

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of CHARLOTTE WETSMAN.

STEPHEN ERIC SHEFMAN, Personal
Representative of the Estate of CHARLOTTE
WETSMAN,

Appellant,

v

THOMAS BRENNAN FRASER, Special
Fiduciary, JUDITH GAIL SILBERMAN, and
PETER SHEFMAN,

Appellees.

In re Estate of CHARLOTTE WETSMAN.

STEPHEN SHEFMAN,

Appellant,

v

THOMAS BRENNAN FRASER, Special
Fiduciary, JUDITH GAIL SILBERMAN, and
PETER SHEFMAN,

Appellees.

In re Estate of CHARLOTTE WETSMAN.

ESTATE OF CHARLOTTE WETSMAN,

Plaintiff-Appellee,

UNPUBLISHED
September 20, 2012

No. 292350
Oakland Probate Court
LC No. 2007-309955-DE

Nos. 292738; 301356
Oakland Probate Court
LC No. 2007-309955-DE

and

STEPHEN ERIC SHEFMAN,

Plaintiff,

v

PETER ELLIOT SHEFMAN,

Defendant-Appellant.

No. 294961

Oakland Probate Court

LC No. 2008-319207-CZ

In re CHARLOTTE WETSMAN TRUST.

STEPHEN ERIC SHEFMAN,

Appellant,

v

PETER ELLIOTT SHEFMAN, JUDITH GAIL
SILBERMAN, and THOMAS BRENNAN
FRASER,

Appellees.

Nos. 296365; 301355

Oakland Probate Court

LC No. 2009-324688-TV

Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

These consolidated appeals involve proceedings in the Oakland County Probate Court regarding (1) the supervised administration of the probate estate of Charlotte Wetsman, who died testate in 2007 (the estate action), (2) a slander of title action concerning estate property, brought by the decedent's son Stephen Shefman, while acting as personal representative, against the decedent's other son, Peter Shefman (the slander of title action), and (3) the court-supervised administration of the decedent's inter vivos trust, beginning in 2009 (the trust action). In the estate action, Stephen appeals as of right from the probate court's orders removing him as personal representative and partially granting his petition for allowance of his first annual account (Docket No. 292350), appointing Thomas Brennan Fraser, a public administrator, as successor personal representative (Docket No. 292738), and allowing Stephen's second and final account in accordance with the court's prior opinions and orders (Docket No. 301356). In Docket No. 294961, Peter appeals as of right from the probate court's order, following a bench

trial, awarding the estate limited damages in the slander of title of action. In the trust action, Stephen appeals as of right from the probate court's orders removing him as successor trustee and appointing Fraser as successor trustee (Docket No. 296365), and granting Fraser's request for instructions to allow certain expenses incurred by the decedent's estate to be paid by trust assets (Docket No. 301355). In each appeal, we affirm.

I. FACTS AND PROCEDURAL BACKGROUND

The decedent died in February 2007, survived by three children, Stephen, Peter, and Judith Gail Silberman. In April 2007, Stephen petitioned the probate court to admit a copy of decedent's will, dated October 30, 1991, and to appoint him as personal representative of decedent's estate as provided in the will. Article II of the will provided for various items of personal property to be divided between the decedent's children by agreement or, in the absence of an agreement, as decided by the personal representative. Article III provided for the residuary estate to be distributed to Stephen, as successor trustee under a trust established by the decedent, dated October 30, 1991, and as subsequently amended, to be integrated with, administered, and accounted for as part of the trust estate.

A principal asset in the residue of the decedent's estate was a vacant lot that was part of a condominium development in the city of Ann Arbor. The condominium property had been conveyed to the decedent in 1997 pursuant to a warranty deed signed by Peter, as president of the Terrance Land Development Corporation. The trust agreement, as amended in 1995, awarded \$5,000 to each of the decedent's grandchildren, and provided that Peter was to receive certain real property in Florida, provided he "agrees to accept said assignment, transfer, and conveyance in full satisfaction of all claims, demands, causes of action, rights, titles or interests in which he may have or claim to have against the Trust and the Estate of GRANTOR, otherwise Peter Shefman, GRANTOR's son, shall take nothing under the Trust[.]"¹ Stephen and Silberman were to share equally in the remaining trust principal. Article VI(A) of the trust agreement provided for the use of the trust principal to pay any administrative expenses and claims of the decedent's estate to the extent that the estate assets were insufficient to pay those expenses and claims. Article VII-I(B) of the trust empowered the successor trustee to purchase property belonging to decedent's estate and to make loans to the personal representative.

In the estate action, the probate court appointed Stephen as personal representative of decedent's estate. Stephen, an attorney, also appeared as counsel for the personal representative. Peter filed ongoing objections to the validity of the decedent's will, arguing that it was the product of Stephen's undue influence against the decedent. The probate court struck Peter's objections in an order entered on October 22, 2007, which also granted discovery sanctions to Stephen.² Proceedings were thereafter conducted concerning various disputes by one or more of

¹ Stephen testified that the decedent sold the Florida property before he became successor trustee.

² The order was amended nunc pro tunc in March 2010 to provide that the will was admitted to probate.

the decedent's children, including Stephen's entitlement to funds in joint bank accounts with decedent, Peter's objections to Stephen's proposed sale of the condominium property, and whether a ring possessed by Silberman and artwork possessed by Stephen were part of the decedent's estate.

In June 2008, Stephen filed an amended, supplemental inventory of the decedent's estate, showing total assets, including the condominium property, valued at \$89,475. He also petitioned the probate court for approval of the sale of the condominium property. In July 2008, Stephen petitioned the probate court to allow his first annual account, which requested approval of fiduciary and attorney fees exceeding \$145,000. Silberman and Peter unsuccessfully moved for Stephen's removal as personal representative. In August 2008, Peter recorded a notice of lis pendens for the condominium property, which alleged that issues affecting the ownership of the property were involved in the estate action, which was described as a "sham legal process."

After the probate court denied Peter's motion for disqualification in the estate action, the court entered an order on September 23, 2008, canceling the notice of lis pendens. Despite that order, Stephen, as personal representative of the estate, filed a slander of title action against Peter, which was assigned to a different probate court judge. Ultimately, following a bench trial in August 2009, the judge determined that the elements for a slander of title claim were established, but that damages were nominal. In an order entered on November 2, 2009, the court awarded the decedent's estate damages of \$726, representing the costs associated with obtaining and recording the order removing the notice of lis pendens in the estate action.

The estate action was assigned to a new judge in January 2009. Following an evidentiary hearing that concluded on May 11, 2009, the successor judge partially approved the attorney and fiduciary fees sought by Stephen in his first annual account as personal representative. Stephen was awarded \$3,975 in attorney fees and \$3,615 in fiduciary fees. In addition, in light of events that had occurred since the predecessor judge denied the request for Stephen's removal, the successor judge sua sponte revisited whether Stephen should continue to serve as personal representative. The court determined that Stephen was no longer suitable to serve as personal representative and should be removed immediately. In an order entered on May 11, 2009, Stephen's fiduciary powers were suspended and Fraser was appointed as special fiduciary to investigate the status of the then-pending slander of title action, determine the impact of that case on the estate, and review and report on the status of the estate. In a subsequent order entered on May 28, 2009, the successor judge reiterated his decision appointing a special fiduciary and ordered that Stephen was to be removed as personal representative. On June 3, 2009, Fraser was appointed successor personal representative of the estate, effective May 11, 2009.

