In the
Missouri Court of Appeals
Western District

SUSAN L. BROWN (A/K/A) SUSAN BROWN-THILL), TRUSTEE OF THE EUGENE D. BROWN TRUSTS CREATED BY TRUST AGREEMENT DATED FEBRUARY 27, 1989, AND JAMES H. COOPER, ESQ., TRUSTEE OF THE SAURINE L. BROWN TRUST, CREATED BY TRUST AGREEMENT DATED NOVEMBER 4, 1999,

Respondents,

v.

SUSAN BROWN-THILL,

Respondent,

RICHARD L. BROWN,

Appellant,

AND HIS MINOR CHILDREN,

Respondents.

WD79914

OPINION FILED:

January 9, 2018

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Kathleen A. Forsyth, Judge

Before Division One:
Cynthia L. Martin, P.J., James Edward Welsh, and Karen King Mitchell, JJ.

Richard L. Brown appeals the circuit court's judgment in a probate proceeding commenced by Susan Brown-Thill, in which she sought, *inter alia*, approval of the "Final Distribution of the Brown Family Estate and the Trustees' Final Accounting." We affirm.

Background

Brown and Brown-Thill, brother and sister, are the beneficiaries of Trusts established by their parents, Eugene D. Brown and Saurine L. Brown ("Grantors").[1] The Trusts, which we refer to as the "EDB Trust" and the "SLB Trust," were "mirror trusts" with essentially identical provisions. They were established in 1989 and 1999, respectively, and were created to allow the Grantors' Estate to pass at their deaths to residuary trusts set up for their children.[2] On January 3, 2007, the Grantors executed Restatements of their Trust Agreements. Those documents were drafted by James Cooper, who had been the Brown's estate attorney since 2006.

Eugene was the sole trustee of the EDB Trust until he suffered a disabling fall in 2007, after which Saurine began serving as sole Trustee of his Trust. Following Eugene's death in May 2008, Saurine appointed Vernon Lotman (her brother) and Cooper to serve as her co-trustees on the EDB Trust. Saurine was sole trustee of the SLB Trust until July 2007, when she appointed Lotman as the sole Trustee. In April 2008, Lotman appointed Cooper as a co-trustee of the SLB Trust. After Saurine died in March 2009, Lotman and Cooper continued to serve as co-trustees of her Trust. Upon Lotman's death in 2011, Cooper became the sole trustee of the SLB Trust.

When Saurine died, Brown and Brown-Thill became co-trustees of the EDB Trust charged with distributing the Trust into their own separate residuary trusts. The two siblings disagreed about various aspects of handling the Trust and eventually submitted their disputes to an arbitrator. In 2010, Brown and Brown-Thill entered into a binding Arbitration Agreement

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[1]Richard Brown has two minor children who are also beneficiaries of the Trusts. Attorney Jason Zager was appointed by the court to serve as guardian *ad litem* for the two minor children in this case.

[2]The Trusts provide that the trustee(s) "shall divide the trust estate of the Residuary Trust into equal shares as to provide one such share for each living child of the Grantor . . . each share shall be held and administered as the trust estate of a separate Residuary Trust for the primary benefit of the child or other descendant for whom the share is created, as provided below." Both Trust Agreements provide the trustees "full power and authority" to do all things necessary or proper to manage, control, invest, and reinvest the trust assets.

which was intended to resolve their disputes over the EDB Trust. The disputes nevertheless continued, and Brown eventually resigned as co-trustee of the EDB Trust in December 2011. Brown-Thill then became the sole trustee of the EDB Trust.

In December 2011, Brown filed a seven-count Petition against Cooper and his associates in the Jackson County Circuit Court ("the Civil Case"). In his first amended petition, Brown alleged, *inter alia*, breaches of fiduciary duties and legal malpractice.[3] The case was initially assigned to the Civil Division but was later transferred to the Probate Division.

Two years later, in December 2013, Brown-Thill and Cooper, as sole Trustees of the EDB and SLB Trusts, respectively, filed a petition in the Probate Division of the Jackson County Circuit Court ("the Probate Case"). They sought: (1) a declaration approving their proposed final distribution plans for both Trusts; (2) a declaration approving the final accountings for the Trusts; (3) an offset against Brown's share of the Estate for attorneys' fees, expenses, and costs incurred by the Trusts in defending lawsuits filed by him;[4] and (4) an injunction enjoining Brown from bringing "further vexatious litigation" regarding the Brown Family Estate.

Along with his Answer, Brown filed a Counterclaim seeking: (Count I) damages for breach of fiduciary duty against Cooper, as trustee of the SLB Trust, and against Brown-Thill, as trustee of the EDB Trust; (Count II) damages for legal malpractice against Cooper and his law partner, Donald Friend II, individually, and their law firms; (Count III) damages for breach of

[3]Specifically, in Count I, Brown sought injunctive relief and damages for breach of fiduciary duties against Cooper, individually; Count II sought damages for legal malpractice against Cooper and his law partner, Donald Friend II, individually, and against Friend & Cooper, LLC; Count III sought damages for breach of fiduciary duties as an investment advisor against Cooper, Friend, and Sentinel Wealth Advisors, LLC; Counts IV and V sought declaratory judgments terminating and distributing the SLB and EDB Trusts, respectively; Count VI sought an injunction against payment of fees from the SLB Trust and disgorgement of fees paid; Count VII sought damages for undue influence against Cooper and Sentinel.

[4]In July 2007, Saurine amended the SLB Trust to include a no-contest clause because of Brown's repeated threats to sue Vernon Lotman in his capacity as a co-trustee of that Trust. Nevertheless, since Saurine's death, the Trusts and/or Trustees have been involved in multiple lawsuits and arbitrations with Brown.

investment advisor fiduciary duties against Cooper and Friend, individually, and Sentinel Wealth Advisors, LLC; (Count IV) an "immediate and equal division, distribution and termination" of the EDB Trust; and (Count VI) an injunction to prevent Brown-Thill and Cooper from paying additional fees from the Trusts and disgorgement of fees previously paid. (There is no Count V.)

