STATE OF MICHIGAN

COURT OF APPEALS

In Re ESTATE OF ALESIO SCARCHILLI, DECEASED,

FRANCIS J. HEARSCH JR., TRUSTEE OF THE ESTATE OF ALESIO SCARCHILLI,

Plaintiff-Appellee and Cross-Appellant,

and

ETTORE SCARCHILLI,

Plaintiff-Appellant and Cross-Appellee,

v

MICHAEL PRODIN, DELPHINE SCARCHILLI, and HELEN SCARCHILLI,

Defendants-Appellees,

and

LORIAN SCARCHILLI, and SYLVAN SCARCHILLI,

Defendants-Cross-Appellees,

and

DYKEMA GOSSETT, PLLC,

Cross-Appellee.

UNPUBLISHED
December 6, 1996

No. 180706
LC No. 93-131131 SE

FRANCIS J. HEARSCH JR., TRUSTEE OF THE ESTATE OF ALESIO SCARCHILLI,

Plaintiff-Appellee,

v

No. 180736
LC No. 93-131131 SE

MICHAEL PRODIN,

Defendant-Appellant.

FRANCIS J. HEARSCH JR., TRUSTEE OF THE ESTATE OF ALESIO SCARCHILLI,

Appellee,

v

No. 184902
LC No. 93-131131 SE

DYKEMA, GOSSETT, PLLC,

Appellant.

Before: Reilly, P.J., and Sawyer and Collette,* JJ.

PER CURIAM.

This case involves three consolidated appeals arising from litigation over the Estate of Alesio Scarchilli. Mr. Scarchilli left the bulk of his estate in two trusts, a 1974 irrevocable trust and a 1975 revocable trust. The underlying litigation was commenced by the trustee for those trusts [hereinafter Trustee] and Ettore Scarchilli to recover various assets claimed by the trusts from the control of the defendants. The jury determined that 380 shares of stock in Michigan Truck and Trailer Repair, Inc., [MT&T] claimed by Michael Prodin were in fact owned by the 1975 trust. Michael Prodin appeals as of right from that verdict. The probate judge granted a directed verdict in favor of Lorian and Sylvan Scarchilli with regard to their ownership of the Presidents' Village Professional Building [PVPB] property.[1] The Trustee cross-appeals as of right from the probate court's denial of the 1975 trust's motion for directed verdict regarding the ownership of the PVPB. Following trial, law firm Dykema Gossett sought attorney fees incurred for the benefit of the trust, and was awarded $479,000 in fees and costs following mediation. The probate judge subsequently found that the fees awarded to Dykema

* Circuit judge, sitting on Court of Appeals by assignment.

Gossett should be paid out of the principal of the trusts. Both Ettore Scarchilli and Trustee appeal as of right from that order regarding the allocation of attorney fees. After the fee determination and allocation, the Trustee moved to dismiss additional claims pending against defendants Helen Scarchilli, Michael Prodin, and Delphine Scarchilli. The court dismissed those claims with prejudice. Ettore Scarchilli appeals as of right from that dismissal. Dykema Gossett later sought additional fees from the trust totaling $95,920. The Trustee moved for summary disposition of this claim for additional fees, which the probate court granted. Dykema Gossett appeals as of right from that dismissal. We affirm.

Background: Alesio Scarchilli [hereinafter Alesio] died in February of 1984. At the time of his death, Alesio was married to his second wife, Helen Scarchilli [Helen], whom he married in 1958. Michael Prodin and Delphine Scarchilli are Helen's children from a previous marriage. Ettore Scarchilli [hereinafter Ettore] is Alesio's son from a prior marriage. Lorian and Sylvan Scarchilli are Ettore's sons.

At the time Helen married Alesio, he owned varied business interests. In the early 1960s, Alesio and Helen bought a piece of property in Sterling Heights where the truck repair business MT&T was located [MT&T property]. Alesio later purchased the truck repair business located on the land, forming two corporations, MT&T, and Tri-County Truck and Trailer Equipment, Inc [Tri-County]. Both corporations were subsequently merged into MT&T. MT&T remained a closely-held corporation, with stock ownership divided among Alesio, Helen, Delphine Scarchilli, and Michael Prodin. In 1992, MT&T was evaluated as having an estimated total value of around $2,203,000, with shares valued between $2,149 and $2,355 apiece, depending upon the valuation method used.

Around 1974 Alesio had attorney Gerald Carnago devise an estate plan to distribute his wealth between his two families. The MT&T property was placed in an irrevocable trust dated December 14, 1974 [the 1974 trust]. Under the terms of the 1974 trust, Alesio and Helen would receive all income generated by the trust during Alesio's lifetime. Afterwards, the 1974 trust would pay fixed monthly amounts to Delphine, Ettore, Sylvan, and Lorian Scarchilli, and the remainder of any trust income would go to Helen Scarchilli during her lifetime. Following Helen's death the net income of the 1974 trust would be divided equally for twenty years, after which the principal would be divided and given to Delphine, Ettore, Sylvan, and Lorian Scarchilli. In December of 1975, Carnago drafted a second, revocable trust [the 1975 trust], which was amended several times. This 1975 trust received the bulk of Alesio's assets, including his shares of MT&T stock. The 1975 trust provided that on Alesio's death the trust would be divided into a family trust, a marital trust, and a spouse's trust. During her lifetime Helen Scarchilli would receive all income derived from those trusts; following her death the family trust would be divided equally into separate trusts for the benefit of Alesio's children, stepchildren, grandchildren, and step-grandchildren in varying percentages.