In July 2009, Stephen petitioned the probate court to allow his second and final account as personal representative, for the period through May 28, 2009. As part of that account, Stephen sought attorney and fiduciary fees exceeding \$179,000. In an order dated February 26, 2010, Stephen was allowed attorney fees of \$15,687 for his own legal services, and fiduciary fees of \$1,580. The court also approved attorney fees of \$2,973 for attorney Richard Siriani in the estate action. On November 5, 2010, Stephen's second and final account was approved in accordance with the court's previous opinions and orders.

In July 2009, proceedings in the trust action also commenced. The judge who was assigned the estate action in January 2009 ordered Stephen to file and register the decedent's trust in the probate court, and granted Fraser's petition for court supervision of the trust. On July 22, 2009, Stephen filed the trust registration in the probate court. On January 22, 2010, Stephen was removed as successor trustee and replaced by Fraser. In subsequent proceedings, Fraser filed a petition for the probate court's approval to use trust funds to pay certain fees and expenses associated with the decedent's estate. On November 5, 2010, the probate court entered an order allowing the fees and expenses to be paid from the trust "as necessary and appropriate."

II. STANDARD OF REVIEW

The probate court's factual findings are reviewed for clear error. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). We give deference to the probate court's "special opportunity" to judge the credibility of witnesses who appear before it. MCR 2.613(C). The court's conclusions of law are reviewed de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

We also review de novo jurisdictional issues and questions of law involving the interpretation or validity of a statute. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *In re McEvoy*, 267 Mich App 55, 69; 704 NW2d 78 (2005). The proper interpretation and application of a court rule is also reviewed de novo as a question of law, applying principles of statutory construction. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). A probate court's construction of a will or trust is likewise reviewed de novo. *In re Raymond Estate*, 483 Mich 48, 52; 764 NW2d 1 (2009); *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005).

A probate court's dispositional rulings, such as whether to remove a trustee or personal representative, are reviewed for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App at 128; *In re Baldwin Trust*, 274 Mich App 387, 404; 733 NW2d 419 (2007), *aff'd* 480 Mich 915 (2007); *Comerica Bank v City of Adrian*, 179 Mich App 712, 730; 446 NW2d 553 (1989). Decisions regarding the amount of reasonable attorney fees or compensation for a personal representative in an estate action are also reviewed for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App at 128; *In re Baird Estate*, 137 Mich App 634, 637; 357 NW2d 912 (1984). Whether to grant a motion for reconsideration is also reviewed for an abuse of discretion. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). An abuse of discretion occurs when the probate court chooses an outcome outside the range of reasonable and principled outcomes. *In re Temple Marital Trust*, 278 Mich App at 128.

III. ESTATE ACTION

A. DOCKET NO. 292350

In Docket No. 292350, Stephen appeals the probate court's May 28, 2009, order removing him as personal representative and partially granting his petition for allowance of his

first annual account in the estate action. While Stephen also seeks review of a portion of the order appointing a special fiduciary and an earlier May 11, 2009, order in which Fraser was designated and appointed as the special fiduciary, an appeal to this Court from a probate court order is limited to the portion of the order under MCR 5.801(B) that is subject to this Court's jurisdiction. *Comerica Bank*, 179 Mich App at 729-730. At the time Stephen filed his appeal in Docket No. 292350, MCR 5.801(B)(1)(a) provided for an appeal by right to this Court from an order "appointing or removing a personal representative, conservator, or trustee, or denying such an appointment."³ Because the appointment of a special fiduciary is not within subrule (1)(a) or any of the other subrules listed in MCR 5.801(B), we do not consider Stephen's arguments concerning Fraser's appointment as special fiduciary.

With respect to those portions of the May 28, 2009, order that are subject to this Court's jurisdiction, Stephen argues that the order should be set aside because the judge who entered it should have been disqualified under MCR 2.003 on the grounds that he was biased and had personal knowledge of disputed evidentiary facts.

MCR 2.003 applies to proceedings in probate court. See MCR 5.001. Under MCR 2.003(D)(1), formerly MCR 2.003(C)(1), a motion for disqualification must be filed within 14 days after discovery of the grounds for disqualification.⁴ Where a party is aware of a judge's alleged judicial bias and does not move for disqualification, the issue is not preserved for appeal. *Kroll v Crest Plastics, Inc.*, 142 Mich App 284, 491; 369 NW2d 487 (1985). The disqualification of a judge under MCR 2.003 is further subject to the rule that "[t]o preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a party must request referral to the chief judge of the trial court after the trial court judge's denial of the party's motion." *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996), see also MCR 2.003(D)(3)(a), formerly MCR 2.003(C)(3)(a).

Considering that Stephen's claim is based on an oral decision rendered on May 11, 2009, we find no merit to Stephen's argument that he could not have moved for disqualification before entry of the May 28, 2009, order that is the subject of this appeal. Further, Stephen could have moved for reconsideration of the order under MCR 2.119(F). As the beneficiary of the will admitted to probate in the estate action, he also had standing to move for disqualification on the basis of judicial bias over the next two years, after he was removed as personal representative, but he did not do so. Because Stephen clearly had an opportunity to move for disqualification, and did not do so, he did not preserve this issue for appeal.

Nonetheless, this Court may overlook preservation requirements where failure to consider an issue would result in manifest injustice, consideration of the issue is necessary to a

³ The court rule was amended, effective April 1, 2010, and former subrule (B)(1)(a) was recodified as subrule (B)(2)(a) and expanded to include a "trust protector as referred to in MCL 700.7103(n)."

⁴ The court rule governing a motion for disqualification was amended after entry of the May 28, 2009, order, but the 14-day time limit was not changed.

proper determination of the case, or the issue presents a question of law and the facts necessary for its resolution have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). This Court is also empowered to consider any issue that, in this Court's opinion, justice requires be considered and resolved. *Paschke v Retool Indus (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994). However, our review of the record does not disclose anything about the judge's May 11, 2009, opinion that warrants relief from the May 28, 2009, order.

No relief is warranted unless a basis for disqualification is shown that affected the outcome of the proceeding. *Hull & Smith Horse Vans, Inc v Carras*, 144 Mich App 712, 719; 376 NW2d 392 (1985); see also *Davis v Chatman*, 292 Mich App 603, 615; 808 NW2d 555 (2011). If there are factual issues to resolve, they must be resolved in the probate court. *Brill v Brill*, 75 Mich App 706, 711; 255 NW2d 739 (1977).