The Probate Case was assigned to Judge Kathleen Forsyth. At a case management conference on May 12, 2014, the judge set the first hearing for September 26, 2014. On May 14th, she granted Brown's motion to consolidate the Probate Case and the Civil Case (which had earlier been transferred to the Probate Division), as "both involve common questions of law and fact concerning the division and distribution, and alleged misadministration of [the SLB] Trust." The court later rescheduled the initial hearing date in the Probate Case to October 31, 2014.

When the bench trial commenced on October 31st, the probate court confirmed that, in addition to the distribution issues, it would hear evidence regarding alleged breaches of fiduciary duty. Thereafter, testimony was heard and evidence was presented on twenty-four non-consecutive days over the course of more than a year. At the conclusion of the trial on December 11, 2015, after eighteen witnesses and hundreds of exhibits, the court ordered the parties to submit proposed findings and conclusions. The court thereafter ordered Cooper and Brown-Thill each to provide a final accounting for the period of their trusteeships. The Trustees timely submitted their accountings with the information requested by the court.

On July 15, 2016, the court entered Judgment in the Probate Case, ordering a final distribution of the assets of the EDB and SLB Trusts and approving the Trustees' final accountings. The court denied the Trustees' request to enjoin Brown from bringing any additional lawsuits against the Estate. The court granted the Trustees' request for a setoff against Brown's share of the assets of the Trusts for the fees and expenses the Trusts had incurred in the

Probate Case. The court also ordered an offset against Brown's share for damages he caused by interfering in a sale of property owned in part by an entity of the Trusts (Normand LP). The court further ordered that Brown be removed as trustee of the residuary trust for himself and his minor children (which would be funded by the distribution plan). To minimize the impact of the offsets on the children, the court ordered Brown's residuary trust divided into sub-trusts for Brown and for his children and directed the guardian *ad litem* to select an independent trustee for both. The court denied Brown's counterclaims against Cooper and Brown-Thill for breach of fiduciary duty and his counterclaim to enjoin the payment of Trustee fees.[5]

Standard of Review

In reviewing a court-tried case, we will affirm the judgment "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012). We review questions of law *de novo*. *Id*. We defer to the trial court's judgment on questions of fact, as it "is in a better position not only to judge the credibility of the witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." *Id*. at 44. In reviewing mixed questions of law and fact, we defer to the court's factual findings but review *de novo* the application of the law to the facts. *Id*.

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[5]The court found that Brown's other counterclaims (*i.e*., legal malpractice against Cooper and Friend, individually, and their law firms; breach of investment advisor fiduciary duties against Cooper and Friend, individually, and Sentinel Wealth Advisors; and disgorgement of previously paid attorneys' and trustees' fees) were brought against persons or entities that are not parties to the Probate Case. The court noted that Cooper is a party to the Probate Case as the Trustee of the SLB Trust, not in his individual capacity. The court further noted that Brown

> seeks disgorgement of fees paid to a number of individuals/entities that are not a party to the probate case [*i.e*., the attorneys to whom the fees were paid] and by Thill and Cooper, who are parties only in their fiduciary role as trustees of the [Trusts], and not in their individual capacities. Therefore, this Court lacks jurisdiction to grant this portion of the relief requested in Count VI.

In light of those facts, the court explained, "evidence relating to such counterclaims was not heard in the trial of this matter nor will such counterclaims be ruled or otherwise addressed herein."

Discussion

Brown raises fourteen points on appeal. We address some points out of order where they are closely related to other non-contiguous points. In ***Point I***, Brown contends that the probate court erred in "ordering a trial without notice, because due process required [that he] be given sufficient notice and reasonable opportunity to prepare for trial on the merits, in that the court failed to provide adequate notice the partial distribution hearing [on October 31, 2014] was going to be a trial." He claims that he was prejudiced because he had "to try his claims without the ordered discovery, the privileged documents, and the Trustees' final accounting, which precluded [him] from demonstrating Trustees' partiality, disloyalty, and breaches of their fiduciary duties."[6]

In plain English, Brown claims that he was denied his constitutional right to due process because he was not notified that the upcoming hearing was going to be a trial on the merits.[7] When an appellant raises a claim of constitutional error, he must demonstrate, *inter alia*, that he raised the constitutional issue *at the first available opportunity* and preserved the claim throughout the trial for appellate review. *State v. Gannaway*, 497 S.W.3d 819, 822-23 (Mo. App. 2016). Here, Brown first complained of an alleged lack of notice on April 29, 2015, which was the tenth day of trial and approximately six months after the trial began. Thus, he clearly failed to raise his constitutional claim at the first available opportunity. That failure is sufficient for this Court to find that Brown did not properly preserve the issue for review. *See id*. at 823.

[6]In his Argument related to this point, Brown does not discuss a lack of discovery, privileged documents, or the court's handling of the final accounting. Claims raised in a Point Relied On that are not developed in the Argument are not preserved for our review. *See Kuenz v. Walker*, 244 S.W.3d 191, 194 (Mo. App. 2007).

[7]In support, Brown cites cases in which a judgment was entered without notice of the hearing being provided, and, thus, the appellants did not appear and did not have an opportunity to be heard or to defend the action. *See Kerth v. Polestar Entm't*, 325 S.W.3d 373, 389 (Mo. App. 2010); *Midwest Grain and Barge Co. v. Poeppelmeyer*, 295 S.W.3d 211, 213 (Mo. App. 2009); *Breckenridge Mtl. Co. v. Enloe*, 194 S.W.3d 915, 921 (Mo. App. 2006). That is not the case here.

In any event, after reviewing this claim, *ex gratia*, we find that Brown was provided adequate notice of the trial and the issues that were being tried. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Kerth*, 325 S.W.3d at 378. Here, Brown had sufficient "opportunity to be heard" beginning on the first day of trial and in the additional ***twenty-three*** days of trial that followed. When the court took up the Probate Case on October 31, 2014, it confirmed that, in addition to the distribution issues, it would hear evidence regarding alleged breaches of fiduciary duty. The court noted that the parties had brought witnesses and were prepared to offer evidence on those claims and that it was prepared to rule on them. Brown's counsel did not object or allege a lack of notice as to the presentation of such evidence. Then, on March 6, 2015, the sixth day of trial, the court again clarified that the bench trial encompassed the breach of fiduciary duty claims, and Brown's counsel agreed. As noted, it was the tenth day of trial before Brown complained about a lack of notice.

