervin Industries, by controlling the business activities of, investments made by, and transactions entered into, by the company, or to diversify the Trust, or that Bank One has a duty to report Ervin Industries' activities in its statement of accounts for the Trust. Bank One's duty is to manage the Trust's holdings, including the Ervin Industries' stock, in accordance with the document creating the Trust and applicable law. *In re Butterfield II, supra* at 259. Evans' objections do not establish that Bank One has acted otherwise. Therefore, the probate court did not err in dismissing Evans' objections to Bank One's 18th Accounts of the Trust.

Finally, both Evans and Bank One take issue with the probate court's award of attorney fees and costs to Bank One. We agree with Bank One that it was entitled to reasonable attorney fees and costs. We also agree with Bank One that the probate court properly ordered that the awarded fees be paid from the income of Evans' individual testamentary trust. However, we agree with Evans that the probate court improperly determined that the attorney fee award should also be paid from the income of Evans' revocable trust.

This Court reviews the probate court's decision to award attorney fees for an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001); *In re Estate of L'esperance*, 131 Mich App 496, 501; 346 NW2d 578 (1984). The factual findings of the probate court supporting its decision are reviewed for clear error. MCR 2.613(C); *Gumma v D&T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999).

Pursuant to MCL 700.7401(1), a "trustee has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, use, and distribution of the trust property to accomplish the desired result of administering the trust legally and in the trust beneficiaries' best interest." This includes the authority to retain and reasonably compensate an attorney "to perform necessary legal services or to advise or assist the trustee in the performance of the trustee's administrative duties." MCL 700.7401(2)(w). See also, *In re Estate of Hammond*, 215 Mich App 379, 387; 547 NW2d 36 (1996) ("Attorney fees incurred by an executor to defend against a petition for his removal are properly chargeable against the estate where no wrongdoing is proven"); *In re Gerber Trust*, 117 Mich App 1, 15-16; 323 NW2d 567 (1982), *In re Eddy Estate*, 354 Mich 334, 351-352; 92 NW2d 458 (1958).[6] Therefore, Bank One was entitled to hire

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[6] Evans asserts that this Court's conclusion in *In re Gerber* that the attorney fees incurred by a trustee that fully prevails in an action brought by a beneficiary are allowable as charges against the trust was based on MCL700.541, which has since been repealed, and therefore it is of no import to the instant case. However, Evans ignores that MCL 700.7401 specifically allows a trustee to employ and reasonably compensate an attorney, as well as this Court's decision in *In re Estate of Hammond, supra* at 387 that "[a]ttorney fees incurred by an executor to defend against a petition for his removal are properly chargeable against the estate where no wrongdoing is proven." Therefore, the assertion that there is no basis in law to award Bank One its fees is without merit. Further, Evans cites *In re Baldwin's Estate*, 311 Mich 288, 314; 18 NW 827 (1945), for the proposition that expenses incurred by a trustee for its own benefit or in its own defense ordinarily are not chargeable to the trust. However, as noted by this Court in *In re Gerber, supra* at 15, such a reading selectively ignores the *Baldwin* Court's comment that a

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counsel to defend against, and to reasonably compensate its attorneys for fees necessitated by, Evans' prior lawsuits against it. Consequently, the probate court did not abuse its discretion in awarding Bank One attorney fees and costs incurred in defending those actions.

This Court has explained that generally, a court should hold an evidentiary hearing when one party is challenging the reasonableness of the attorney fees claimed, unless a sufficient record has been created to allow the court to review the issue. *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 113; 593 NW2d 595 (1999). In support of its request for approximately $562,000 in attorney fees and costs incurred in defending Evans' prior actions in probate and federal court, Bank One submitted materials setting forth the work undertaken in both the probate court and federal litigations, the total hours spent performing that work, the hourly rates of those performing the work, and the total amount billed to Bank One for that work. Bank One also provided affidavits establishing that the hourly rates charged were consistent with market rates and opining that the fees and costs charged were reasonable given the professional standing of Bank One's counsel, the reasonableness of the hourly rates charged, the complexity of the litigation and the results achieved.

When determining the reasonableness of the requested fees, a court should consider: '"(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.'" *Michigan Tax Management Services Co v City of Warren*, 437 Mich 506, 509-510; 473 NW2d 263 (1991), quoting *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). A trial court "is not limited to those factors in making its determination," however, and "need not detail its findings as to each specific factor considered." *Id.* See also, *John J Fannon Co v Fannon Products*, 269 Mich App 162, 172; 712 NW2d 731 (2006) ("[A] trial court is not required to give detailed findings regarding each factor."). And, "[t]he award will be upheld unless it appears upon appellate review that the trial court's finding on the 'reasonableness' issue was an abuse of discretion." *Michigan Tax Management, supra* at 510.

Based on our review of the record, we conclude that, contrary to Evans' assertions, the probate court did not abuse its discretion by awarding Bank One $375,000 in attorney fees and costs, considering both the amount of attorney fees and costs incurred by Evans during the course of, and the repetitive nature of the issues raised in, the successive actions. However, we also conclude that the trial court did not adequately explain its decision to reduce the attorney fees and costs requested by Bank One to that amount. Upon remand, the trial court should review the documentation in support of that request, hold a hearing if necessary, reconsider its award in this regard and articulate the reasons for its award.

Additionally, because the document creating the Trust specifically provides Bank One with the authority to allocate expenses to Trust income, as opposed to Trust principal, where Bank One believes that it is equitable to do so, the probate court did not abuse its discretion in allowing the award of the fees and costs to be paid from the income of the Trust, rather than the principal. Further, this Court has upheld the assessment of attorney fees solely against the

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different conclusion might be appropriate where, as here, the trustee fully prevails.

beneficiary or beneficiaries that pursued the litigation, where to do otherwise would be "grossly unjust or inequitable." *In re Estate of Hammond, supra* at 387-388. It was Evans and Evans alone that persisted, over the objection of her siblings, in litigating and relitigating the propriety of Bank One's conduct as trustee. Under these circumstances, it was appropriate to order that the fee award be paid from the income of Evans' individual testamentary trust. To force Evans' siblings to also pay these fees would have been inequitable and unjust under the circumstances presented. However, we conclude that the probate court overreached by also ordering that payment be made from the income of Evans' revocable trust. That trust was not a party to the probate court action and was not subject to its jurisdiction.

We reverse the probate court's decision that attorney fees be paid from the income of Evans' revocable trust. We remand for entry of an order requiring that they be paid from the income of Evans' individual testamentary trust and for further review and fact finding on whether Bank One's requested attorney fees and costs should be reduced. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto