STATE OF MICHIGAN

COURT OF APPEALS

In re ILENE G. BARRON REVOCABLE TRUST

MICHAEL SCULLEN, Trustee,

Appellant,

v

RICHARD BARRON, MARJORIE SCHNEIDER, and KATHLEEN BARRON,

Appellees.

UNPUBLISHED

January 24, 2013

No. 307713

Wayne Probate Court

LC No. 2008-730919-TV

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and BOONSTRA, JJ.

PER CURIAM.

Appellant, successor trustee of the Ilene G. Barron Revocable Trust, appeals as of right the probate court's order reducing his hourly rate for his fiduciary fees to $100 per hour.[1] We affirm the probate court's determination of a reasonable fiduciary fee rate; however, we conclude that certain of appellees' objections to appellant's fees are barred by the doctrine of res judicata, and we remand for consideration of whether appellees' objections are otherwise barred by the language of the trust agreement or the statute of limitations.

I. PROBATE COURT'S FEE EVALUATION

Appellees, beneficiaries of the Ilene G. Barron Revocable Trust, were unsatisfied with appellant's performance as successor trustee of the trust, and filed numerous objections with the probate court concerning this administration. The probate court held an evidentiary hearing regarding appellees' various petitions. Relevant to this appeal, appellees testified that appellant charged the trust approximately $150,000 in total fees during his over three-year administration; these fees included fiduciary fees and fees for legal work, including legal assistant fees. Appellant testified that his current hourly rate as an attorney is $195 and he typically does not charge a different fee for acting as a fiduciary in administering a trust, but charges his regular attorney fee. Further, testimony from a trust beneficiary established that appellant charged the trust $185 to $195 per hour for his services throughout his administration of the trust, and additionally charged $75 per hour for legal assistant fees. The probate court found appellant's fee to be excessive relative to the custom in the community and reduced his hourly rate for his fiduciary services to $100 per hour.

Appellant first claims that the probate court abused its discretion in reducing his hourly rate for his fiduciary services because there was no evidence to support the court's ruling and the court failed to consider the appropriate factors in evaluating the reasonableness of a trustee's fees. We disagree. In *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008) this Court set forth the standard of review for probate court decisions as follows:

> Issues of statutory construction present questions of law that this Court reviews de novo. But appeals from a probate court decision are on the record, not de novo. The trial court's factual findings are reviewed for clear error, while the court's dispositional rulings are reviewed for an abuse of discretion. The trial court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. [Citations omitted.]

---

[1] Appellees are the trust's beneficiaries. Only appellees Richard Barron and Marjorie Schneider were petitioners in the probate court.

Under the Michigan Estates and Protected Individuals Code ("EPIC"), "[i]f the terms of a trust, do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances." MCL 700.7708. In *Comerica v Adrian*, 179 Mich App 712, 724-725; 446 NW2d 553 (1989), this Court enumerated several factors that probate courts may utilize in determining the reasonableness of a trustee fee, including:

> (1) the size of the trust, (2) the responsibility involved, (3) the character of the work involved, (4) the results achieved, (5) the knowledge, skill, and judgment required and used, (6) the time and services required, (7) the manner and promptness in performing its duties and responsibilities, (8) any unusual skill or experience of the trustee, (9) the fidelity or disloyalty of the trustee, (10), the amount of risk, (11) the custom in the community for allowances, and (12) any estimate of the trustee of the value of his services.

However, "[t]he weight to be given any factor and the determination of reasonable compensation is within the probate court's discretion." *Id.* at 724; see also *In re Thacker Estate*, 137 Mich App 253, 258; 358 NW2d 342 (1984). The probate court has the "broadest discretion" in evaluating "the worth of services rendered in light of its experience and knowledge of such matters" and in determining "[t]he weight to be given any factor." *Comerica*, 179 Mich App at 724; *Thacker*, 137 Mich App at 258. Further, when evaluating a petition for review of the trustee's fees, the probate court must review the requested fees for reasonableness with "an eye toward preservation of the estate's assets for the beneficiaries." *In re Sloan Estate*, 212 Mich App 357, 364; 538 NW2d 47 (1995).