In sum, Brown received adequate notice, prior to the start of the trial, that the probate court would be conducting a hearing that would encompass his breach of fiduciary duty counter-claims. He also had a complete opportunity to be heard on each of the claims and counterclaims that were adjudicated by the probate court. Point I is denied.

In ***Point II***, Brown contends that the trial court erred in conducting a bench trial,

> because [he] was entitled to a jury trial, in that the case involved mixed questions of law and equity and [he] was prejudiced as the court would have been bound by a jury's findings of fact . . . creating reversible error by denying appellant's constitutional right under Art. I, § 22(a) of the Missouri Constitution to have a jury decide these facts.

A trial court has the discretion to try cases involving requests for equitable relief and damages in one proceeding. *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462, 473 (Mo. banc

2004). As noted, the probate court confirmed on the first day of trial that, in addition to the distribution issues, the court would hear evidence regarding the alleged breach of fiduciary duties. Brown did not object to the lack of a jury trial at that time. On March 6, 2015, when the probate court again clarified that the breach of fiduciary duty claims were a part of the bench trial, Brown's counsel agreed that the bench trial would encompass those claims.

Due to the parties' habit of conflating the Civil Case and the Probate Case, Judge Forsyth sent the parties a letter on March 24, 2016, clarifying which matters were being tried in the Probate Case and which were going to be heard by a jury in the Civil Case. She noted that there was no request for a jury trial in the Probate Case and that it had proceeded to a bench trial. The letter explained that the court had already taken evidence on all the Trustees' claims, as well as Brown's counterclaims for breach of fiduciary duties. The judge observed that the rest of Brown's counterclaims were not triable in the Probate Case either in a bench or a jury trial, as they were brought against persons and entities that were not parties to that case. She further observed, as to Brown's Civil Case, that only Counts II (legal malpractice) and III (breach of investment advisor fiduciary duties) in that case were triable to a jury.

Two days later, Brown's counsel attended a court hearing via conference call and acknowledged that the letter accurately described the claims and counterclaims being tried at the bench trial. Brown did not complain about the lack of a jury trial until April 27, 2015, the eighth day of trial (and even then, he agreed that the breach of fiduciary duty claims against Brown-Thill should proceed in the bench trial).

As Brown correctly observes, citing *Leonardi*, 137 S.W.3d at 472, Missouri's Constitution guarantees a jury trial. A party can waive that right, however, by, among other things, entering into trial before the court without objection. *See Estate of Talley v. Am. Legion*

Post 122, 431 S.W.3d 544, 549 (Mo. App. 2014); § 510.190.2, RSMo[8]; Rule 69.01(b)(4). Here, Brown appeared before the court without objection on seven separate days of hearings before raising his complaint about the lack of a jury. Thus, Brown waived any right he had to a jury trial on his counterclaims alleging breach of fiduciary duty in the Probate Case. Point denied.

Brown claims in ***Point III*** that the trial court erred in denying his Rule 73.01 Motion for Judgment at the close of the Trustees' case-in-chief, in that "the weight of the evidence and applicable law showed such motion should be granted [because] the Trustees failed to make a *prima facie* case (1) for distribution, (2) for approval of the final accounting, (3) for offsets, or (4) for an injunction." He contends that he was prejudiced by having "to defend his case in the absence of a *prima facie* case by the Trustees."

In his one-page argument, Brown states vaguely that the Trustees failed to establish that they were entitled to relief, and thus he was entitled to judgment in his favor. He opaquely claims that the Trustees

> had retreated from their distribution plan and labeled it a "blueprint," had never submitted a "final accounting" . . . , had not submitted a single offset, and could never be granted an injunction.

He further suggests that "[e]xamination of the transcript reveals the Trustees' case failed, and no defense was necessary"; "the court erred in denying the Motion for Judgment, when it should have granted it as a matter of law"; and "[i]t prejudiced [Brown] to spend the time and money to defend against the Trustee's [unproven] case." That is his entire argument.

An argument must "explain why, in the context of the case, the law supports the claim of reversible error. It should advise the appellate court how principles of law and the facts of the case interact." *In re Marriage of Fritz*, 243 S.W.3d 484, 487 (Mo. App. 2007). Here, Brown

[8]References to Missouri statutes are to the Revised Statutes of Missouri (RSMo) 2000, as updated by 2013 Cumulative Supplement and the 2014 and 2015 Non-Cumulative Supplements.

fails to explain, as to any of his broad conclusory statements, how the facts of the case interact with applicable principles of law. Moreover, "[i]f a party fails to support a contention with argument beyond [mere] conclusions, the point is considered abandoned." *Id*.; *see also Kuenz*, 244 S.W.3d at 194 (citing Rule 84.13(a)). Similar to *Fritz*, Brown cites no specific evidentiary deficiency but, instead, directs us to review the 3,663-page transcript as a whole. Consequently, as in *Fritz*, we must find that Point III is abandoned.

Brown contends in ***Point IV*** that the trial court erred "in ordering the Trustees to provide a final accounting after the trial was over and evidence was closed." He claims that "the court should have ordered Trustees to produce the final accounting before the trial" and that "receiving the accounting after trial prevented [him] from proffering questions and presenting rebuttable [we presume that he means ***rebuttal***] evidence regarding the final accounting at trial."[9]

We disagree. Attached to their petition, the Trustees submitted the Estate's accounting records, including property appraisals, tax returns, and quarterly consolidated balance sheets and income statements, from January 2009 through June 2013. Thereafter, the Estate's financial records (*i.e*., tax returns, quarterly financials, appraisals of real estate, personalty, and oil and gas interests, and other financial documents) were updated and received into evidence throughout the trial. According to the Trusts' CPA, the annual accounting reports consist of all liabilities, receipts of income and distributions, and a listing of the assets and their respective fair market values. In addition, Brown's accounting expert witness was given access to the Trusts' QuickBooks records to assist Brown in determining his damages. At trial, Cooper provided

[9]Brown cites *Cohoon v. Cohoon*, 627 S.W.2d 304 (Mo. App. 1981), a non-probate case about dissolving a farming partnership, for his claim that this court was required to follow a two-step process for this final accounting, and *Zelch v. Ahlemeyer*, 592 S.W.2d 482 (Mo. App. 1979), in which the court held that an accounting was necessary before determining the validity of a deed of trust and noted that there was a legitimate dispute because no accurate and complete records were ***ever*** submitted. *See id*. at 485-86. Neither case assists Brown.

detailed testimony explaining the content and format of the Trusts' accounting records, and Brown's counsel had the opportunity to cross-examine Cooper about those records.