After Alesio died Helen Scarchilli disavowed ever signing her interests in Alesio's property over to the 1974 and 1975 trusts, and instead proceeded as if she received the bulk of Alesio's estate by right of survivorship. Helen and Delphine Scarchilli and Michael Prodin continued to operate and manage MT&T and serve as its officers and directors. Michael Prodin testified that at the first meeting

with Alesio's survivors, Carnago told Helen and Prodin that everything belonged to Helen except for the PVPB property, which belonged to the grandchildren. Helen Scarchilli was appointed personal representative of Alesio's estate and was the original trustee of the trusts. Helen Scarchilli maintained that she still owned 380 shares of stock in MT&T claimed by the 1975 trust, and that she never agreed to transfer the MT&T property to the 1974 trust. Michael Prodin claimed that he owned a total of 320 shares of MT&T, which included 220 shares later claimed by the 1975 trust. Due to Helen Scarchilli's and Michael Prodin's claims of ownership over the majority of MT&T stock, Ettore Scarchilli and the Trustee filed suit against them seeking to regain control over what Ettore Scarchilli, the trustee, believed to be trust assets, namely the MT&T property and disputed shares of MT&T stock. The Trustee also sued to regain control of the PVPB property, which was claimed by Lorian and Sylvan Scarchilli.

The 1975 trust's claims against Michael Prodin: Michael Prodin testified that in 1970 Alesio asked him to manage MT&T, which was then a failing business. Prodin agreed to work at MT&T only if Alesio made him a shareholder in the company. Alesio agreed to do so, and hired him. In 1971, after Prodin had worked at MT&T for around one year, Alesio told Prodin that he was giving him his stock, but that he was keeping the certificates in the corporate ledger book for safekeeping. This was standard practice with MT&T; none of the shareholders had actual possession of their stock certificates, which were kept with the corporate records. Certificate number 6 for MT&T, issued September 1, 1971, gave Prodin 100 shares of MT&T. Certificate number 6 of Tri-County, issued the same date, gave Prodin 80 shares in Tri-County. When the two companies were merged in 1972, these certificates were worth 220 shares of the reissued MT&T stock. These 220 shares are the ones at issue in this case. Later on, in December of 1971, Alesio gave Prodin another 100 shares of MT&T stock and 30 shares of Tri-County as a year-end bonus. Nobody disputed Prodin's ownership of these subsequently-granted shares.

Some time shortly before or after Alesio issued the number 6 stock certificates to Prodin, Alesio presented Prodin with a promissory note and pledge agreement and asked him to sign both in order to receive his stock. The promissory note, dated September 1, 1971, provided that Prodin would pay Alesio $7,500 at six percent interest in monthly payments of $200 per month until paid in full. The pledge agreement, also dated September 1, 1971, pledged the 100 shares of MT&T and 80 shares of Tri-County granted in the number 6 certificates as collateral "to secure performance and payment of all obligations and indebtedness of Debtor [Prodin] to Secured Party [Alesio] of whatever kind and whenever or however created or incurred." Paragraph VII of the pledge agreement states:

> Debtor agrees and affirms that demand, notice, protest and all demands or notices of any action taken by Secured Party under this Pledge Agreement or in connection with any note or notes except those provided in this Pledge Agreement are hereby waived . . . .

Additionally, Alesio had Prodin endorse the back of both number 6 certificates. Although Prodin did not specifically remember endorsing the backs of the certificates, he acknowledged the signatures as his.

A letter from Alesio's lawyer David Hersh outlines the entire stock transaction, and states that "The shares of stock are not to be delivered to Michael until he has fully paid for them."

Prodin testified that Alesio told him that he was giving him the stock as a gift over a period of time, and that the note and pledge were for tax purposes only. Prodin maintained that he never received any money in exchange for the note, did not make payments on the note, and that it was understood that he would not have to pay the note. Hersh's letter and some handwritten notes do provide some support for Prodin's version of events.

Although he was a director and treasurer of MT&T, Prodin testified that there were never any formal meetings of MT&T directors during Alesio's lifetime; Alesio handled all such matters himself with the assistance of his lawyers. Prodin never discussed his share of stock or the percentage of MT&T he owned during Alesio's lifetime. When Gerald Carnago took over as Alesio's corporate counsel in 1973, Prodin was never present during meetings with Carnago.

Gerald Carnago testified that the corporate minute books and records of MT&T "bounced around" between his and Alesio's possession. Although the merger between MT&T and Tri-County occurred in September of 1972, Alesio did not have Carnago update the corporate records and reissue shares in the merged MT&T until 1975 or 1976. When updating the records, Carnago backdated the changes to the date of the merger. When reviewing the outstanding stock certificates, Carnageo's attention was drawn to the two certificates number 6 issued to Prodin. Carnago testified that the number 6 certificates issued to Prodin for 100 shares of MT&T and 80 shares of Tri-County had been pledged as collateral on a promissory note to Alesio. Alesio complained to Hersh and Carnago that Prodin owed him money, had never paid for the stock in the number 6 certificates, and had never paid him back on the note. Both Hersh and Carnago told Alesio to simply take back the stock. Carnago did not demand payment from Prodin or otherwise notify him that Alesio was foreclosing on the number 6 stock certificates; he merely issued new stock certificates in Alesio's name. According to Carnago, 220 shares were repossessed by Alesio and placed in the 1975 trust.

Despite this repossession and transfer of stock, the corporate stock register prepared July 7, 1978 and other MT&T corporate records continued to indicate that Prodin still owned 365 shares of MT&T. Some corporate records before 1975 indicated that Alesio had in fact passed complete title to the 220 shares to Prodin; Alesio's notes from June 25, 1974 indicated that Prodin owned 15/45ths [i.e. one-third] of MT&T stock, which would have been around 341 shares. After Alesio's death, questions of stock ownership arose during the April 1985 meeting of MT&T shareholders and directors; however no immediate action was taken to resolve the issue. Both Helen and Prodin maintained that the transfer of their interests in MT&T to the 1975 trust was fraudulent and should not be recognized.

Ultimately the Trustee and Ettore sued Prodin for title to the disputed 220 shares of MT&T stock, claiming that the shares belonged to the 1975 trust. Ettore and the Trustee argued that Alesio validly foreclosed against the stock for nonpayment of the note, and, in the alternative, that Alesio had never completed any gift of the stock to Prodin. Prodin argued that the 220 shares of stock were

converted through fraud and that any foreclosure was invalid because Prodin had not received written notice of the foreclosure as required by the UCC. Prodin's counsel argued that he still had the right to redeem his 220 shares of MT&T stock for the amount due under the promissory note. The probate judge rejected Prodin's arguments, finding that the advocated UCC provisions were inapplicable. At the close of the evidence, both sides moved for directed verdict regarding the ownership of the stock. The probate court denied both motions.