Although the expert testimony presented on the excessiveness of appellant's fee was found inadmissible[2] and the billing statements and accountings were not admitted into evidence, we conclude that the evidence, in light of the probate court's extensive experience and knowledge in evaluating the reasonableness of trustee fees, supported the court's reduction in appellant's hourly rate for his fiduciary services. *Comerica*, 179 Mich App at 724; *Thacker*, 137 Mich App at 258. It is evident from testimony at the evidentiary hearing, as well as the numerous petitions before the court concerning the administration of the trust, that the court was keenly aware of the factors pertinent to the probate court's determination of the reasonableness of a trustee's fee under Michigan law. Notably, testimony revealed the value, complexity, and composition of the assets comprising the trust, appellant's specific actions in administering the trust, specific issues that arose during the administration, appellant's level of experience in the practice of trust administration, and the adversarial nature of the relationship between two of the appellees and appellant. We believe, on this record, the probate court could adequately evaluate

[2] The probate court excluded the expert testimony from evidence, finding that the testimony was not properly admitted in accordance with MRE 703.

the reasonableness of appellant's fiduciary fee in accordance with the pertinent factors enumerated in *Comerica*, 179 Mich App at 724, especially in light of the court's extensive experience and knowledge in evaluating such matters. *Thacker*, 137 Mich App at 258.

We also believe the probate court properly relied on its own personal knowledge and extensive experience in reviewing trustee fees, in light of the testimony regarding the trust's administration, in determining a reasonable rate for appellant's fiduciary services. In fact, this Court has recognized that the probate court is encouraged to rely upon personal knowledge in determining the reasonableness of an attorney fee. *Thacker*, 137 Mich App at 258; citing *Becht v Miller*, 279 Mich 629, 640-641; 273 NW 294 (1937). It was also proper, in light of the court's experience, knowledge, and broad discretion in evaluating the worth of trustee services, to place significant weight on the customary fee charged in the community for fiduciary services, especially in light of the testimony indicating a lack of any specialized skill or experience on the part of appellant in trust administration. *Comerica*, 179 Mich App at 724; *Thacker*, 137 Mich App at 258. On this record, we believe the probate court's decision reducing appellant's fiduciary fee to $100 per hour was within the range of reasonable and principled outcomes, and thus, did not constitute an abuse of discretion. *Temple*, 278 Mich App at 128.

Appellant asserts that the probate court did not reference the factors enumerated in *Comerica*, 179 Mich App at 724, to be used in evaluating the reasonableness of a trustee's fees in its opinion. Instead, the court referenced the factors enumerated under Michigan Rule of Professional Conduct (MRPC) 1.5(a) for use in evaluating the reasonableness of attorney fees. Many of those factors are similar to the factors used to evaluate the reasonableness of trustee fees identified in *Comerica*, i.e., the skill and time involved, the customary fee, the amount in question or size of the trust or estate, and the experience of the attorney/trustee. Accordingly, we do not believe the court's reference to the factors enumerated under MRPC 1.5(a), instead of the factors enumerated in case law, constituted reversible error, especially considering the probate court's broad discretion in this arena. *Comerica*, 179 Mich App at 724; *Thacker*, 137 Mich App at 258. It is evident that the court placed significant weight on the customary fee for trustee services in the community in evaluating the reasonableness of appellant's fee, a factor identified as pertinent to the reasonableness of both an attorney's and a trustee's fee. Furthermore, the court did reference *Comerica* in a prior opinion, wherein the court indicated that in determining whether the trust accountings contain excessive trustee fees, it considers, among other factors, the factors enumerated in *Comerica*, which indicates that the court was, in fact, aware of the factors pertinent to evaluating the reasonableness of a trustee's fee.