It is clear from the trial court's May 11, 2009, opinion that it applied the criteria in Article III of the Estates and Protected Individuals Code (EPIC), MCL 700.3101 *et seq.*, for removing a personal representative for cause and, in particular, focused on MCL 700.3611(2) when removing Stephen as personal representative.⁵ The court found that Stephen had a duty to act in the best interests of the estate and the parties. The court considered several factors in determining that Stephen was not suitable for the office of personal representative, including Stephen's conflict with Peter, Stephen's lack of credibility regarding his knowledge of the conflict, and a determination that Stephen was taking advantage of his position to deprive Silberman and Peter of certain assets. While the court also considered information that he received from his court staff regarding Stephen's repeated contacts with them, we find no merit to Stephen's argument that this constituted disqualifying conduct. MCR 2.003(C)(1)(c), formerly MCR 2.003(B)(2), provides for disqualification where "[t]he judge has personal knowledge of disputed evidentiary facts concerning the proceeding," but does not apply to knowledge gained by a judge in the course of judicial proceedings. See *FMB-First Nat'l Bank v Bailey*, 232 Mich App 711, 729; 591 NW2d 676 (1998). While Stephen's contacts with court staff involved events outside the courtroom, Stephen does not dispute that the contacts took place. In addition, the record establishes that Stephen continued to contact the court's staff even after the court informed him at a hearing on May 1, 2009, that his *ex parte* communications with staff was inappropriate.

Although Stephen argues that it was appropriate for him to attempt to speak with the court's staff in an effort to provide information on a matter of law in his capacity as an attorney, the danger of *ex parte* communications is that they will expose a judge to one-sided argument and, at worst, invite improper influence. *Grievance Administrator v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000). Under the Michigan Rules of Professional Conduct, a lawyer shall not seek to influence a judge. MRPC 3.5(a). Because it is undisputed that Stephen

⁵ The EPIC became effective April 1, 2000, see MCL 700.8101(1), and, except as otherwise provided in the EPIC, it applies to a "governing instrument executed by a decedent dying after that date." MCL 700.8101(2)(a). The decedent in this case died in 2007.

contacted the judge's staff after being cautioned on May 1, 2009, that his conduct was inappropriate, Stephen has not established any disputed evidentiary fact concerning the estate action that would warrant the trial court's disqualification on the basis that it had personal knowledge of disputed evidentiary facts concerning the proceeding.

Stephen's claim of judicial bias based on the court's May 11, 2009, opinion also fails. A party challenging a judge for bias or prejudice must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). A judge's rulings against a party, "no matter how erroneous, or vigorously expressed, are not disqualifying." *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004). A judge's opinion must display such deep-seated favoritism or antagonism that fair judgment is impossible. *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). There is nothing in the probate court's May 11, 2009, opinion which indicates that it was actually biased against Stephen, or which indicates that fair judgment was impossible.

Stephen next challenges the suspension of his authority as personal representative pursuant to the probate court's May 11, 2009, order that also provided for appointment of a special fiduciary. Stephen's challenge to the suspension of his authority is moot in light of the probate court's subsequent May 28, 2009, order removing him as personal representative. Substantively, the order of suspension merely gave effect to the probate court's ruling on May 11, 2009, that Stephen's removal as personal representative was to take effect immediately. Because the dispositive issue is whether Stephen's removal was proper, it is unnecessary to consider Stephen's challenge to the suspension order. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

With respect to Stephen's removal as personal representative, Stephen argues that the probate court had no authority under MCL 700.3611 or any other provision of the EPIC to sua sponte remove him as personal representative or to take this action without affording him a hearing regarding the matter. The goal when construing a statute is to ascertain the Legislature's intent. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). To determine that intent, statutory provisions are not to be read in isolation, but rather are to be read together to harmonize their meaning and give effect to the act as whole. *Id.* at 15.

MCL 700.3611(1) provides that "[u]pon filing of the petition, the court shall fix a time and place for hearing. The petitioner shall give notice to the personal representative and to other persons as the court orders." Thus, the statute contemplates that a personal representative is entitled to notice and a hearing when an interested person petitions the probate court to remove a personal representative for cause. But the EPIC also permits a probate court to act on its own motion when it appears that a personal representative "may take some action that would jeopardize unreasonably the interest of the petitioner or some other interested person." MCL 700.3607(1). It also provides that where there is a supervised administration of an estate, the supervised personal representative is responsible to both the court and interested persons. MCL 700.3501(2). "Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the court's continuing authority that extends until entry of an order approving estate distribution and discharging the personal representative or other order terminating the proceeding." MCL 700.3501(1).

In this case, the court did not sua sponte act at the May 11, 2009, hearing to raise the issue of Stephen's continued fitness as personal representative, but rather revisited, in light of subsequent events, the prior petitions for removal filed by Silberman and Peter, which had been denied by the predecessor judge, without prejudice, in July 2008. Further, a successor judge generally may revisit an order entered by a predecessor judge to arrive at a more correct adjudication of the case before entry of a final judgment. MCR 2.604(A); *Meagher v Wayne State Univ*, 222 Mich App 700, 718; 565 NW2d 401 (1997). A sua sponte ruling to remove a personal representative is not improper so long as it is not done in contravention of a party's due process rights. *Al-Maliki v LaGrant*, 286 Mich App 483, 486-487; 781 NW2d 853 (2009); *In re Baldwin Trust*, 274 Mich App at 389-390.

Procedural due process is a flexible concept that essentially ensures fundamental fairness. *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825 (2005). "Procedure in a particular case is constitutionally sufficient where there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Id.* Even an opportunity to move for rehearing may provide a party with procedural due process. See *Paschke*, 198 Mich App at 706.

It is clear from the record in this case that the probate court gave Stephen notice at the May 11, 2009, hearing of its decision to remove him immediately as personal representative. There is no indication in the record that Stephen stated any objection to decision, despite having any opportunity to address various matters after this ruling. Nor did Stephen seek reconsideration of the May 28, 2009, order, despite having an opportunity to do so under MCR 2.119(F). Rather, Stephen petitioned the probate court on June 12, 2009, to remove Fraser as special fiduciary and successor personal representative. Stephen was given an opportunity to address any claim of procedural error at a June 24, 2009, hearing concerning his petition, but did not expound upon any alleged deficiency other than to indicate that he would be relying on reasons raised in appeals to this Court. Stephen was also given an opportunity to address Fraser's argument, after Fraser's investigation of the case, that the probate court's removal of Stephen as personal representative was appropriate, but he chose not to respond, asserting that he was allotted insufficient time to make a response. The probate court ruled:

I am fully aware of the reasons that I removed you and not—Mr. Fraser could have gone on for another hour, I think, uh, and not covered all of the reasons that you should be removed, Mr. Shefman. I stand by that order and Mr. Fraser is the personal representative and I'm not removing him and I'm approving of the action I took. It's appropriate that you be removed and Mr. Fraser be appointed.

Considering the record as a whole, while Stephen chose not expound on his objections to his removal as personal representative in the probate court, he was not deprived of a meaningful opportunity to be heard regarding this matter. According, any procedural error was harmless. MCR 2.613(A).

Stephen also argues that the probate court abused its discretion by removing him as personal representative of decedent's estate. We disagree. Under MCL 700.3611(2), a personal representative may be removed in the "best interests of the estate." A personal representative is a fiduciary. MCL 700.1104(e). "A fiduciary stands in a position of confidence and trust with

respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary” and “shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity.” MCL 700.1212(1). The personal representative’s duties include settling and distributing the decedent’s estate in accordance with the terms of a probated and effective will and the EPIC, and “as expeditiously and efficiently as is consistent with the best interests of the estate.” MCL 700.3703(1).