With regard to the Prodin stock claims, the probate judge instructed the jury regarding the elements of a gift, the elements of fraud, and the statute of fraud requirements for transfer of stock. The probate judge explained Article 9 of the UCC in the following manner:

> To prevail on his Article 9 claim, Mr. Prodin must prove by a preponderance of the evidence that one, the transaction was covered by Article 9 of the Uniform Commercial Code. For example, that the transaction was intended to create a security interest in favor of Alesio; two, the foreclosure violated Article 9 of the Uniform Commercial Code; and three, Mr. Prodin tendered the payment due for the shares.

Prodin objected to that part of the instruction stating that he was required to tender payment due and objected to the lack of an instruction stating that Alesio was required to give written notice of any foreclosure under UCC Article 14. The probate judge declined to use Prodin's proposed special verdict form, and instead told the jury that they should simply decide whether the trust or Prodin had title to the contested MT&T stock. The jury found that the stock was owned by the 1975 trust. Prodin moved for judgment not withstanding the verdict or a new trial, which the probate judge denied.

The 1975 trust's claim to the Presidents' Village Professional Building Property: On September 8, 1983 Alesio purchased a medical office building called the Presidents' Village Professional Building [PVPB] for $280,000. The warranty deed conveyed the property to "Alesio Scarchilli, as Trustee under Declaration of Trust by Alesio Scarchilli dated December 8, 1975." On December 6, 1983, Alesio executed a subsequent quitclaim deed for the same property from "Alesio Scarchilli, as Trustee under Declaration of Trust by Alesio Scarchilli dated December 8, 1975" to "Alesio Scarchilli in trust for Silvano Luigi Scarchilli, a minor, and Lorian Alesio Scarchilli, a minor."

Before his death Alesio told Prodin and other family members that he had purchased a medical office building so that if any of the grandchildren became professionals they would have an office if they needed one. Gerald Carnago was Alesio's lawyer for the PVPB purchase. Carnago testified that Alesio bought the property to provide funds for his grandsons' education. Alesio told him that he wanted to buy the PVPB property in trust for his natural grandchildren, and Carnago advised him to set up an educational trust. Carnago and Alesio put the PVPB property in the name of a trust for Lorian and Sylvan Scarchilli and planned to draw up an educational trust afterwards. However, Alesio died before Carnago had the opportunity to draw up the trust documents. Helen Scarchilli was not involved in the purchase of the PVPB property or the closing on the sale; all documents were put in Alesio's name as trustee for the 1975 trust.

Following Alesio's death, both Helen and the 1975 trust contested Lorian's and Sylvan's title to the PVPB property. Helen asserted that the property was hers by right of survivorship, and the Trustee claimed that the transfer of the building from the 1975 trust was outside Alesio's power as trustee. Ettore, Lorian, and Sylvan argued that Alesio did have the power to remove principal from the 1975 trust during his lifetime due to his role as grantor of the trust. Carnago testified that the 1975 trust was drafted with the intent of creating a revocable trust with the broadest possible powers reserved for Alesio as grantor. However, these broad powers would belong only to Alesio during his lifetime; successor trustees would not have the same broad powers because they would not be grantors. At the close of proofs, the Trustee and Ettore, Lorian and Sylvan moved for directed verdict with regard to the ownership of the PVPB property. The probate judge granted directed verdict in favor of Lorian and Sylvan Scarchilli, finding that Alesio effectively quitclaimed the 1975 trust's interest in the PVPB property to himself as trustee for Lorian and Sylvan, which effectively vested title to Lorian and Sylvan because no trust existed.

Allocation of fees to be paid to Dykema Gossett: After the bench and jury verdicts in favor of the trusts, Ettore's attorneys, Dykema Gossett, [Dykema] petitioned the probate court for payment of their fees from the trusts. Dykema claimed that it had expended time and made disbursements totaling $841,944 on behalf of the trusts, and sought a fee award of $779,400, which it asserted was one-third the present value of the assets it had secured for the trusts. The court found that Dykema was entitled to fees and disbursements from the trusts, and ordered that the amount be submitted to mediation pursuant to MCR 2.403. This order specifically provided that fees should be awarded for services rendered and expenses incurred in the trusts' litigation regarding MT&T stock and property, and that fees incurred in the course of the PVPB litigation should not be considered. The probate judge reserved his decision regarding the apportionment of those fees from the trusts.

The billing records presented by Dykema at mediation included all bills and expenses incurred up to January 31, 1993. There is no record of the mediation proceedings. The mediation panel found that Dykema should be awarded $455,000 as reasonable attorney fees and costs of $24,500. The mediators made this finding on a standard form which did not explain which billings had been accepted or rejected. All parties accepted the mediators' evaluation, and the probate court entered judgment for Dykema in the amount of the award. That order stated that it was for "attorney and expert witness fees incurred in securing title to the MT&T property in the Trustee of the 1974 Trust, and the MT&T stock in the Trustee of the 1975 Trust . . . ." The order specifically provided that it resolved only the amount of fees and not how they would be allocated.

The probate judge instructed the Trustee to recommend how the fees should be allocated between the two trusts. The Trustee took the position that the fee and costs award should be allocated equally between the 1974 and 1975 trusts, and that within each trust 100% of the amount allocated should be charged against trust income instead of against the principal [corpus] of the trust. The Trustee recommended that the fees be allocated against income because the actions of the main income beneficiary, Helen Scarchilli, necessitated that the trusts bring suit for possession of the MT&T assets.