We also disagree with appellant's contention that the probate court improperly considered the trust's accountings and his billing statements in reaching its decision. To support his argument, appellant claims that the court's reference in its opinion to $29,288.61 in "trustee administration fees" shows that the court impermissibly "went outside the record" and based its reasoning on its own review and analysis of the interim trust accountings and/or appellant's billing statements, which were not admitted into evidence. However, it is apparent that the court obtained the amount from appellant's proposed plan of distribution, which was filed with the court and properly admitted at the evidentiary hearing and represents the estimated additional expenses of administering the trust. Therefore, contrary to appellant's argument, the probate court's reference to the $29,288.61 amount does not necessarily indicate that the court

improperly considered evidence not admitted at the evidentiary hearing. In fact, it is uncontested that appellant's total fees throughout the administration of the trust approximated $150,000; this amount was reflected in the federal estate tax return introduced by appellant at the evidentiary hearing.

We conclude that the trial court did not abuse its discretion in determining a reasonable fee for fiduciary services. We note that the order of the probate court specifies that appellant's "*fiduciary fees* shall be billed to the Trust at a rate of $100 per hour." (Emphasis added). We do not read the probate court's order as imposing a reduced rate for *attorney fees* charged to the trust by appellant for legal services. According to the record before this Court, these two fees appear to have been invoiced separately in the interim accountings provided to appellees by appellant.

II. APPELLEES' OBJECTIONS TO THE APRIL 14, 2008 ACCOUNTING ARE BARRED BY RES JUDICATA

We note that appellant's accounting for the period ending April 14, 2008, had been filed with the probate court at the time appellees filed a petition in October 2008 objecting to appellant's allegedly improper payment of a claim against the trust. Appellees did not object to the payment of appellant's trustee fees in the 2008 petition. We agree with appellant that the doctrine of res judicata bars appellees from objecting to that accounting on the basis that appellant's fees were excessive, because they could have raised that objection in their earlier petition. "Michigan courts have broadly applied the doctrine of res judicata" and "have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999); see also, *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007); *Begin v Mich Bell Tel Co*, 284 Mich App 581, 600; 773 NW2d 271 (2009). Res judicata applies "when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001); *Limbach v Oakland Co Rd Comm*, 226 Mich App 389, 395; 573 NW2d 336 (1997).

There is no dispute that both of the petitions at issue involve the same exact parties, i.e., the appellees Richard Barron and Marjorie Schneider and appellant. Further, the earlier petition was decided on the merits for purposes of res judicata by the probate court's entry of a stipulated order resolving appellees' objection to the trust accounting for the period ending April 14, 2008. *Sewell*, 463 Mich at 575. "Probate court orders are final orders and have the force and effect of judgments in courts of record and are res judicata of the matters disposed of therein." *Banks v Billups*, 351 Mich 628, 634; 88 NW2d 255 (1958). Finally, the "matter contested in the second action was or could have been resolved in the first." *Sewell*, 463 Mich 575; see also, *Washington*, 478 Mich at 420; *Begin*, 284 Mich App at 599-601. It is evident that both petitions shared a common motivation, i.e., appellees' need to protect their beneficial interests in the trust's assets. Both actions sought to recover monies that Richard Barron and Marjorie Schneider believed appellant improperly disbursed from the trust, were related in time in that they concerned trust disbursements occurring during the period ending April 14, 2008, and

originated from the same interim accounting prepared by appellant. Therefore, the actions were sufficiently related in motivation, time, and origin, and would have formed a "convenient trial unit" to constitute the same transaction for purposes of res judicata. *Begin*, 284 Mich App at 601. Although the earlier and subsequent petitions did not necessarily rely on the same evidence, i.e., the evidence relevant in the earlier action concerned the nature and source of a specific claim allowed against the trust, whereas the evidence relevant in the subsequent action concerned the reasonableness of appellant's fees, "under Michigan's broad application of res judicata applying the 'same transaction' test, whether evidence necessary to support a first lawsuit differs somewhat from that necessary for subsequent claims will not be dispositive." *Id.*, 284 Mich App at 601. Because appellees could have raised their objection to appellant's trustee fee disbursed during the accounting ending in April 14, 2008 in his earlier action had they exercised reasonable diligence, it is now barred by res judicata. *Begin*, 284 Mich App at 600, 603, 605.