On April 12, 2016, the probate court ordered the Trustees to submit final accountings as to the Trusts' assets. The court ordered Brown to file any objections to the accountings within ten days of such filing. The court expressly stated that "***there will be no additional evidence taken***" and objections would be limited to only those supported by existing trial exhibits and testimony. The Trustees submitted their final accountings for the SLB and EDB Trusts on May 23 and May 31, respectively,[10] which contained the same information previously provided in the pleadings and at trial. Brown thereafter filed his objections.

In addressing this issue in its Judgment, the trial court opined:

> In a final effort to insure that the Consolidated Financials provided all information needed by Brown . . . , the Court required the Trustees of both Trusts to file a final report of their actions in the accounting format common to trusts, notwithstanding the Trust Indentures' waiver of that very requirement. In that same Order, the Court invited Brown and his minor children to point out to the Court any discrepancy between the Trustees' Final Accountings and evidence presented at trial (including the Consolidated Financials). . . . . ***There were no discrepancies noted in Brown's response to the final accounting***. [Emphasis added.]

Here, the Trust Agreements provided that an income beneficiary may request an accounting not more than annually. Moreover, neither Missouri nor Florida law requires trustees to submit a final accounting before the conclusion of a trial. *See* § 456.8-813, RSMo (requiring trustee to submit a report of liabilities, receipts, and disbursements from the trust, a listing of the trust's assets, and the amount of trustee compensation at least annually and at the termination of

[10]The final accounting for the SLB Trust encompassed the time period of April 2008 through March 2016; the final accounting for the EDB Trust covered the time period of January 2012 through March 2016. In its order for a final accounting of the EDB Trust, the court concluded that it would not inquire into the actions of the Trustees prior to December 2011, since Brown was a co-trustee of that Trust prior to that time and, thus, had full access to the Trust's accounting records, including access to the QuickBooks records, various receipts, and other documents.

the trust); Fla. Stat. § 736.08135(2)[11] (requiring a trustee to submit an accounting of all cash, property transactions, and all significant transactions affecting the trust during the accounting period). In *Barnett v. Rogers*, 400 S.W.3d 38, 50-51 (Mo. App. 2013), we held that providing quarterly financial statements to a beneficiary satisfied Missouri's reporting requirements.

Here, where the Trustees attached the Trusts' accounting records to their Petition and continued to provide relevant accounting records and to introduce such records at trial (all of which were incorporated into the final accountings), Brown had the documents he needed to "proffer questions and present [rebuttal] evidence." Thus, Brown does not establish that the court erred in receiving the final accountings for the Trusts at the conclusion of the trial or that he was prejudiced thereby. Point denied.

In ***Point V***, Brown contends that the trial court erred

> in ordering, after conclusion of trial, that Missouri law governs the Administration of the EDB Trusts and not Florida law, . . . in that the court had no power to *sua sponte* change the *situs* of the trust when the Trustee previously represented and the court had already determined Florida as the Trust's *situs*, and Brown was thereby prejudiced as he relied on the *situs* and governing law being Florida law throughout trial.

The stated *situs* in both Trust Agreements is Florida, but both also authorize the Trustee to change that situs.[12] On December 14, 2014, in the midst of the bench trial, Brown filed a motion to apply Florida public policy to the Trustees' accounting requirement (among other things). On March 24, 2015, the probate court entered an Order finding that the *situs* of the SLB Trust had been changed to Missouri and that Florida remained the *situs* of the EDB Trust. The court

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[11]References to Florida statutes are to West's Florida Statutes Annotated (Fla. Stat.), current through 2016.

[12]The Trust Agreements provided, in relevant part, that:

> The situs of the property of any trust created under this Trust Agreement may be maintained in any jurisdiction, in the Trustee's absolute discretion, and thereafter transferred at any time or times, without any otherwise required court approval or notice to beneficiaries, to any jurisdiction selected by the Trustee.

denied Brown's motion to apply Florida public policy. It ordered that Missouri law would govern the administration of the SLB Trust, and Florida law would govern its meaning and effect. Florida law would govern the administrative and substantive matters as to the EDB Trust.

In its final Judgment, the court determined that the correct *situs* of the EDB Trust was Missouri. The court explained that, after hearing "an additional 17 days of testimony and [having] the opportunity to gain insight from many hundreds of exhibits[,] this Court must now find that its initial determination of the *situs* of the [EDB] Trust was premature and in conflict with the totality of the evidence now before it." The court noted that its "March 24, 2015 Order was interlocutory and subject to revision pursuant to Missouri Supreme Court Rule 74.0l(b) as it did not adjudicate all claims, rights and liabilities of the parties." The court stated, however, that its determination as to the *situs* of the EDB Trust "does not affect the substantive law to be applied," and that "[p]ursuant to § 736.0105(2) and § 736.0107, Fla. Stat. (2009), the meaning and effect of the [EDB] Trust shall be governed by Florida law."

Brown now contends that the probate court "had no power" to find at the conclusion of trial that Missouri is the *situs* of the EDB Trust. We disagree. This Court has repeatedly stated that "a court may open, amend, reverse or vacate an interlocutory order" at "any time before final judgment." *Nicholson v. Surrey Vacation Resorts, Inc.*, 463 S.W.3d 358, 365 (Mo. App. 2015). For all practical purposes, the probate court's "continuing authority renders every pre-trial motion ruling without prejudice and subject to reconsideration." *Id*. Here, the court's March 24 Order was interlocutory, as it did not adjudicate all claims, rights, and liabilities of the parties. Rule 74.01(b). Brown cites no relevant legal authority to support his contention that the Order could not be modified by the court at any time prior to the final judgment. Thus, he has failed to preserve this claim for our review. *See Fritz*, 243 S.W.3d at 488.