The probate judge found that Alesio's intent in setting up the trusts was to provide for Helen as income beneficiary, and to protect the Scarchilli family's interest as remaindermen. The judge found that the revised uniform principal and income act [RUPIA], MCL 555.51 et seq; MSA 26.79(1) et seq, required that costs be assessed against the trusts' principal, and ordered that the fee awards be paid equally out of the principal of the 1974 and 1975 trusts.

Dykema's claims for additional fees: In October of 1993, Dykema filed a second petition for award of attorney fees from the trust, seeking fees for its work pursuing claims for breach of fiduciary duty and excess compensation on behalf of the 1975 trust. Dykema had originally represented the trusts in their suit against Helen Scarchilli for breach of her fiduciary duty as trustee. Dykema also brought excess compensation claims against Michael Prodin and Helen and Delphine Scarchilli on behalf of the trusts. Dykema claimed that it was due an additional $81,384.25 for work performed on the fiduciary duty claim between October 1990 and January 29, 1993, and $14,536 for work performed on the excess compensation claims between October 1990 and January 21, 1993, and submitted hourly billing statements supporting these claims. The Trustee moved to dismiss Dykema's claim for additional fees on the basis of res judicata, arguing that all fee issues had been presented and decided by the earlier mediation. The probate judge agreed with the Trustee, noting that all of the fees submitted in the latest petition had been previously presented during that earlier mediation. The probate court found that the mediation award incorporated any and all billings from Dykema up to the date of the mediation, which included the billings sought in the present proceeding.

Dismissal of claims for excess compensation: Around October of 1990, Ettore Scarchilli and the Trustee sued the directors and officers of MT&T, Helen and Delphine Scarchilli and Michael Prodin, for excess compensation received from MT&T. The excess compensation claim was essentially a shareholders' derivative action which alleged that the directors were diverting corporate money to themselves in the form of high salaries. Ettore's lawyers at Dykema did most of the discovery and preparatory work for the excess compensation claim. However, the excess compensation claims were not actively pursued following the probate judge's order allocating Dykema's fee award against the corpus of each trust rather than its income. The Trustee testified that the allocation of fees made pursuit of the excess compensation claims unprofitable for the trusts, because any fees incurred would likely be paid out of the corpus of the trust, and any money received in the excess compensation claims would have been paid back into MT&T corporation, then paid out in the form of dividends, which would simply be paid to Helen Scarchilli as income beneficiary.

One week before the scheduled trial date, the Trustee filed a Notice of Abandonment/Dismissal of Claim notifying the parties that he intended to abandon the excess compensation claims. This notice informed the other parties that they could petition to intervene, and was served on Ettore's new counsel. Ettore filed written objections in response to the Trustee's notice, but did not move to intervene. The probate judge dismissed the excess compensation claims with prejudice, noting that the case had already come up for trial, that the Trustee had filed notice that he was abandoning the claim, that the respondents appeared and were ready for trial, and that nobody had petitioned to intervene in the matter.

I.

Ettore Scarchilli and the Trustee argue that the probate judge erred by allocating Dykema's fee award against trust corpus rather than income. Appellants assert that the probate judge improperly interfered with the Trustee's decision regarding allocation, that the discretion given to the Trustee by the trust instruments overrides contrary provisions in the RUPIA, and that equity requires that fees incurred due to the income beneficiary's actions be charged against trust income rather than principal. We conclude that the probate judge did not err by ordering that the attorney fees be allocated against the principal of the trusts. Under RUPIA the fees should be assessed against the principal of the trusts because those fees were incurred during legal action involving the principal of the 1974 and 1975 trusts. Contrary to the Trustee's and Ettore Scarchilli's arguments, the provisions contained in the trust instruments do not clearly contravene the provisions of RUPIA.

A probate court's construction or interpretation of trust instruments is reviewed for clear error. *Miller v Dept of Mental Health*, 432 Mich 426, 434; 442 NW2d 617 (1989); *In re Estate of Green*, 172 Mich App 298, 311; 431 NW2d 492 (1988). Statutory interpretation is a question of law which is reviewed de novo for error on appeal. *Smeets v Genesee Co Clerk*, 193 Mich App 628, 633; 484 NW2d 770 (1992). Section 21(b)(v) of the Revised Probate Code, MCL 700.21(b)(v); MSA 27.5021(b)(v) gives the probate court exclusive legal and equitable jurisdiction over "Proceedings concerning the . . . administration . . . of trusts . . . including . . .proceeding to (v)]d]etermine . . . questions of construction of. . . trusts; instruct trustees, and determine relative thereto the existence or nonexistence of an immunity, power, privilege, duty, or right." A probate court's intervention in a trustee's administration of a trust ordinarily requires a showing that the trustee has violated his fiduciary duty. *In re Butterfield Estate*, 418 Mich 241, 257; 341 NW2d 453 (1983).

Ordinary expenses of administering a trust are generally charged against income; extraordinary expenses that benefit the remaindermen of the trust are charged against the principal of the trust. *Donovan v National Bank of Detroit*, 384 Mich 595, 601; 185 NW2d 354 (1971). Section 13 of RUPIA, MCL 555.63; MSA 26.79(13), provides the guidelines for charging specific trust expenses against either income or principal:

> (a) The following charges shall be made against income:
>
> (1) Ordinary expenses incurred in connection with the administration, management or preservation of the trust property . . . .
>
> * * *
>
> (c) *The following charges shall be made against principal:*

(1) *[E]xpenses reasonably incurred in connection with principal, court costs and attorney's fees primarily concerning matters of principal . . . .* (Emphasis added).

The probate judge did not commit an error of law in interpreting RUPIA. Here the litigation over the MT&T property and stock directly involved the principal of the 1974 and 1975 trusts, and ended up significantly increasing the assets held by those trusts to the benefit of the remaindermen. Under RUPIA §13(c)(1) and *Donovan*, those fees should be charged against principal rather than income.

We also conclude that the probate judge's interpretation of the trust instruments was not clearly erroneous. The Trustee and Ettore argue that the provisions contained in the 1974 and 1975 trust instruments giving the trustee discretion to allocate expenses between principal and income overrode the RUPIA provisions regarding allocation of expenses.

