

Take-Away: A probate court can deny a trustee its fees, including attorneys' fees it incurs regarding the Trust, when the court finds that there has been a breach of fiduciary duty.

Background: The Michigan Trust Code (MTC) provides that upon the acceptance of trusteeship, the trustee shall administer the Trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of trust beneficiaries, and in accordance with the MTC. [MCL 700.7801.] If there is a breach of trust the MTC gives the probate court broad authority to remedy the breach, including the reduction or denial of the trustee's compensation. [MCL 700.7901(2)(h).] The MTC also gives the probate court the authority to reduce or deny a trustee's claim for compensation, expenses, or disbursements with respect to a breach of trust. [MCL 700.7904(3).] A recent decision from the Michigan Court of Appeals found a co-trustee, a tax attorney, to have breached his fiduciary duties regarding the trust, or more technically he disrespected the rights and duties of his co-trustee (his mother) that resulted in the denial of his fiduciary compensation and the attorneys' fees he incurred in litigation when the co-trustee unsuccessfully sought his removal as co-trustee.

In re Allen R. Soble Revocable Trust, Michigan Court of Appeals, No. 364844 (May 9, 2024)

Facts: Allen established his Trust in 1969. Allen died in 1982. Allen's wife Shelda and his son, Richard (the tax attorney) then became co-trustees of Allen's Trust. The Trust created a Marital Trust for Shelda. Apparently, Shelda disclaimed her right to receive principal from the Marital Trust shortly after Allen's death, but not her right to the Marital Trust income. For the next 30 years Shelda and Richard successfully administered the Marital Trust. In 2012 Shelda filed a motion to remove Richard as co-trustee and to invalidate her disclaimer.

Shelda accused Richard of moving assets among several family trusts, making gifts to his and a brother's families, and only then did Richard start to charge a trustee fee. Also, Richard began to withhold income distributions from his mother because she had failed to repay an advance of \$300,000 from the Trust.

Probate Court: The judge upheld Shelda's disclaimer, and it did not remove Richard as co-trustee, but in his finding the court observed that "Richard may have breached his fiduciary duty" but it held that the breach did not require his removal.

Litigation Saga Continues: More litigation ensued between the co-trustees in 2015 and 2016 in the probate court. Richard filed an annual accounting for the Trust, and he sought fiduciary fees for trust administration and preparation of the Trust's accounting. Shelda objected to the accounting and Richard's request for fees, precipitating yet another petition from Shelda to remove Richard as co-trustee. Richard prepared and filed the accounting without Shelda's knowledge or input, thus prompting her petition of removal. Each co-trustee 'lawyered-up' incurring legal fees.

Probate Court: Again, the probate judge found that Richard's failure to cooperate with Shelda by unilaterally filing an annual accounting and refusing to communicate with Shelda's attorney "*to be a form of breach of trust by failing to follow the intent of the settlor that the co-trustees work collaboratively.*" But again, the judge declined to remove Richard finding that the Trust had been otherwise properly administered. Richard's accounting was approved, as were some fiduciary and legal fees sought, with the court then ordering the co-trustees to work cooperatively.

Litigation Continues Unabated: Despite the court order to cooperation, Richard and Shelda continued to fight over fiduciary and attorneys' fees they incurred in the prior litigation. Each sought substantial amounts in legal fees, e.g., \$66,000, \$47,784. Shelda claimed that Richard's failure to cooperate necessitated the litigation, that the probate court had found Richard to be in breach of the Trust, and that Richard's fees should be denied, citing MCL 700.7904.

Probate Court: After an evidentiary hearing the probate judge, the judge awarded Shelda the attorneys fees, directing that those fees be paid from trust principal. Richard's fiduciary and attorneys' fees were denied by the court, relying on MCL 700.7901(2)(h) due to Richard's "*numerous and significant breaches of fiduciary duties.*"

Michigan Court of Appeals: This Court sustained the decisions of the probate judge.

Breach of Fiduciary Duty: It found that Richard had breached a trust duty under MCL 700.7901(1) by his failure to follow the intent of the Trust settlor that the co-trustees work collaboratively, specifically by Richard unilaterally filing an annual account without Shelda's knowledge, and by refusing to communicate with Shelda's attorney. It also found that Richard had filed a baseless motion to disqualify Shelda's attorney in the probate court.

Attorneys Fees: While the probate court did not find that Richard's breach of trust substantially impaired the Trust's administration, and therefore did not support Richard's removal as co-trustee, it did find that Richard's "misconduct was the primary reason for the repeated lengthy trials costing the Trust hundreds of thousands of dollars in legal and fiduciary fees, suggesting that the probate court sought to protect the Trust from further diminution by Richard's continued misconduct.

Reasonable Compensation: The Trust instrument expressly directed that a trustee was entitled to receive reasonable compensation for the services performed and authorized the trustee to be reimbursed for all costs, expenses, charges, and liabilities incurred or paid with respect to the Trust, including the fees and expenses of counsel. With this authorization, Richard claimed that he was entitled to his fees and the payment of his legal fees from the Trust. The Court responded that this provision of the Trust was "inapplicable to the facts of this dispute." It found that this section of the Trust did not address appropriate sanctions

for the trustee's breach of trust.

Payment of Fees from Principal: Richard's last claim of error by the probate court was its direction that Shelda's attorneys' fees be paid from trust principal. Again, the Court disagreed with Richard's argument. It reasoned that Shelda was required to receive all income from the Trust, as it was a Marital Trust. Citing the Michigan Uniform Principal and Income Act (UPIA) [MCL 555.501] by reimbursing Shelda's legal fees and expenses from the Trust's income would have the effect of Shelda paying her legal fees from her own money and thus being liable individually for those expenses, contrary to the language of the Trust which provided that a trustee would "not be liable therefore individually."

UPIA: Richard also argued that the UPIA controls the payment of legal fees. Recall that the UPIA is a default set of rules if the trust instrument is silent. Specifically, MCL 555.901(b) provides that a trustee shall make disbursements from income, one-half of all expenses for accountings, judicial proceedings or other matters that involve both income and remainder interests. However, MCL 555.902(1)(d) also provides that the expenses of a proceeding that concerns primarily the principal of the Trust, including a proceeding to construe the Trust or to protect its property, is to be paid from Trust principal. Accordingly, assigning Shelda's legal fees to be paid from the Marital Trust principal was correct. In short, the Court found that Shelda's petition to seek Richard's removal as co-trustee was intended to protect trust principal.

Conclusion: While a Trust instrument provides clear authorization to a trustee to claim reasonable fiduciary fees and the reimbursement of expenses incurred from the Trust, a probate court nonetheless has full authority to deny the payment of the trustee fees and the reimbursement of expenses from the Trust when it finds that there is a breach of trust. The *Soble* decision is interesting in that the probate judge did find that there was a breach of trust by the co-trustee sufficient to warrant the denial of fiduciary and attorney's fees that were incurred, but that breach was not sufficiently egregious enough to warrant the co-trustee's removal. One wonders if Shelda and Richard, who continue as co-

trustees, will soon be back in court, yet again.