The probate court found that Stephen was unsuitable to serve as personal representative because he was not fulfilling his duty to act in the best interests of the estate or the parties. The estate action had been open for approximately two years, and the court had the opportunity to hear Stephen’s testimony regarding various estate matters, including his first annual account for the period ending June 11, 2008. During this period, Stephen succeeded in striking Peter’s objections to the admission of the will, which were based on Stephen’s alleged misconduct. The estate itself was small because most of the decedent’s assets had been placed in her trust, and the will provided that the residuary of the decedent’s estate was to be transferred to that trust. There was ample evidence to support the probate court’s determination, particularly when evaluating Stephen’s requested attorney and fiduciary fees, that the estate was not particularly complex, but rather had become complicated by the personalities of Stephen and Peter. We find no clear error in the probate court’s assessment of the nature and magnitude of the conflict. MCR 2.613(C); *In re Bennett Estate*, 255 Mich App at 549.

In addition, the probate court gave appropriate consideration to Stephen’s use of his multiple positions as personal representative and attorney for the estate to gain an advantage over Peter and Silberman. This advantage manifested itself in the fees sought by Stephen, which the probate court found were excessive and included matters that largely benefitted Stephen individually as opposed to relating to his duties as personal representative. The probate court’s findings amply demonstrate that it was in the best interests of the estate to remove Stephen as personal representative. Unlike *In re Kramek Estate*, 268 Mich App 565; 710 NW2d 753 (2005), the evidence in this case showed that Stephen’s role as personal representative was complicating the case and that he could not be relied upon to perform his duties owed to other interested parties in an impartial manner. Therefore, the probate court did not abuse its discretion in removing Stephen as personal representative.

We next consider Stephen’s challenge to the amount of attorney fees allowed by the probate court as part of his first annual account as personal representative. The EPIC provides that a personal representative, except as restricted or otherwise provide by a will or court order in a formal proceeding, “acting reasonably for the benefit of interested persons,” may

[e]mploy an attorney to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative’s administrative duties, even if the attorney is associated with the personal representative, and act without independent investigation upon the attorney’s recommendation. An attorney employed under this subdivision shall receive reasonable compensation for his or her employment. [MCL 700.3715(w).]

To properly charge an item against an estate, it must be shown that the services benefit the estate as a whole, and not an individual or group of individuals. *Becht v Miller*, 279 Mich 629, 638; 273 NW 294 (1937); see also *In re Valentino Estate*, 128 Mich App 87, 90; 339 NW2d 698 (1983). Where attorney fees are properly chargeable against an estate, a court must consider the factors in MRPC 1.5(a) when determining the reasonableness of the attorney fees. MCR 5.313(A). The burden of proving the reasonableness of requested attorney fees is on the party requesting them. *Smith v Khouri*, 481 Mich 519, 528-529; 751 NW2d 472 (2008).

We find no clear error in the probate court's findings concerning the difficulty in separating Stephen's claim for attorney fees for matters related to him individually and as beneficiary of the estate, as opposed to personal representative. A court's ability to make a proper allocation of attorney fees and expenses that relate to an individual's multiple capacities bears directly on whether the individual has satisfied his burden of proof. *In re Davis's Estate*, 312 Mich 258, 266; 20 NW2d 181 (1945). Although the probate court did not detail the particular items that it allowed from Stephen's statement of attorney services, Stephen has failed to establish that the number of hours allowed by the court was an abuse of discretion. Stephen has also failed to establish that the court abused its discretion in awarding attorney fees at an hourly rate of \$175, rather than the requested hourly rate of \$300. Even Stephen's expert witness, Joseph Ehrlich, testified that the requested rate was on the "high side" for an attorney, like Stephen, who is not a probate specialist. The record also discloses that the court gave appropriate consideration to the factors in MRPC 1.5(a). We conclude that the court's ultimate decision to award \$3,975 to Stephen for attorney fees was not an abuse of discretion.

We also uphold the probate court's decision denying any attorney fees for the services of attorney Siriani during the relevant time period. The probate court did not clearly err in finding that Siriani's work during this period was performed for Stephen in an individual capacity, and not for the benefit the estate. *In re Temple Marital Trust*, 278 Mich App at 128.

Lastly, the probate court did not abuse its discretion in setting the amount of Stephen's compensation as personal representative for the period covered by the first annual account. *In re Baird Estate*, 137 Mich App at 637. Under the EPIC, Stephen was entitled to reasonable compensation. MCL 700.3719(1). The probate court found that the same problems that existed in evaluating attorney fees also existed in evaluating Stephen's requested fiduciary fees. The court rejected Stephen's requested hourly rate of \$125 that, according to Stephen's own testimony, was derived from making inquiries of various people. Again, Stephen's own expert testified that the requested rate was on the high side. No empirical data was presented in support of the requested rate, but it is apparent from the probate court's decision that it considered fee requests by other fiduciaries. The court found that "\$125 is at the absolute top end of fees that are requested by fiduciaries who come into the court," and noted that, in cases where such fees are requested, a skilled fiduciary performed a service that was complicated in one respect or another. Considering the evidence that Stephen was not an experienced fiduciary and that the case was not overly complex, the probate court did not abuse its discretion in using an hourly rate of \$40, or in ultimately allowing \$3,615, as reasonable compensation for Stephen's fiduciary services.

B. DOCKET NO. 292738

In Docket No. 292738, Stephen challenges the probate court's June 3, 2009, order appointing Fraser as successor personal representative. Stephen argues that the probate court had no authority under the EPIC or any court rule to sua sponte appoint a personal representative. Stephen's argument ignores the posture of the estate action when the probate court made its appointment. As indicated previously, the estate action was subject to the probate court's continuing authority because it involved the supervised administration of the decedent's estate. MCL 700.3501(1). Further, Stephen had already been removed as personal representative for cause. The record also indicates that Fraser had already fulfilled his assigned duties as special fiduciary by preparing a May 25, 2009, report summarizing the status of the estate action and his recommendation that a successor personal representative be appointed immediately.⁶ As the only fiduciary at that time, Fraser was an "interested person" in the proceeding. See MCL 700.1105(c) (defining "interested person," in part, as including the incumbent fiduciary and persons identified by supreme court rules); see also MCR 5.125(A)(6) (treating a special fiduciary appointed under MCL 700.1309 as a special person entitled to notice of a petition in a probate proceeding).

Pursuant to MCL 700.3505, the probate court was authorized to grant relief at any time during the pendency of its supervised administration of the decedent's estate on the petition of an interested person.⁷ Therefore, Fraser arguably should have presented his status report and recommendation to the probate court as part of a petition. Nonetheless, "[a]n objection to the appointment of a personal representative may be made only in a formal proceeding." MCL 700.3203(2). Because Stephen had the opportunity to be heard with respect to his objections to Fraser acting as successor personal representative at the hearing on June 24, 2009, any procedural error that occurred when the probate court initially made its appointment on June 3, 2009, was harmless. MCR 2.613(A); cf. *In re Baldwin Trust*, 274 Mich App at 389-390.