Section 2(a) of RUPIA, MCL 555.52(a); MSA 26.79(2) provides in relevant part:

(a) A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. *A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each*

(1) In accordance with the terms of the trust instrument, notwithstanding contrary provisions of this act;

(2) In the absence of any contrary terms of the trust instrument, in accordance with the provisions of this act. . . . (Emphasis added).

Thus, under RUPIA §2(a)(1), in order for the apportionment of fees to be controlled by the terms of the trust rather than RUPIA the trust instrument must contain clear language stating an intent that the apportionment provisions of RUPIA do not apply to the trust. *Donovan, supra,* 384 Mich at 600. Where trust instruments are ambiguous with regard to how specific expenses are to be apportioned by the trustee, expenses should be apportioned according to RUPIA. *Donovan v NBD,* 20 Mich App 485, 488; 174 NW2d 146 (1969), *aff'd* 384 Mich 595; 185 NW2d 354 (1971). The probate judge should look to the trust instrument as a whole to determine the settlor's intent. *Id*.

The Trustee and Ettore assert that ¶6 of the 1974 trust and ¶10 of the 1975 trust give the trustee complete discretion to allocate expenses as he sees fit, and that these trust provisions override the expense allocation provisions of RUPIA pursuant to RUPIA §2(a)(1). Paragraph 6 of the 1974 trust provides in relevant part:

> 6. Expenses of trust: With regard to any necessary and proper charges and expenses in connection with the trust estate, the trustees shall have the power, in their discretion:
>
> (a) To deduct . . . and pay out of any money belonging to the trust estate any such charges and expenses including . . . legal assessments … which at any time may be due and owing by, or exist against the trust estate.
>
> (b) *To determine the apportionment of such charges and expenses between principal and income.* (Emphasis added).

Paragraph 10 of the 1975 trust provides in relevant part:

> 10. Allocation Between Income and Corpus: All receipts and all disbursements the Trustee is authorized to make shall be credited to or charged against either income or principal as the Trustee shall determine to be *in accordance with sound and established accounting principles under the law of trusts . . . . It is the Grantor's intention in creating the trusts hereunder to primarily benefit the income beneficiaries* and the Grantor requests the Trustee, in resolving doubtful matters relating to allocation between income and principal, to take such fact into consideration. (Emphasis added).

Although ¶6 of the 1974 trust gives the Trustee discretion to apportion charges between income and principal, it does not clearly state that the apportionment provisions of RUPIA do not apply to the trust. It also does not contain specific provisions regarding the apportionment of those charges against principal or income. The expert testimony indicated that the Trustee would not have unlimited discretion to allocate expenses, but would have to look at the trust instrument as a whole and comply with the law of trust when making such an allocation. Because ¶6 does not contain clear language contravening the provisions of RUPIA, §2(a)(1) does not apply to the 1974 trust. Under RUPIA §2(a)(2), the allocation of fees against the 1974 trust should be done in accordance with the provisions of the RUPIA.

Although ¶10 of the 1975 trust gives the Trustee discretion to allocate fees against income or principal, that paragraph specifically states that such allocations must be made according to the law of trusts. Under the current law of trusts, RUPIA §13(c)(1) and *Donovan, supra*, 384 Mich 601, the fees in question should be charged against the principal. Furthermore, ¶10 states that the grantor's intent was to primarily benefit the income beneficiary. In light of such expressed intent the law of trusts indicates that such expenses should be assessed against principal rather than income. *Donovan, supra*, 20 Mich App 488.

Although the probate judge never found that the Trustee had violated his fiduciary duty, it was not necessary for such a showing to be made in this case. Where a trust gives a trustee power to allocate expenditures between income and principal, such powers are permissive rather than

mandatory; the trustee can either request direction from the court with regard to such allocation or exercise his own judgment so long as his actions are fair to both income beneficiaries and remaindermen. *In re Gray Estate*, 9 Mich App 262, 270; 156 NW2d 594 (1967). Here the Trustee did not simply exercise his discretion and make a final determination regarding the allocation of fees, but instead submitted his recommendation to the probate court so that the probate judge could determine how the fees should be allocated. Failing to follow the Trustee's recommendation is not the same as setting aside the Trustee's decision.

The probate judge's allocation of fees was not inequitable. Trustees must be impartial in their administration of a trust; their actions should not favor income beneficiaries or remaindermen unless such an intent is clearly expressed in the trust instruments. *Butterfield, supra*, 418 Mich 256-257. The Trustee's allocation of 100% of the legal fees against the trusts' income was clearly designed to punish the income beneficiary and reward the remaindermen. Review of the 1974 trust document reveals no expressed intent to favor the remaindermen over the income beneficiaries. In fact, review of ¶10 of the 1975 trust document specifically states an intent to primarily benefit the income beneficiary and directs that the Trustee's allocation of expenses should be done in such a manner as to further that goal.

The Trustee's recommended allocation is not justified by his pat assertion that the fees should come out of income because the actions of the income beneficiary, Helen Scarchilli, required that the lawsuits be brought on behalf of the trusts. If anyone was at fault for causing this litigation it was the decedent Alesio Scarchilli, who came up with an elaborate trust and estate plan without adequately informing his heirs and kept inadequate and misleading records regarding the actual ownership of MT&T stock. Review of the testimony and documentary evidence indicates that Helen Scarchilli and Michael Prodin had reason to believe that they in fact owned the contested MT&T assets. The fact that Helen Scarchilli defended against Ettore's and the Trustee's lawsuits in good faith should not be used as a basis to punish her.

II.

Ettore Scarchilli argues that the probate judge abused his discretion by dismissing the excess compensation claims with prejudice, and asserts that the probate court committed errors of law by applying MCR 5.120. We disagree.