In any event, only prejudicial error is reversible error. *Lake Ozark/Osage Beach Joint Sewer Bd. v. Mo. Dept. of Nat. Res.*, 326 S.W.3d 38, 43 (Mo. App. 2010). Brown fails to show how he was in any way prejudiced by the court's decision. This is his entire argument as to prejudice: "Worth noting and clear by comparing applicable statutes is that Florida is 'tougher' on Trustees and requires Trustees to meet a higher standard of fiduciary conduct than Missouri does. (*See* MUTC Chapter 456 versus FTC Chapter 736.)" Brown later claims, without further elaboration, that "[a]pplying the wrong choice of law to the case is prejudicial to [him] and reversible error." He proffers no actual comparison of any specific Florida and Missouri standards. In sum, Brown fails to illustrate any prejudice and, consequently, fails to establish reversible error. Thus, this Point is denied.

Point VI asserts that the trial court erred in ***approving*** the final accounting, "because the court should have ordered the Trustees to perfect their final accounting, in that the accounting submitted was incomplete and insufficient." Brown contends that he "was prejudiced because the court and [he] could not determine from the accounting if the expenditures . . . were proper and not misdirected, concealed, or wrongful payments in breach of the Trustees' duties."

The Trustees provided final accountings that contained the information required by Florida law (Fla. Stat. § 736.08135) and complied with the court's instructions in its Order for a Final Accounting.[13] Brown's actual complaint seems to be that the probate court noted expenses that it could not verify, as "the provider is not identified nor the services adequately described,"

[13]The April 12, 2016 Order for a Final Accounting set forth the required contents as follows:

> A formal accounting, for the purposes of this proceeding, must include an inventory of all assets held in trust on the first day of the accounting period and state the value of each. From the first to the last date of the accounting period, the Trustee must report all receipts, disbursements and distributions (distinguishing between principal and income for each entry). The source of all funds or property received by the Trusts must be clearly stated. If assets have been sold, any closing costs of the sale must be disclosed. The accounting must conclude with a statement of assets held in trust on the final date of the accounting period.

but accepted the final accountings anyway. Despite being unable to fully verify some of the payments, the probate court explained that

> [t]he Court is not imposing any of the remedies [for breach of trust] available under [§ 456.10-1001], because the Indentures under which the Trustees serve contain the following indemnification clause: "Any individual acting as Trustee of any trust under this Trust Agreement shall be indemnified and reimbursed from the trust estate for any loss, damage, liability or expense incurred . . . by reason of any act or failure to act." This clause requires that the Trustees' respective Trusts indemnify them for any loss incurred in connection with the administration of the Trusts, ***absent gross negligence [or] willful malfeasance***.

(Emphasis added.) The court did not find evidence of "gross negligence or willful malfeasance," and Brown fails to show that the court erred in that determination.

As the court explained, "consolidated financials were offered into evidence," and "[b]oth Trustees were subject to cross-examination, [which] afforded those interested in the Trusts an opportunity to gather additional information about Trust expenditures and demonstrate to the Court any trustee malfeasance." Moreover, the court "invited" Brown to point out "any discrepancy between the Trustees' Final Accountings and evidence presented at trial," but "no discrepancies [were] noted in Brown's response."

In short, Brown fails to establish that the court erred in approving the final accountings that were submitted by the Trustees. This Point is denied.

Brown asserts in ***Point VII*** that the trial court erred in holding that the Trustees did not breach their fiduciary duty, because the evidence

> demonstrated [that] the Trustees (1) had a duty . . . to expeditiously distribute to the beneficiaries in a reasonable period the trust assets . . . and failed to do so, (2) failed to adhere to the terms of the trust instrument they were bound to implement by failing to expeditiously sell [two residences owned by the Trusts], thereby causing unwarranted expenses; all of which prejudiced Brown by withholding from him his rightful half of trust assets.

Under both Missouri and Florida law, to prevail on a breach of fiduciary duty claim, the claimant must show: (1) a fiduciary duty existed; (2) breach of that duty; (3) causation; and (4) harm. *Matter of Wilma G. James Trust*, 487 S.W.3d 37, 48 (Mo. App. 2016); *Patten v. Winderman*, 965 So.2d 1222, 1224 (Fla. Ct. App. 2007). A trustee is presumed to administer a trust in good faith, and the burden of proving otherwise falls on the appellant. *Barnett*, 400 S.W.3d at 49. "Generally, where a grantor vests sole discretion of a matter in a trustee, a court will not interfere in the exercise of that discretion unless the trustee willfully abuses his discretion or acts arbitrarily, fraudulently, dishonestly, or with an improper motive." *Id*.

As noted in the Judgment, Brown alleged that Cooper and Brown-Thill breached their fiduciary duties to: (a) act impartially, (b) incur only reasonable costs, (c) administer prudently, (d) inform and account, (e) act loyally (*i.e*., "solely in the interest of the beneficiaries"), and (f) expeditiously distribute the Trust property. The probate court examined each duty alleged to have been breached and thoroughly addressed each of them. The court then explained that

> the Court has found only a relatively few occasions on which the Trustees' actions did not conform to the duties imposed on them by the [Missouri Uniform Trust Code], as modified by the . . . Trust Indentures. None of the Trustees' actions noted by the Court . . . suggest that the Trustees acted in a willful, wanton or malicious manner.

The court concluded that, because "[Brown] has failed to adduce clear and convincing evidence to prove [otherwise], his claim must be denied."[14]

[14]The probate court explained in its Judgment:

> The Trustees' obligation to administer the Trusts as a prudent person would is a fundamental duty and requires that the trustees consider "the purpose, terms, distributional requirements and other circumstances of the trust" in investing and distributing Trust assets, and to "exercise reasonable care, skill and caution" subject only to provisions of the governing instrument altering this standard. The . . . Trust Indentures do, in fact, address this standard directly by giving the Trustee absolute discretion in investment decisions and indirectly by abrogating the Trustees' liability "for any mistake in judgment in the making or retaining of investments . . . so long as any such decision is made in good faith."