⁶ Although we have determined that we lack jurisdiction to review the probate court's appointment of Fraser as special fiduciary on May 11, 2009, we note that MCL 700.1309(a) authorized the probate court to appoint a special fiduciary to perform specific duties based on reliable information. See also MCR 5.204. The basis for the appointment in this case was Stephen's immediate removal as personal representative on May 11, 2009, which was accomplished by the probate court's entry of an immediate order suspending Stephen's fiduciary powers and the subsequent removal order entered on May 28, 2009. Considering that a fiduciary is responsible for providing reasons to the probate court for continuing the administration of a decedent's estate, MCL 700.3951(1), it was appropriate for the court to look to a special fiduciary to obtain a status report in conjunction with the removal of Stephen as personal representative.

⁷ At the time Fraser was appointed successor personal representative, MCL 700.1106(o) defined a "petition" as "a written request to the court for an order after notice." The statute was amended, effective April 1, 2010, and the definition now appears in subpart (p). Under MCR 5.102, a petitioner must "cause to be prepared, served, and filed, a notice of hearing for all matters requiring notification of interested persons." MCR 5.102.

Lastly, considering that Stephen's challenge to Fraser's appointment rests solely on Stephen's claim that he should not have been removed as personal representative in the first instance, which we have rejected, we find no basis for disturbing the probate court's June 3, 2009, order appointing Fraser as successor personal representative.

C. DOCKET NO. 301356

Stephen raises two issues in Docket No. 301356 regarding his second and final account as fiduciary, which was approved by the probate court in an order dated November 5, 2010, in accordance with previously issued opinions and orders. Stephen challenges the probate court's determinations regarding the amount of allowable attorney fees and allowable compensation for his services as personal representative. Those matters were decided in an order dated February 26, 2010.⁸

The record indicates that the probate court awarded Stephen compensation for the full 39.5 hours requested, but at a reduced hourly rate of \$40, resulting in an award of \$1,580 for his service as personal representative. The probate court noted that the \$40 hourly rate was the same rate that it used when awarding compensation in connection with Stephen's first annual account, but also received additional evidence before determining that \$40 was an appropriate hourly rate. We find no basis for concluding that the probate court abused its discretion in determining a reasonable hourly rate. Accordingly, we affirm the probate court's determination of the amount of allowable compensation for Stephen's fiduciary services for the period of his second and final account as personal representative.

With respect to allowable attorney fees, we note that Stephen's argument on appeal focuses solely on the amount of attorney fees allowed by the probate court for his own attorney services. The probate court awarded Stephen attorney fees of \$15,687, which were based on an hourly rate of \$195.

Stephen argues that the probate court erred in its determination of allowable attorney fees because it did not follow the approach in *Smith*, 481 Mich 519. That approach addresses how reasonable attorney fees should be determined for purposes of awarding case evaluation sanctions under MCR 2.403(O)(6)(b). See *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 700 n 3; 760 NW2d 574 (2008). But it has also been applied to a determination of statutory attorney fees. *Augustine v Allstate Ins Co*, 292 Mich App 408, 429 n 2; 807 NW2d 77 (2011). The approach requires a court to determine a baseline reasonable fee, derived from the fee customarily charged in the locality for similar legal services, and to then multiply that amount by the reasonable number of hours expended in the case, and then make up or down adjustments as appropriate using the factors listed in MRPC 1.5(a) and *Wood v DAIIIE*,

⁸ Because MCR 5.801(B)(2)(x) provides for an appeal by right from an order allowing or disallowing an account, and the attorney and fiduciary fees were requested by Stephen as part of his second and final account, which was not fully resolved until entry of the November 5, 2010, order, and because Stephen timely filed his appeal from that order, we disagree with Fraser's argument that this Court lacks jurisdiction to consider Stephen's claim.

413 Mich 573, 588; 321 NW2d 653 (1982), and any additional relevant factors. *Smith*, 481 Mich at 530-531.

Although the probate court did not strictly follow that approach in this case, this case does not involve an award of case evaluation sanctions. Rather, it involves attorney fees for an attorney that a personal representative, “acting reasonably for the benefit of interested persons,” may employ “to perform necessary legal services or to advise or assist the personal representative in the performance of the personal representative’s administrative duties.” MCL 700.3715(w). Under MCR 5.313(A), “[i]n determining the reasonableness of fees, the court must consider the factors listed in MRPC 1.5(a).” Generally, however, a court is not required to make detailed findings regarding each factor when determining reasonable attorney fees. See *John J Fannon Co v Fannon Prod, LLC*, 269 Mich App 162, 172; 712 NW2d 731 (2005); *In re Attorney Fees & Costs*, 233 Mich App 694, 705; 593 NW2d 589 (1999). The purpose of a court articulating its view of appropriate factors is to aid appellate review. *Smith*, 481 Mich at 537.

We are not persuaded that the probate court’s failure to follow the particular baseline formula in *Smith*, 481 Mich at 531, warrants a remand for a redetermination of fees. The approach taken by the probate court differs from *Smith* only in that the court was required to follow MCR 5.313(A) and the evaluation of reasonable attorney fees was made without initially multiplying a baseline market rate against the number of reasonable hours. The probate court complied with the directive of MCR 5.313(A) that it consider the factors in MRPC 1.5(a). The probate court found that it had considered those factors when determining an hourly rate of \$175 in connection with Stephen’s first annual account, and that it had the benefit of additional testimony when evaluating the reasonableness of Stephen’s requested fees in connection with his second and final account. The court found that Stephen did not meet his burden of showing entitlement to the requested hourly rate of \$300, but that some increase over the previously awarded rate of \$175 was justified because of increased expenses that Stephen may have occurred in operating his law practice. The court also found that the hours reported by Stephen presented the same concerns that existed with the first annual account with respect to time spent by Stephen in pursuit of his personal interests and personal conflicts with his siblings. We decline to consider Stephen’s proposed survey information from October 2010 because that information was not available to the probate court when it decided this matter in February 2010. After reviewing the record, we conclude that the probate court did not abuse its discretion in determining the amount of Stephen’s allowable attorney fees for the period of Stephen’s second and final account.

IV. SLANDER OF TITLE ACTION

In Docket No. 294961, Peter raises four issues concerning the estate’s slander of title action against him. Following a bench trial, the trial court issued a verdict in favor of the estate, but awarded damages of only \$726. The probate court found that Peter was liable for common-law slander of title, which requires proof of “falsity, malice, and special damages, i.e. that the defendant maliciously published false statements that disparaged a plaintiff’s right in property, causing special damages.” *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). Special damages include litigation costs. *Id.* at 9. The probate court did not award litigation costs for the cost of prosecuting the slander of title action because it determined that the action could have been avoided. But it awarded \$726, representing Stephen’s fees for four hours

of legal services, at an hourly rate of \$175, to obtain an order removing the notice of lis pendens, and expenses of \$26 to record the order.

Peter first argues that the probate court erred in awarding attorney fees without determining the legal authority and capacity of the party requesting attorney fees. He argues that Stephen routinely switched his “title” and associated authority, and appeared in a variety of different capacities. He also asserts that Stephen failed to authenticate his entitlement to attorney fees. Peter’s argument confuses the estate action and the slander of title action. Although the special damages in the slander of title action were based on attorney services provided by Stephen to the estate, the probate court required the estate to submit an affidavit detailing the amount of attorney fees associated with the removal of the notice of lis pendens. The court also gave Peter an opportunity to respond to the affidavit, but he did not do so. Because Peter did not file a response, the probate court appropriately determined the amount of allowable attorney fees without an evidentiary hearing. *Smith*, 481 Mich at 532. On appeal, Peter has not demonstrated any basis for disturbing the probate court’s award of attorney fees of \$700 and expenses of \$26 associated with the removal of the notice of lis pendens.