Errors of law are reviewed de novo on appeal. *Smeets, supra*, 193 Mich App 633. The probate judge's dismissal with prejudice due to the Trustee's abandonment of the claim is analogous to a dismissal of a claim with prejudice for no progress. Such a dismissal is reviewed for an abuse of discretion. *North v Dept of Mental Health*, 427 Mich 659, 661; 397 NW2d 793 (1986). Similarly, if we regard the probate judge's dismissal as a denial of a continuance or adjournment, that decision is also reviewed for an abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

The probate judge properly applied the provisions of MCR 5.120 and did not commit an error of law or abuse his discretion by dismissing the excess compensation claim. Because the trustee had abandoned the claim, and no other party had petitioned to intervene to pursue the claim, the proper course was to dismiss the claim.

MCR 5.120 provides:

> The fiduciary or trustee represents the interested parties in a contested matter. The fiduciary or trustee must give notice to all interested parties whose addresses are known that a contested matter has been commenced and must keep such interested parties reasonably informed of the fiduciary's or trustee's actions concerning the matter. The fiduciary or trustee must inform the interested parties that they may file a petition to intervene in the matter and that failure to intervene shall result in their being bound by the actions of the fiduciary or trustee. *The interested party shall be bound by the actions of the fiduciary or trustee after such notice and until the interested party notifies the fiduciary or trustee that the interested party has filed with the court a petition to intervene*.

The 1992 Probate Rules Committee Comment to MCR 5.120 states "This is a new rule, designed to give finality to actions of fiduciaries and trustees."

Under MCR 5.120, all plaintiffs would be bound by the trustee's decision to voluntarily abandon the excess compensation claim unless they moved to intervene so that they could pursue the claim themselves. Ettore was notified of the trustee's intent to abandon the claim, and was made aware that he could intervene in the matter in order to pursue this claim. Despite this notice, he never moved to intervene. Under MCR 5.120 Ettore was bound by the Trustee's decision to abandon the claim. The probate court did not err in dismissing the claim with prejudice. The excess compensation claims had been pending since 1991, yet on the March 31, 1994 trial date there was no intervening plaintiff willing to prosecute those claims. Defendants appeared on that date apparently ready to proceed with trial on the excess compensation claims. In light of these circumstances and the fact that MCR 5.120 was designed to give finality to a trustee's actions, dismissal with prejudice was proper.

III.

The Trustee claims that the probate judge erred by denying the Trustee a directed verdict regarding the ownership of the PVPB property. We find no error.

The suit over the ownership of the PVPB property was essentially an action to quiet title to be decided by the probate judge. All concerned parties moved for directed verdict following the close of proofs, and all parties made extensive arguments regarding the applicable law. Thus, the probate court's grant of directed verdict in favor of Sylvan and Lorian Scarchilli should be treated as a verdict

following a bench trial. A trial court's findings of fact following a bench trial are reviewed for clear error. MCR 2.613(C); *Arco Industries Corp v American Motorists Corp*, 448 Mich 395, 410; 531 NW2d 168 (1995). Similarly, a probate court's construction or interpretation of trust instruments is also reviewed for clear error. *Miller, supra*, 432 Mich 434. Findings of law are reviewed de novo. *Smeets, supra*, 193 Mich App 633.

The evidence showed that Alesio Scarchilli intended to give himself the broadest possible power over the corpus of the 1975 trust during his lifetime, and did so by reserving his right as grantor to withdraw property from the trust corpus at will during his lifetime. The evidence showed that Alesio withdrew the PVPB property from the 1975 trust via a quitclaim deed and gave that property to himself as trustee for Lorian and Sylvan Scarchilli. There is no indication that the quitclaim deed is invalid or that the gift was outside Alesio's powers as grantor. The probate judge properly found in favor of Lorian and Sylvan Scarchilli.

MCL 555.21; MSA 26.71 provides "When the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other acts of the trustees, in contravention of the trust, shall be absolutely void." The Trustee argues that Alesio's removal of the PVPB property from the 1975 trust was in contravention of the express provisions of the trust instrument and therefore void.

The intent of the settlor is paramount in construing a trust instrument. *Miller, supra*, 432 Mich 434. In the case of a revocable trust, the settlor [grantor] may name himself as trustee and reserve the right to use or dispose of the corpus [principal] of the trust during his lifetime. *Sabin-Scheiber v Sabin*, 128 Mich App 427, 431; 340 NW2d 114 (1983).

Paragraph 13 of the 1975 trust, entitled "Power of Amendment and Revocation," states:

> A. The Grantor shall have the power at any time during his lifetime by an instrument in writing delivered to the Trustee to modify, alter, amend or revoke this Agreement, in whole or in part, and to change the beneficiaries thereof, *and to withdraw any part or all of the principal of this trust estate . . . .* (Emphasis added).

Alesio Scarchilli was grantor of the 1975 trust as well as trustee. Paragraph 13 of the 1975 trust instrument clearly gave him the ability to withdraw any part of the trust principal, including the PVPB property.

In his motion for directed verdict the Trustee argued that Alesio had not properly withdrawn the PVPB property from the 1975 trust because he had never delivered a written instrument to the trustee withdrawing that part of the trust principal. In *Sabin-Scheiber*, this Court found that a settlor/co-trustee who was empowered to withdraw funds from the corpus of a trust properly did so despite the fact that he did not make a written request to the trustee for the funds as required by the trust instrument. 128 Mich App 433. The Court found that the purpose of the written notice requirement was for the

trustee's benefit, and that a written request was not necessary where the withdrawing settlor was also a trustee. *Id*. Because Alesio Scarchilli was both grantor and the sole trustee of the 1975 trust during his lifetime, he did not need to write himself instructions to withdraw the PVPB property from the trust.

IV.

Michael Prodin argues that he still had a right to redeem the contested shares of MT&T stock, and that the probate judge erred by failing to grant a directed verdict in his favor on this issue. We disagree.

When reviewing the denial of a motion for directed verdict, this Court must examine the evidence in a light most favorable to the nonmoving party to determine whether sufficient evidence was presented to create an issue for the trier of fact. *Phillips v Estate of Diehm*, 213 Mich App 389, 395; 541 NW2d 566 (1995). The trial court's decision is reviewed for an abuse of discretion. *Id*.