In his Point Relied On, Brown alludes to two specific matters. He first claims that the Trustees failed to expeditiously distribute the Trusts. The trial court found, however, that the delays in the distribution were warranted due to the ongoing litigation affecting the Trusts, the nature of the Trusts' assets, and the lack of cooperation by Brown. The evidence supported that finding. Brown's second claim relates to the Trustees' handling of the sale of a Kansas residence owned by the EDB Trust and a Florida condominium owned by the SLB Trust. After hearing evidence and considering the circumstances, the court found that Brown-Thill's actions with respect to the Kansas property were appropriate and not a breach of fiduciary duties. The court noted that she complied with the Arbitration Agreement's requirements for the sale of the property and that her staying at the property while she was in Kansas City provided benefits to the Trust. The probate court did not make a specific finding as to the sale of the Florida property, but it heard evidence and approved Cooper's sale of the property in the midst of trial.[15]

In denying Brown's breach of fiduciary duty claims, the probate court explained that, in a case such as this,

> [w]hen a settlor vests sole discretion in a trustee and supplies no objective standards by which to evaluate the reasonableness of the trustees' conduct, a court must not interfere unless the trustee willfully abuses his discretion or acts arbitrarily, fraudulently, dishonestly or with an improper motive in exercising such power.

The court found "no credible evidence to prove that either Trustee acted arbitrarily, fraudulently or dishonestly in their administration of the Eugene or Saurine Trusts."

Brown disregards our obligation to defer to the trial court's factual findings, given its superior position to assess witness credibility, and "to view all the evidence in the light most

[15]Brown also makes arguments about a "failure to distribute any interim income" and a "misapplication of the indemnification clause," but neither of those issues are included in the Point Relied On; thus, we will not address them. *See Fritz*, 243 S.W.3d at 488 (issues raised only in the argument part of the brief and not contained in the point relied on "are not preserved for review").

favorable to the result and disregard all contrary evidence." *See Barnett*, 400 S.W.3d at 51. Brown fails to establish that the probate court's findings on these issues were unsupported by the evidence, are against the weight of the evidence, or misapplied the law. Point denied.

In ***Point VIII***, Brown argues that "the court erred in ruling [that Brown-Thill] did not breach her fiduciary duty, because the evidence presented to the court overwhelmingly . . . proved [that] Brown-Thill, as sole trustee, engaged in self-dealing and paid herself individually from the EDB Trust monies to cover legal fees she individually incurred."

This claim apparently relates to Brown's counterclaim VI. The court noted in its Judgment that counterclaim VI

> seeks an Order of this Court requiring the refund or disgorgement of previously paid attorney fees. No attorney to whom fees were paid by either the [EDB] Trust or the [SLB] Trust is a party to the instant case. Therefore, Brown's prayer that the Court order the refund or disgorgement of attorney fees previously paid must be denied. Because Thill and Cooper have no personal interest in the attorney's fees paid by the Trusts, Brown bears the burden of proving that the Trustees' payment for the legal services represented by these transactions was a breach of their duty to the Trusts. Brown has failed to meet that burden.

Brown alleges that Brown-Thill breached her fiduciary duty by receiving legal expense reimbursements from the EDB Trust. As noted, however, that Trust Agreement provides that a Trustee "shall be indemnified and reimbursed" for any expense the Trustee incurs, individually or as a fiduciary, absent gross negligence or willful malfeasance. The court observed that Brown bore the burden of "proving that Cooper and Thill were either grossly negligent or committed willful malfeasance in their payment of attorney fees [and] Brown produced no credible evidence to that effect." The court found, therefore, that was it bound by that indemnification clause.

Both Missouri and Florida permit a trustee to be reimbursed for attorneys' fees incurred in the administration of a trust. § 456.7-709, RSMo; Fla. Stat. § 736.0709. In addition, the court may award attorneys' fees and costs to any party to be paid by another party. *See* § 456.10-1004,

RSMo; Fla. Stat. § 736.1004 (both permitting award of attorney fees from any party and allowing fees to be deducted from any party's interest in the trust). Thus, reimbursement of legal fees to Brown-Thill in the administration of the EDB Trust is not a breach of her fiduciary duty. The court also was free to believe Brown-Thill's testimony that, when she was litigating matters in her personal capacity, she paid her own attorneys' fees. *See Hawthorn Bank & Hawthorn Real Estate, LLC v. F.A.L. Inv., LLC*, 449 S.W.3d 61, 65 (Mo. App. 2014). Brown fails to show that the probate court's decision in this regard was not supported by substantial evidence. Point denied.

On a related point, in ***Point XIV***, Brown claims that the court erred in finding that Cooper did not have an attorney-client relationship with Brown-Thill "because such finding was against the weight of the evidence, in that Cooper admitted in multiple filings the existence of the relationship, and the existence of the relationship creates impermissible conflicts." Brown does not allege prejudice in his Point Relied On and does not clearly explain in his argument how he was prejudiced by this alleged error.

Cooper testified that he had not represented Brown-Thill individually at any arbitration hearing or any of the litigation proceedings between her and Brown. He said that he appeared at the arbitration hearings at the request of the arbitrator to provide expert testimony as the Estate attorney and to ascertain how the arbitrator's decision might impact the SLB Trust. The trial court was free to believe Cooper's testimony, and we defer to its factual findings. *Id*. Brown submitted no evidence at trial which established that Brown-Thill and Cooper had an attorney-client relationship or that Cooper provided legal services to Brown-Thill that were adverse to Brown. The probate court concluded, therefore, that "Brown's allegation [that the Trustees] breached their duty of loyalty to the EDB Trust because Cooper acted as Brown-Thill's attorney while she served as Co-Trustee of the Trust ***lacks any factual basis***." (Emphasis added.)