Peter also argues that the probate court erred in allowing the estate to benefit from Stephen’s wrongdoing. Peter asserts that Stephen was removed as personal representative of decedent’s estate for improper conduct, and that he engaged in fraudulent conduct with respect to the condominium property underlying his notice of lis pendens. Peter also asserts that he did not have an opportunity to address the proper ownership of the condominium property. Again, Stephen has unduly confused the estate action and the slander of title action. Peter’s allegation that he did not have an opportunity to address the ownership of the condominium property is refuted by the probate court’s summation of his own testimony. The court’s September 28, 2009, opinion and order reflects that Peter admitted that the condominium property was given to the decedent as collateral for a loan that he did not repay, but that Peter claimed that he did not know that he was signing a deed during the loan transaction. Peter has not substantiated his argument on appeal or otherwise established any basis for disturbing the probate court’s findings regarding his liability for special damages to the plaintiff-estate in the slander of title action.

Peter next argues that the probate court violated his right to due process by allowing his subpoenaed witness to testify by telephone at trial. Peter raised this due process issue in his motion for reconsideration of the probate court’s September 28, 2009, opinion and order entered after the bench trial, but we find no basis for disturbing the probate court’s denial of that motion. *Woods*, 277 Mich App at 629. First, Peter does not address the probate court’s determination at trial that good cause existed to allow the witness to testify by telephone. See MCR 2.402(B). Second, the transcript of the witness’s testimony indicates that neither the probate court nor Fraser, who appeared on behalf of the estate, had difficulty understanding the witness’s testimony. Further, the probate court summarized certain testimony for Peter that he claimed he was not able to understand. Because this record establishes that Peter had a meaningful opportunity to present his evidence and make arguments at trial, he was not deprived of due process. *Reed*, 265 Mich App at 159; see also *Al-Maliki*, 286 Mich App at 485. Third, even if error did occur, it was harmless because the witness’s testimony was relevant only to the issue of special damages and the probate court did not award any special damages related to the estate’s failure to complete the sale of the property to the witness. Therefore, no relief is warranted. MCR 2.613(A).

Lastly, Peter argues that the probate court erred by ignoring a settlement agreement between himself and Fraser, as successor personal representative of the decedent's estate, which Peter alleges was reached after the probate court issued its September 28, 2009, opinion and order. Because there is no record evidence that the settlement agreement was ever presented to the probate court, we reject this claim of error.

V. TRUST ACTION

A. JURISDICTION

In Docket No. 296395, Stephen appeals the probate court's January 22, 2010, order removing him as successor trustee and appointing Fraser as successor trustee. In Docket No. 301355, Stephen appeals the probate court's November 5, 2010, order granting Fraser's request for instructions to allow certain expenses incurred by the decedent's estate to be paid with trust funds. In both appeals, Stephen challenges the probate court's jurisdiction to decide issues affecting the trust after entry of a July 21, 2009, order, entered nunc pro tunc as of July 8, 2009, which required Stephen, as successor trustee of the trust, to file and register the decedent's trust with the probate court and requiring court supervision of that trust, in response to a petition filed by Fraser, as the successor personal representative of decedent's estate.

Although Stephen frames his argument in Docket No. 296395 as primarily involving the probate court's subject-matter jurisdiction, he concedes in Docket No. 301355 that the probate court had subject-matter jurisdiction. Substantively, Stephen's arguments in both appeals address whether the probate court acquired personal jurisdiction over him and the "trust," and whether the probate court's jurisdiction was properly invoked by an interested person. Stephen also urges this Court to consider his arguments in light of provisions of the Michigan Trust Code, MCL 7007.101 *et seq.*, which are contained in amendments and additions to Article VII of the EPIC that became effective April 1, 2010. See MCL 700.8204. Stephen submits that all orders entered in the trust action are void or should be vacated.

Contrary to what Stephen argues, the amendments and additions to article VII of EPIC do not apply to this dispute, because all relevant acts and proceedings were concluded before April 1, 2010, the effective date of those amendments. MCL 700.8206 provides, in pertinent part:

(1) Except as otherwise provided in article VII, all of the following apply on the effective date of the amendatory act that added this section:

(a) The amendments and additions to article VII enacted by the amendatory act that added this section apply to all trusts created before, on, or after that effective date.

(b) The amendments and additions to article VII enacted by the amendatory act that added this section apply to all judicial proceedings concerning trusts commenced on or after that effective date.

(c) The amendments and additions to article VII enacted by the amendatory act that added this section apply to judicial proceedings concerning trusts commenced before that effective date unless the court finds that application

of a particular provision of the amendments and additions would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of the amendments and additions does not apply and the superseded provisions apply.

* * *

(2) The amendments and additions to article VII enacted by the amendatory act that added this section do not impair an accrued right *or affect an act done before that effective date*. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before that effective date, that statute continues to apply to the right even if it has been repealed or superseded. [Emphasis added.]

“Proceeding” is defined in MCL 700.1106(r), formerly MCL 700.1106(p), to include a “petition.” A “petition” means a “written request to the court for an order after notice.” MCL 700.1106(p), formerly MCL 700.1106(o). “Court” means the “probate court or, when applicable, the family division of circuit court.” MCL 700.1103(j).

Because the relevant proceedings in this case concluded in July 2009, when the probate court ordered Stephen to file and register the trust, and ordered court supervision of the trust, and Stephen completed the act of registration in July 2009, the provisions of the Michigan Trust Code in Article VII of the EPIC, which became effective April 1, 2010, do not apply. MCL 700.8206(2).

Turning to Stephen’s jurisdictional arguments, we find that Stephen confuses principles of standing and jurisdiction. Although Stephen has conceded in Docket No. 301355 that the probate court had subject-matter jurisdiction, because Stephen continues to argue that jurisdiction was not invoked by a petition filed by a person with standing, we shall consider this issue. It is necessary to distinguish between subject-matter jurisdiction, personal jurisdiction, and standing.