The probate judge did not err by refusing to grant a directed verdict in favor of Michael Prodin on his claim that he possessed a continuing right to redeem the stock. Sufficient evidence was presented at trial to create an issue for the jury regarding whether the pledge agreement and note actually gave rise to a security interest that fell within the provisions of the Uniform Commercial Code. Moreover, even if the UCC provisions applied to Prodin's case, he lost any right of redemption because there was no evidence that he had tendered performance of the debt owed within a reasonable time.

Reviewing the evidence in a light most favorable to the Trustee, a question of fact existed regarding whether the entire stock transaction between Prodin and Alesio was a secured transaction governed by UCC Article 9. Prodin testified that the promissory note and pledge agreement were merely a sham used to avoid payment of gift taxes. Prodin testified that he was never expected to pay on the note and that he never did so. Notes from Alesio's attorney also showed that the transaction was a sham; that Alesio was planning to give the stock to Prodin but wanted to avoid paying gift tax. This evidence indicated that the entire transaction was merely a disguised (and incomplete) gift, which fell outside the provisions of UCC Article 9. Because there was a question of fact regarding whether the transaction fell within the UCC, Prodin was not entitled to directed verdict on the issue of his claimed right to redeem the stock pursuant to the provisions of article 9.

Additionally, assuming *arguendo* that the pledge agreement and note established a secured transaction under article 9, the evidence did not show that Prodin still had a valid right to redeem the stock. Section 9-503 of the UCC, MCL 440.9503; MSA 19.9503 provides "Unless otherwise agreed a secured party has on default the right to take possession of the collateral." Section 9-505(2) of the UCC, MCL 440.9505(2); MSA 19.9505(2)[2] provides for the secured party's repossession of the collateral in satisfaction of the debt owed:

> In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the

> obligation. *Written notice of such proposal shall be sent to the debtor* if he has not signed after default a statement renouncing or modifying his rights under this subsection . . . . *If the secured party receives objection in writing from a person entitled to receive notification within 21 days* after the notice was sent, the secured party must dispose of the collateral under section 9504. *In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation. E*emphasis added).

UCC §9-506, MCL 440.9506; MSA 19.9506 gives a debtor the right to redeem before retention of the collateral in satisfaction of the debt under §9-505(2). Section 9-506 states in relevant part:

> At any time … before the obligation has been discharged under section 9505(2) the debtor … may … redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorney's fees and legal expenses. [MCL 440.9506; MSA 19.9506.]

It is well established that in order to invoke his right to redeem collateral under UCC §9-506, "the debtor must tender performance of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking the collateral." *Howard v Lud*, 119 Mich App 55, 63; 325 NW2d 623 (1982). Where a debtor does not tender performance despite actual notice that the secured party intends to retain the collateral, the right to redeem is waived by the debtor's failure to act. *Id*.

The evidence at trial showed that Prodin should have known of Alesio's repossession of the MT&T stock by the time of the April 6, 1985 MT&T director's meeting, when the dispute over the stock ownership was raised and discussed. Despite Prodin's actual notice that his stock had been repossessed, there was no evidence indicating that he had tendered the payment due under the promissory note and pledge. Prodin does not assert that tender was made, but instead asserts that he has a continuing right to redeem the MT&T stock due to the fact that he never received written notice. Under Prodin's version of the UCC, his right to redeem will last indefinitely, and any deadlines for tendering payment will not begin to run until he receives written notice. Prodin's assertion of a continuing right to redeem is inconsistent with precedent and common sense. Under UCC §9-505(2), a debtor has only twenty-one days after written notice was sent to tender payment and redeem the collateral. Under *Howard*, *supra*, the right to redeem collateral under UCC §9-506 does not last indefinitely, but is waived where tender of payment is not made after the debtor receives actual notice of the repossession. Prodin received actual notice of Alesio's repossession of the MT&T stock in April of 1985. The evidence did not show that he ever tendered payment on the note after receiving this notice, so his right to redeem was waived.

V.

Michael Prodin argues that the jury's verdict regarding the ownership of the contested 220 shares of MT&T stock must be reversed due to erroneous jury instructions. We find no reason to reverse.

Whether a jury instruction applies to the facts of a case and accurately states the applicable law is within the trial court's discretion. *Bordeaux v Celotex Corp,* 203 Mich App 158, 168-169; 511 NW2d 899 (1993). A trial court may give a non-standard jury instruction so long as it accurately states the law and is concise, understandable, and nonargumentative. *Id.*, at 169. Sufficient evidence must have been presented to warrant giving the instruction. *Id*. Jury instructions are reviewed in their entirety; reversal is not required if the instructions accurately and fairly present the parties' theories and the applicable law. *Id*. This Court will not reverse a verdict on the basis of an erroneous jury instruction unless the failure to reverse would be inconsistent with substantial justice. *Winiemko v Valenti,* 203 Mich App 411, 418; 513 NW2d 181 (1994).

The jury instructions given by the probate judge accurately stated the applicable law and fairly presented the parties' theories. Any deficiency in the instructions due to failure to explain the exact terms of the UCC was harmless.

Prodin argues that the probate judge erred by failing to give his requested instruction number 14, which explains the written notice requirement contained in UCC §9-505(2). The instructions did not explain the requirements of UCC §9-505(2) or give an adequate description of UCC requirements to allow the jury to determine whether Alesio's repossession of the stock violated the UCC. However, any error due to this defect does not require reversal of the verdict. Prodin argued that because he never received written notice of Alesio's repossession of the stock as required under UCC §§9-505(2) he still had a valid right to redeem that stock. As previously pointed out, Prodin waived his right to redeem by failing to tender payment on the note within a reasonable period after receiving actual notice of the repossession. *Howard, supra*, 119 Mich App 63.

Prodin further argues that the instructions were erroneous because they required that he prove the existence of the security interest, and that he tendered payment in full for the note. These instructions were proper. As pointed out above, there was a question of fact regarding whether a valid security interest existed. A debtor must tender payment in full to preserve his right to redemption. *Howard, supra,* 119 Mich App 63.