Brown fails to persuade us that the court's findings were unsupported by the evidence. Deferring to the trial court's factual findings, as we must, the probate court did not err in rejecting Brown's claim of an attorney-client relationship between the Trustees. Point denied.[16]

Brown contends in ***Point IX*** that the trial court "erred in awarding the Trustees' attorney fees [because] the court found the distribution plans the Trustees' advocated for violated the prohibition against self-dealing, and therefore failed as a matter of law."

First, the probate court did ***not*** find that the Trustees' actions "violated the prohibition against self-dealing." Nor did its rejection of the Trustees' proposed distribution plan equate to such a finding.[17] This claim apparently relates to the Trustees' request for an offset to Brown's share of the Trusts' assets for "the attorneys' fees, expenses and costs which [he] unilaterally cost the [Estate] over the last three years through his litigious efforts [as to the] Estate." The probate court granted an offset of the attorneys' fees incurred in the Probate Case. Pursuant to Missouri law, and under the terms of the Trusts, the Trustees were entitled to such an offset.[18]

In its Judgment, the court noted that Brown "complains vociferously about the Trustees' failure to distribute assets from the Trusts," and yet he (1) "has taken each opportunity to thwart or . . . delay" every attempt to do so, (2) intentionally interfered with the sale of property owned by the Trusts (*see* Point X, *infra*), and (3) has "made every conceivable effort to elongate the trial

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[16]Brown makes arguments about discovery, duty of impartiality, and duty to administer in good faith but does not include those issues in his Point Relied On XIV. Thus, we need not address them. *See Fritz*, 243 S.W.3d at 488 ("issues that are raised only in the argument part of the brief and are not contained in the point relied on are not preserved for review"). He also makes a vague reference to documents that Cooper and Brown-Thill "claim as privileged, but eventually [were] the source of post post-trial review by a Special Master." As the appointment of the Special Master was made in the Civil Case, Brown fails to demonstrate how that is even relevant to this appeal.

[17]The court simply found that some provisions of the Trustees' proposed distribution plan could constitute a conflict of interest and, thus, would not be included in the final distribution plan.

[18]Missouri law provides that "[i]n a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." § 456.10-1004. As noted, *supra*, the Trusts provided for reimbursement and indemnification of the Trustees.

of this Case." The court opined that this "is a text book example of a situation where justice and equity mandate that the Court award costs and expenses, including attorneys' fees, in a manner that will balance the benefits to the extent possible within the confines of the evidence before it." *See Bugg v. Rutter*, 466 S.W.3d 596, 605 (Mo. App. 2015) (attorneys' fees and costs may be awarded under "special circumstances," such as in the case of a party's intentional misconduct); *Klinkerfuss v. Cronin*, 289 S.W.3d 607, 618-19 (Mo. App. 2009) (same). We agree.

The probate court is empowered to satisfy any fees awarded by an offset against assets distributed from the Trusts. *See* § 456.10-1004. Here, the evidence supported the award of attorneys' fees and costs incurred in the Probate Case as an offset against Brown's share of the Trusts' assets. The probate court did not misapply the law or abuse its discretion in making such an award. Point IX is denied.

Brown argues in ***Point X***:

> The court erred when it awarded damages to Normand [LP], for Brown's purported disruption of the sale of 17.1 acres . . . because Normand was not entitled to damages . . . , in that (1) the contract for the land sale was never signed between Normand and [the buyer], (2) Brown was not a general partner and had no duty to sign the contract, (3) Normand was not and could not be a party to this suit, because any disagreements between members are governed by the arbitration clause in the Normand partnership operating agreement.

The EDB and SLB Trusts have an ownership interest in an entity named Normand LP.[19] Normand previously had a partial interest in a 43-acre parcel of land in Missouri known as "Tiffany Springs." The Trustees alleged at trial that a proposed sale of approximately 17.1 acres of that property in 2014 was not completed because of Brown's interference. The probate court found that Brown "intentionally and maliciously interfered with" the sale of that property and

[19]The EDB and SLB Trusts are the general partners in Normand; Brown and Brown-Thill, individually, are limited partners. Brown-Thill and Brown each owned a 44.57% limited partnership interest in Normand at the time the loss was incurred. The EDB Trusts owned a 10.24% limited partnership interest and a .31 % general partnership interest; the SLB Trust held a .31 % general partnership interest.

awarded damages to the Trusts for the lost opportunity to sell the asset in the form of a $642,000 offset against Brown's share of the Trusts' assets.

It is well-established that an offset is an equitable measure within the inherent power of the courts. *Helstein v. Schmidt*, 78 S.W.2d 132, 135 (Mo. App. 1935). The probate court has both equitable and legal powers to adjust matters "between the parties without rigid adherence to any determined form and may shape the remedy to meet the demands of justice." *See Estate of Cantonia v. Sindel*, 684 S.W.2d 592, 595 (Mo. App. 1985); § 472.030, RSMo. Here, the probate court properly exercised that equitable power.

The evidence showed that Brown interfered with the sale of the property by refusing to consent to a partial sale, rejecting reasonable offers, and attempting to negotiate proposals without the authority to do so. As a result of Brown's actions, (1) Normand ultimately had to defend against a partition action filed by its co-owner, thereby incurring attorneys' fees, and (2) the property was eventually sold at auction for less than its appraised amount and certainly less than the amount of the sale scuttled by Brown. The probate court found that Brown's interference had cost Normand's owners $642,500. The court ordered the loss to "be allocated among the Normand partners *pro-rata*. [Brown-]Thill and the Trusts shall be reimbursed for their loss from Brown's Sub-Trust . . . in the manner provided in Section VII of this Judgment[.]" The court ordered Brown-Thill's reimbursement to be "in the form of an outright distribution."

No money was awarded Normand. The court merely allocated trust funds from one trust to another to compensate for the losses attributable to Brown's obstreperous conduct. The court did not abuse its discretion in making this allocation. Both Brown-Thill and the Trusts were appropriately awarded an offset because each held a partnership interest in Normand at the time of the loss and were substantially harmed by Brown's actions. Point denied.