“Subject matter jurisdiction and standing are not the same thing.” *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). An issue of subject-matter jurisdiction may be raised at any time. *Smith v Smith*, 218 Mich App 727, 729-730; 555 NW2d 271 (1996). It is determined by the allegations in a pleading. *Altman*, 197 Mich App at 472. Subject-matter jurisdiction is generally defined as “a court’s power to hear and determine a cause or matter.” *In re Petition by Wayne Co Treasurer for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich App 285, 291; 698 NW2d 879 (2005). “There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which the action of the trial court is not void although it may be subject to direct attack on appeal.” *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538, 544; 260 NW 908 (1935). An error with respect to an individual’s standing to bring an action constitutes a mistake in the exercise of subject-matter jurisdiction. *Altman*, 197 Mich App at 479. A cause of action provided to a litigant by law may establish standing. *Lansing Sch Ed Ass’n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

The probate court is a court of limited jurisdiction and derives all of its powers from statutes. *Manning v Amerman*, 229 Mich App 608, 611; 582 NW2d 539 (1998). There is no dispute that the probate court has jurisdiction over the administration of a trust. MCL 700.1302(b). In addition, it is clear that an “interested party” was entitled to invoke the probate court’s jurisdiction at the time relevant to this proceeding. See MCL 700.7201(2). While the phrase “interested party” was not statutorily defined, MCL 700.1105(c) provided:

“Interested person” . . . includes, but is not limited to, the incumbent fiduciary; an heir, devisee, child, spouse, creditor, and beneficiary and any other person that has a property right in or claim against a trust estate or the estate of a decedent, ward, or protected individual; a person that has priority for appointment as personal representative; and a fiduciary representing an interested person. Identification of interested persons may vary from time to time and *shall be determined according to the particular purposes of, and matter involved in, a proceeding*, and by the supreme court rules. [Emphasis added.]⁹

MCR 5.125 lists various interested persons, but also provides that “[t]he court shall make a specific determination of the interested persons if they are not defined by statute or court rule.” MCR 5.125(D). Considering the provisions of both MCL 700.1105(c) and MCR 5.125(D), it is clear that the probate court had the authority to decide whether Fraser was an interested person. We must look to the allegations in Fraser’s June 2009 petition, filed as successor personal representative of the decedent’s estate, to determine whether the probate court had subject-matter jurisdiction to decide the matter and also determine Fraser’s standing to file the petition. *Altman*, 197 Mich App at 476-477.

Fraser’s petition indicates that he sought court supervision over the administration of the trust because it was necessary to look to the trust to pay administrative expenses of the decedent’s estate. Although Fraser was not attempting to make a claim against the estate at that time, because the probate court had the authority to decide whether Fraser was an interested person, the petition was factually sufficient to invoke the probate court’s subject-matter jurisdiction. Any claim concerning Fraser’s standing to seek registration and court supervision of the trust should have been pursued in an appropriate appeal. Because our review in Docket Nos. 296395 and 301355 is limited to the probate court’s January 22 and November 5, 2010, orders, any issue concerning Fraser’s status as an interested person at the time the petition was filed is not properly before us.

In light of our determinations that the probate court had subject-matter jurisdiction, and that the particular standing issue raised by Stephen on appeal is not properly for us, it is

⁹ The current version of MCL 700.7201(2) uses the phrase “interested person” rather than “interested party.” In any event, “[s]tatutory provisions must be read in the context of the entire act.” *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011). The word “party” is a generic term that can take on different meanings. *Nippa v Botsford Gen Hosp (On Remand)*, 257 Mich App 387, 394-396; 668 NW2d 628 (2003). It is apparent that the phrase “interested party” used in former MCL 700.7201(2) includes an “interested person.”

unnecessary to consider Stephen's argument that petitions filed by Peter and Silberman were insufficient to cure any jurisdictional defect. It is also unnecessary to address Fraser's argument that he could have sought registration of the trust under other provisions of the EPIC, or that a petition filed by Silberman for partial distribution of trust assets was sufficient to confer subject-matter jurisdiction on the probate court.

With respect to Stephen's argument that the probate court failed to acquire "personal" jurisdiction over him and the trust, we note that actions involving trusts may have characteristics of both in rem and in personam proceedings. *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 312; 70 S Ct 652; 94 L Ed 865 (1950). An action in rem, in the strict sense, is directed against the property itself or to enforce a right in property. *Detroit v 19675 Hasse*, 258 Mich App 438, 448-450; 671 NW2d 150 (2003). An issue involving in rem jurisdiction generally involves whether property that is the subject on an action is located within the forum. MCL 600.751; MCL 600.755; *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 140; 486 NW2d 326 (1992); see also *Thaw v Detroit Trust Co*, 307 Mich 6, 11; 11 NW2d 305 (1943) (under then-existing Michigan law, a suit for an accounting against a testamentary trustee was an in rem proceeding brought where the trust estate was legally situated).

Stephen does not address any issue that substantively involves the situs of the trust estate. Therefore, we shall limit our consideration in Docket Nos. 296395 and 301355 to Stephen's claim that the probate court's orders should be voided or vacated on the ground that the probate court lacked personal jurisdiction over him. Jurisdiction over a party is necessary for a court to require a party to comply with its orders. *Yoost v Caspari*, 295 Mich App 209; 220-221; 813 NW2d 783 (2012); *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 427; 633 NW2d 408 (2001). But an issue involving personal jurisdiction may be waived. *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011). A defense that a trial court lacks personal jurisdiction over a party or property is waived unless it is raised in the trial court in accordance with applicable court rules. *Electrolines, Inc v Prudential Assurance Co, Ltd*, 260 Mich App 144, 163-164; 677 NW2d 874 (2003); but see *Yoost*, 295 Mich App at 220-221 (a court is under a continuing obligation to sua sponte question its jurisdiction over a person). A challenge to personal jurisdiction may also be waived by express or implied consent. *Lease Acceptance Corp v Adams*, 272 Mich App 209, 229; 724 NW2d 724 (2006); see also *Lown*, 488 Mich at 268 (a variety of legal arrangements may give rise to consent); MCL 600.701(3).

As indicated previously, our review in this case is limited to the portions of the January 22 and November 5, 2010, orders that are subject to this Court's jurisdiction. MCR 5.801(B); *Comerica Bank*, 179 Mich App at 729-730. Neither order contains a jurisdictional ruling. In addition, the record establishes that Stephen had already registered the trust pursuant to the probate court's July 21, 2009, order. Although Stephen maintains that the registration was done under protest, MCL 700.7103(1) then provided that "[b]y registering a trust or accepting the trusteeship of a registered trust, the trustee submits personally to the court's jurisdiction in a proceeding under section 7201 relating to the trust that is initiated by an interested person while the trust remains registered." The statute contains no exception for a registration under protest. Where statutory language is unambiguous, it is applied as written. *Liggons*, 490 Mich at 70.

To the extent that Stephen believed that the July 21, 2009, order was unenforceable against him, the appropriate course of action was to pursue an appeal under MCR 5.801.¹⁰ Considering that an issue of personal jurisdiction may be waived, the limited scope of the appeals in Docket Nos. 296395 and 301355, and the evidence that Stephen registered the trust, Stephen's submission on appeal that personal jurisdiction was not acquired over him, such as to "void" all orders entered in the trust action, is not properly before this Court.

B. DOCKET NO. 206365

Apart from the jurisdictional issue raised in Docket No. 206365, Stephen argues that the probate court did not follow the proper procedure in removing him as successor trustee. Stephen argues that the probate court should have followed MCL 700.3611, which governs the removal of a personal representative, and should have used MCR 5.203 as a guide, and that, regardless of the proper procedure, he was entitled to notice and a meaningful opportunity to be heard regarding the matter.

Stephen's reliance on MCL 700.3611 is misplaced because this statute unambiguously applies only to a personal representative. *Liggon*s, 490 Mich at 70. Stephen's reliance on MCR 5.203 is also misplaced because it does not apply to trustees. See MCR 5.201 (before and after it was amended, effective April 1, 2010). Other provisions governing proceedings involving the removal of a trustee include MCL 555.26, which provides:

Upon the petition or bill of any person interested in the execution of an express trust, and under such regulations as shall be established by the court for that purpose, the court of chancery may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the trust. [.]