VI.

Michael Prodin also contends that the probate judge erred by not using the special verdict form he presented. We disagree.

The probate court did not err by refusing to use Prodin's proposed special verdict questions. The probate judge did not abuse his discretion by asking the jury for a general verdict on the ownership of the contested MT&T stock.

MCR 2.514(A) allows the trial judge to require the jury "to return a special verdict in the form of a written finding on each issue of fact, rather than a general verdict." Whether a special verdict form should be submitted to the jury is within the trial judge's discretion. *Ketola v Frost*, 375 Mich 266, 274 n 4; 134 NW2d 183 (1965); *State Hwy Comm v Abood*, 83 Mich App 612, 620 (1978).[3] The use of special verdict questions under MCR 2.514(A) is permissive rather than mandatory; it "does not provide that a party may demand a special verdict as a matter of right." Martin, Dean, & Webster, Michigan Court Rules Practice (3d Ed 1986), Rule 2.514, p 209. The verdict form presented by the trial court merely asked the jury to determine who owned the 220 shares of MT&T stock claimed by both Prodin and the 1975 trust. Although Prodin argues that the probate judge's refusal to use his special verdict form was erroneous, he does not adequately explain how use of the general verdict form was improper or unfairly prejudicial. Prodin argues that his counsel tailored his closing arguments based upon the assumption that the trial judge would use his special verdict form, and that failure to use the special verdict questions made closing argument worthless. This is not sufficient to find an abuse of discretion. The probate judge accurately and sufficiently explained Prodin's theory of the case. The jury received adequate instructions regarding the relevant issues. The question of who owned the 220 shares of MT&T stock was not so complex that it could not be decided in a general verdict.

VII.

Finally, Dykema argues that the probate court erred by dismissing its fees arising from the breach of fiduciary duty and excess compensation claims. We find no error.

The probate judge did not err by finding that Dykema's claims for additional fees was barred by acceptance of the mediation award. The fees in question had been incurred before the date of mediation, and were in fact presented to the mediation panel. Because the requested fees were presented at mediation, and there is no evidence that they were not considered when deriving the mediation award, they should be considered subsumed into that mediation award.

The trial judge granted summary disposition based upon res judicata. We review a trial court's grant of summary disposition de novo. This Court reviews the record and determines whether the prevailing party was entitled to judgment as a matter of law. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Whether res judicata applies is a question of law which is also reviewed de novo on appeal. *Husted v Auto Owners Ins Co*, 213 Mich 547, 555; 540 NW2d 743 (1995). MCR 2.116(C)(7) is the applicable court rule for summary disposition where a claim is barred due to "release, payment, prior judgment, immunity granted by law, . . . or other disposition of the claim." Summary disposition pursuant to MCR 2.116(C)(7) is proper where the pleadings demonstrate that a party is entitled to judgment as a matter of law, or the evidence shows that there is no genuine issue of

material fact. *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992). If no facts are in dispute, whether the claim is barred is a question of law for the trial court to decide. *Id*.

Michigan's broad application of res judicata bars both claims which were actually litigated as well as claims which arose out of the same transaction which could have been litigated but were not. *Hofman v ACIA*, 211 Mich App 55, 92; 535 NW2d 529 (1995).

MCR 2.403(M)(1) provides:

> (1) If all the parties accept the panel's evaluation, judgment will be entered in that amount. *The judgment shall be deemed to dispose of all claims in the action* and includes all fees, costs, and interest to the date of judgment. (emphasis added).

The purpose of mediation pursuant to MCR 2.403 is to expedite and simplify the settlement of cases without a trial. *Larson v Auto-Owners Ins Co*, 194 Mich App 329, 332; 486 NW2d 128 (1992). An accepted mediation serves as a final adjudication of the claims mediated. *Id*. Where a claim is submitted to mediation under MCR 2.403, and the award is accepted, that mediation award disposes of any and all claims between the accepting parties unless it can be shown that less than all the issues were submitted to mediation. *Larson*, at 332; *Reddam v Consumers Mfg Co*, 182 Mich App 754, 757; 452 NW2d 908 (1990). Allowing parties to effectively split their claims so as to preserve certain claims following acceptance of mediation runs directly contrary to the stated purposes of the mediation rule and is generally disfavored. *Joan Automotive Industries, inc v Check*, 214 Mich App 383, 388-389; 543 NW2d 15 (1995).

Although the orders directing the parties to proceed to mediation and entering judgment in the amount of the mediation award stated that the fee award was for attorney fees related to the trusts' claims to the MT&T property and stock, the obvious purpose of that language was to limit Dykema's recovery to fees incurred on behalf of the trusts, rather than its efforts on behalf of Lorian and Sylvan Scarchilli. Dykema has not clearly shown that its claims for fees incurred in the excess compensation and breach of fiduciary duty litigation were not included in the mediators' award. In fact, the record shows that those fees were presented to the mediators as part of Dykema's original claim for fees. The billings presented at mediation by Dykema contained all of that firm's legal work for the trust up to the date of mediation, and included charges related to the excess compensation and breach of fiduciary duty claims. The mediators did not make any specific findings regarding which fees were considered, but instead simply found that Dykema was entitled to fees of $455,000 and costs of $24,500. Acceptance of the $479,500 mediation award effectively disposed of all claims between Dykema and the Trustee.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ David H. Sawyer
/s/ William E. Collette

[1] Ettore Scarchilli was aligned with Lorian and Sylvan Scarchilli in opposition to the 1975 trust's claim to ownership of the PVPB property.

[2] This is the version of MCL 440.9505(2); MSA 19.9505(2) in effect until 1979. The statute was amended slightly by 1978 PA 369 §1.

[3] Special verdicts must be used in cases where the doctrine of comparative negligence is applicable. *Placek v Sterling Heights*, 405 Mich 638, 680-683; 275 NW2d 511 (1979).