III. REMAND IS NECESSARY FOR THE PROBATE COURT TO CONSIDER BARS TO APPELLEES' OBJECTIONS TO THE TRUST ACCOUNTINGS

Appellant next claims that appellees were precluded from objecting to certain trust accountings because the trust agreement imposes a 90-day limitations period during which the beneficiaries are allowed to object to the accountings received from the trustee; otherwise the accounting is deemed to be accepted. Although the probate court did not decide this issue, we address it because appellant raised it before the court and it presents an issue of law. See *Detroit Leasing Co v City of Detroit*, 269 Mich App 233, 237-238; 713 NW2d 269 (2005), citing *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). However, because further fact finding is needed to resolve this issue, we remand for further consideration of the trust accountings to determine whether the limitations periods imposed by the terms of the trust agreement or MCL 700.7905 preclude appellees from objecting to appellant's trustee fees disclosed in those accountings.

In order to provide guidance to the trial court on remand, we make the following observations. In the absence of court supervision over the trust or a petition for review, the administration of the trust, including the payment of a trustee's fees, should proceed expeditiously in the hands of the trustee, consistent with the terms of the trust, free of judicial intervention. *Temple*, 278 Mich App at 137-138; MCL 700.7201(2); MCR 5.501(B), (C).[3] The

[3] The probate court's jurisdiction was initially invoked when two of the appellees filed a petition seeking court supervision of the trust on the basis that appellant had an adversarial relationship with them and continued to display bias against them. There is no indication in the lower court record that the court ever ordered supervision of the trust, and thus, the trust's administration should proceed consistent with the terms of the trust.

trust agreement contains a provision requiring the trustee, at least annually, to furnish the income beneficiaries with accountings of the principal, income, and disbursements of the trust. The provision also requires income beneficiaries to object to the accountings within 90 days of their receipt, or else the accountings are "deemed to be accepted." Accordingly, under the terms of the trust agreement, which govern the administration in the absence of judicial supervision or a petition for review, appellees were required to object within 90 days of their receipt of the accountings. Therefore, failure by appellees to object to the accountings within the time prescribed by the trust agreement constitutes acquiescence in the amount of trustee fees paid to appellant and precluded any challenge to the trustee fees disclosed in those accountings.

Appellant claims that he furnished quarterly trust accountings disclosing the amount of his fees to appellees following the grantor's death on January 28, 2008. However, the record before this Court contains no evidence, with the exception of the first accounting for the period ending April 14, 2008, from which it can be determined when appellant provided the interim accountings, because neither the accountings nor appellant's monthly billing statements were admitted in evidence or filed with the probate court as part of appellees' objections to the interim accountings. There was also no admissible testimony at the evidentiary hearing regarding this issue. Therefore, this Court is unable to determine whether any interim accountings disclosing appellant's fees were furnished to appellees before March 16, 2010, without objection. If so, then appellees are precluded from objecting to those accountings in accordance with the limitations period imposed under the trust agreement, which in the absence of judicial supervision, governed its administration. MCL 700.7201(2).

Additionally, appellees may also be barred from objecting to certain accountings under MCL 700.7905(1)(a), which provides a limitations period of one year to claim breach of trust where the trustee "sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the trust beneficiary of the time allowed for commencing a proceeding." In the absence of the accountings or testimony regarding this issue, however, we cannot ascertain whether appellant adequately informed appellees of the time allowed for commencing a proceeding against a trustee for breach of trust as required to invoke the one-year time limitation period. MCL 700.7905(1)(a), (2).

We affirm the probate court's order reducing appellant's hourly rate for his fiduciary fees to $100 per hour. We remand for further consideration of whether appellee's objections to the trust accountings are barred by language of the trust agreement or MCL 700.7905(1)(a), with the caveat that objections to the April 14, 2008 accounting are barred by res judicata. We do not retain jurisdiction.

/s/ Amy Ronayne Krause

/s/ Mark J. Cavanagh

/s/ Mark T. Boonstra