In ***Point XI***, Brown contends that the trial court erred in denying ***his*** attorneys' fees, in that sufficient evidence established that he was entitled to such fees, because he "demonstrated [that] he was forced to respond to the Trustees' two proposed distribution plans and the court found both plans violated the prohibition against self-dealing thereby failing as a matter of law."

Brown asserts no legitimate basis upon which to claim that the probate court erred in failing to award him attorneys' fees in this case. Again, the court did not find that the proposed distribution plan "violated the prohibition against self-dealing," and its rejection of the proposed plan does not automatically equate to such a finding. Second, Brown does not establish that he is entitled to his attorneys' fees in this case under the 2010 Arbitration Agreement between himself and his sister, as he suggests.[20]

As noted, the court had both legal and equitable powers to award costs and expenses and also to withhold costs and expenses due to a beneficiary's malicious conduct. *Klinkerfuss,* 289 S.W.3d at 619; *Cantonia*, 684 S.W.2d at 595; § 472.030, RSMo. The court was free to believe or disbelieve "any, all, or none of the evidence," and we defer to its factual findings. *Hawthorn*, 449 S.W.3d at 65. For the same reasons that the court did not err in awarding the Trustees' their attorneys' fees due to Brown's self-serving actions and interference (*see* Point IX, *supra*), the court did not err or abuse its discretion in denying Brown his attorneys' fees. Point denied.

In ***Point XII*** Brown asserts that the trial court erred in ordering him removed as the Trustee of his own residuary trust. He asserts that "the court should not have removed him *sua*

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[20]Brown cites the following provision of the Arbitration Agreement:

> If either party pursues any claim, dispute, or controversy against the other in a proceeding other than the arbitration provided herein, the responding party shall be entitled to dismissal or injunctive relief regarding such action and recovery of all costs, losses, and attorneys' fees relating to such action.

Instead of moving for dismissal or injunctive relief, however, Brown filed counterclaims in this case, and he ***had already filed his own petition*** in the Civil Case. In any event, Brown does not establish that this provision of that Arbitration Agreement is applicable here.

sponte absent an explicit finding [that he] breached the trust or committed some act authorizing the removal of a Trustee[,] in that Florida law [clearly establishes] that a trustee cannot be removed without competent substantial evidence supporting such removal." He claims that he was prejudiced because being removed as trustee "alienated him from his own Residuary Trust."

Both Missouri and Florida law allow a court, at its own discretion, to remove a trustee who has demonstrated a lack of cooperation, unfitness, or inability to effectively administer the trust. § 456.7-706, RSMo; Fla. Stat. § 736.0706. Here, the probate court determined, "based upon Brown's testimony and the testimony of his expert, that it is necessary for 1) Brown's share of the [EDB] and [SLB] Trusts to be administered by an independent Trustee and 2) his minor children's interest to be protected by creating a separate trust share for their exclusive benefit." There was substantial competent evidence to warrant the removal of Brown as Trustee of his residuary trust because the evidence demonstrated that he was unfit and unwilling to cooperate with the administration of any trust.

As the court observed in its Judgment:

> Brown testified on several occasions about needing money to fund "entrepreneurial interests." Using Trust assets for such a purpose would create an unnecessary risk to the remaindermen's share. Brown also stated on more than one occasion that his children are "remaindermen and I'm the beneficiary," noting that "the trust language speaks of potential conflicts and resolves them in favor of the income beneficiary," and "if I drew income and depleted the assets, I don't believe that that would be a breach in itself." Brown's most concerning testimony came in response to cross-examination by his children's guardian *ad litem* when he acknowledged that he is the sole Trustee of a Trust created for him and his descendants funded with $500,000 from his parents' Trusts and none of that money remains.

In addition to Brown's own damning testimony, the court also noted that Brown's expert witness on trusts agreed that "it would be in the best interests of the beneficiaries" to appoint a corporate trustee. Moreover, the guardian *ad litem* asked, on the first day of trial, for "a Co-Trustee" with financial experience to be appointed for Brown's residuary trust "because his children are also

beneficiaries of that trust." The court's removal of Brown as trustee of his residuary trust was supported by substantial evidence and was not a misapplication of the law. Point denied.

Brown argues in ***Point XIII*** that the court erred in dividing his residuary trust into sub-trusts because it "exceeded the court's equitable powers[,] was an improper modification of the Trust as it was not allowed by the Trust document[,] and was against the Grantor's stated intent."

We disagree. Missouri and Florida both permit such an action by the court. The applicable statutes allow the court to intervene in the administration of a trust and conduct judicial proceedings that "relate to any matter involving the trust's administration," § 456.2-201, RSMo, or "any other matters involving trustees and beneficiaries." Fla. Stat. § 736.0201.

The evidence showed that, under the terms of the Trust Agreements, Brown's minor children are current beneficiaries of the separate residuary trust created by the Grantors for him and his issue. For the same reasons that are stated in Point XII, *supra*, the probate court ordered that the residuary trust be divided into separate sub-trusts to protect the children and for guardian *ad litem* Zager to select an independent trustee to administer both sub-trusts. Brown fails to show that the probate court erred in doing so. The court's decision to divide Brown's residuary trust was supported by the evidence and complied with the law. Point denied.

Motions Taken with the Case

The parties have filed three motions which have been taken with the case. Jason Zager's "Motion for Payment of Compensation to Attorney/Next Friend" for his services as Guardian *ad litem*/Next Friend for the Brown children is remanded to the circuit court for its consideration, as that court is in a better position to assess the propriety of his request for attorney's fees. We deny the Trustees' two "Motion[s] to Strike" Brown's appendix to his reply brief. We note, however, that we find nothing of value to this Court in that appendix in any event.

Conclusion

It would be impossible not to notice that a shocking amount of time, money, and personal anguish has been expended as a result of the "scorched earth" approach the parties have taken in this litigation. We are of the opinion that a final conclusion will be a blessing to all concerned.

For all the foregoing reasons, we affirm the probate court's Judgment in all respects. We remand the matter back to the trial court solely for disposition of the guardian *ad litem*'s motion for attorney's fees.

/s/ James Edward Welsh
James Edward Welsh, Judge

All concur.