In this case, the record indicates that Fraser petitioned for Stephen's removal as successor trustee on various grounds, and that Stephen filed a response to the petition and testified regarding his administration of the trust at the evidentiary hearing concerning Stephen's second and final account in the estate action. Although the probate court decided to remove Stephen as successor trustee at that evidentiary hearing without giving the parties an opportunity for oral argument, as a matter of motion practice, a court has discretion to dispense with or limit oral arguments on contested motions. MCR 2.119(E)(3). Further, an opportunity for a rehearing may be sufficient to afford a party due process. *Paschke*, 198 Mich App at 706. Because Stephen has failed to establish that he was deprived of notice or a meaningful opportunity to be heard, relief is not warranted on the basis of the probate court's alleged procedural error. MCR 2.613(A); see also *Al-Maliki*, 286 Mich App at 486-487; *In re Baldwin Trust*, 274 Mich App at 398-399.

¹⁰ We note that Stephen indicated at a hearing on October 5, 2009, that he filed an application for leave to appeal the order with the Oakland Circuit Court, but the application was denied.

Stephen also argues that the probate court abused its discretion in removing him as successor trustee. We disagree. The record amply supports the probate court's determination that Stephen's actions were directed at favoring himself over co-beneficiary Silberman, and that Stephen breached his duty to efficiently and expeditiously administer the trust and comply with its terms. We are not persuaded that the probate court abused its discretion in concluding that Stephen should be removed as successor trustee. *In re Temple Marital Trust*, 278 Mich App at 128; *Comerica Bank*, 179 Mich App at 729. The decision falls squarely within the grounds for removal provided by MCL 555.26.

Lastly, Stephen challenges the probate court's decision to appoint Fraser as successor trustee. Stephen argues that the probate court disregarded provisions of the trust in reaching this decision, and that Fraser was not qualified by statute to serve as trustee. Having considered each of Stephen's arguments, we find no basis for disturbing the probate court's decision to appoint Fraser as successor trustee.

At the time the probate court appointed Fraser to act as successor trustee, it had discretion under MCL 555.27 to appoint a new trustee or to cause the trust to be executed by one of its officers under its direction. The provisions in MCL 720.202 and MCL 720.206 concerning the appointment and powers of county public administrators did not preclude the probate court from appointing a county public administrator to act as a trustee under MCL 555.27.

In addition, we find no support for Stephen's argument that the probate court disregarded the provisions of the trust. "The cardinal rule of law and the predominant rule in the construction and interpretation of testamentary instruments is that the intent of the testator governs if it is lawful and if it can be discovered." *In re Dodge Trust*, 121 Mich App 527, 539; 330 NW2d 72 (1982). In construing the meaning of a trust, the settlor's intent is to be carried out as nearly as possible. *In re Kostin Estate*, 278 Mich App 47, 53; 748 NW2d 583 (2008).

In this case, the probate court acknowledged his understanding that the trust provided for the successor trustee to be Silberman, but found that Silberman was unsuitable to serve as trustee because she did not reside in Michigan, was not able to consistently participate in the proceedings even by telephone, and also had a hostile relationship with Stephen. Because this case did not involve Stephen's resignation, but rather his removal, we disagree with Stephen's argument that a successor trustee should have been selected in accordance with the process in article XIII(e) of the trust, which applies to resignations.

And while article XIII(a) of the original trust agreement provided for Silberman and Peter to jointly serve as successor co-trustees if Stephen was unable to act, it is clear from the decedent's second amendment to the trust that she did not consider Peter capable of being even a co-beneficiary of the trust at that time. The decedent's expressed intent in the second amendment was to remove Peter as a co-beneficiary to avoid an adverse impact on the other trust beneficiaries and the trust assets. Peter was given the choice of accepting a then-existing parcel of property in Florida or taking nothing under the trust.

But even assuming that the decedent intended for Peter serve as a co-trustee with Silberman in the event Stephen was unable to serve, there is no evidence that either Peter or Silberman would have accepted an appointment to serve in that capacity. In any event, at the

time of the probate court's decision, it could not seriously be argued that Peter would be a suitable trustee to administer the trust for the benefit of Silberman and Stephen. Peter's objective, which was evident from his petition filed in the trust action, was to set aside the second amendment based on Stephen's alleged wrongdoing. Further, Stephen has not challenged the probate court's determination that Silberman was not suitable to serve as trustee. In view thereof, and given the probate court's authority to appoint Fraser as successor trustee under MCL 555.27, we uphold the probate court's decision.

C. DOCKET NO. 301355

Apart from the jurisdictional issue raised by Stephen in Docket No. 301355, Stephen challenges the probate court's November 5, 2010, order granting Fraser's request, as successor trustee of the decedent's trust, to allow Fraser to use trust funds to pay for certain fees and expenses incurred as part of the administration of the decedent's estate. Because this issue involves proceedings on a petition for instructions filed after April 1, 2010, the amendments and additions to Article VII of the EPIC, containing the Michigan Trust Code, apply. MCL 700.8206(1)(b).

We are not persuaded that Fraser's use of trust funds was precluded by the Michigan Trust Code or the trust agreement. The material question is not whether Fraser, as successor personal representative of the decedent's estate, was entitled to the trust funds while assets remained in the decedent's estate, but rather whether Fraser, as successor trustee, had permissive authority to allow the use of trust funds to pay expenses incurred in the administration of the decedent's estate in order to avoid potential interest and other costs that would have been incurred and charged against the estate if outstanding invoices were not timely paid.

The record indicates that at the time Fraser requested instructions from the probate court, there were insufficient liquid assets in the decedent's estate to pay outstanding invoices for certain legal services. The principal residuary asset remaining in the estate was the condominium property that, under article III of the will, was to be transferred to and administered as part of the trust. While article I of the will provides for debts and expenses to be charged to the residuary estate, the trust itself provides in article VI that the principal of the trust estate shall be used for estate expenses to the extent they are not paid out of assets subject to probate, and article VII-I(B) of the trust authorized the successor trustee to engage in certain transactions with the personal representative, including loans deemed necessary or advisable to preserve assets of the decedent's estate.

"The powers and duties of the trustees, and the settlor's intent regarding the purpose of the trust's creation and its operation, are determined by examining the trust instrument." *In re Kostin Estate*, 278 Mich App at 53. Regardless of whether Fraser, in his capacity as successor personal representative, was statutorily entitled to the receipt of trust assets to pay for expenses before all residuary assets remaining in the decedent's estate were liquidated and applied to expenses and other debts, considering the trust instrument as a whole, Fraser, in his capacity as successor trustee, was empowered to make a loan for payment of the expenses. The probate court's order substantively achieves this result. Indeed, it is clear from the probate court's decision granting Fraser's request for instructions that it contemplated Fraser repaying the trust if there were excess funds in the decedent's estate. We express no opinion regarding whether

Fraser has properly accounted for the transaction, inasmuch as that issue is beyond the scope of this appeal. Limiting our review to the probate court's grant of Fraser's request for instructions to approve the use of trust funds to pay for administrative expenses of the decedent's estate, as necessary and appropriate, Stephen has not established any basis for appellate relief.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Jane M. Beckering