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STATE OF MICHIGAN
SUPREME COURT

In re:

THE ROBERT E. WHITTON
REVOCABLE TRUST.

____

MOLLY MICHALUK,

Petitioner-Appellant,

v

EDDIE WHITTON and
RICHARD WHITTON,
Successor Trustees of the
ROBERT E. WHITTON REVOCABLE TRUST,

Respondents-Appellees.

Supreme Court No. ___________

Court of Appeals
Case No. 337828

Oakland County Probate Court
File No. 2016-372,116-TV

______________________________________/

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APPELLANT MOLLY MICHALUK'S
APPLICATION FOR LEAVE TO APPEAL

Oral Argument Requested

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Statement of Appellate Jurisdiction

This Court has jurisdiction under MCR 7.303(B)(1) to "review by appeal a case … after decision by the Court of Appeals." This application is timely filed within 42 days after the August 9, 2018 Court of Appeals opinion. MCR 7.305(C)(2)(a).

Judgment Appealed From and Relief Requested

Petitioner-appellant Molly Michaluk seeks leave to appeal the August 9, 2018 Court of Appeals opinion. She is a beneficiary of her deceased father Robert Whitton's trust. She filed a petition for instructions regarding modification of the trust. The trust includes an *in terrorem* clause that would disinherit Molly if she challenged provisions of the trust. The petition asked for a declaration that, if she sought to modify the trust to provide for what her father said he wanted in the trust shortly before his final illness, that would not trigger the *in terrorem* clause or, alternatively, there would be probable cause under MCL 700.7113 to seek modification so that the *in terrorem* clause would not apply. The probate court dismissed the petition, holding that a petition to modify the trust would violate the *in terrorem* clause. The Court of Appeals affirmed on alternative grounds, holding that the probate court should have dismissed the petition because it "present[ed] an unripe and nonjusticiable issue."

Ms. Michaluk requests this Court to grant leave to appeal because the Court of Appeals decision is contrary to settled law that a party can seek a declaratory judgment to guide future conduct. The decision undermines the utility of declaratory judgments. No longer would a party be able to bring an actual controversy to court without first taking action that could expose them to liability. Parties would not be able to seek advance guidance where there is an actual controversy about their rights. Trustees and beneficiaries could not seek a declaration of rights that involve a trust, trustee, or trust beneficiary.

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Statement of Questions Involved

1. Can a person who may be subject to a penalty for taking certain action obtain a declaration of rights that involve a trust, trustee, or trust beneficiary before taking that action in order to guide the person's future conduct?

The probate court did not address this question.

The Court of Appeals said "no."

Appellant Molly Michaluk says "yes."

2. Can a no-contest (*in terrorem*) clause in a trust—providing that a beneficiary who challenges or contests the trust or becomes an adverse party for restatement of the terms of the trust—divest a probate court of its statutory power to modify the trust?

The probate court said "yes."

The Court of Appeals did not address this question.

Appellant says "no."

3. Would a petition to modify the trust here be within the scope of the trust's no-contest clause, where the proposed petition neither challenges nor contests the original trust or the three amendments to that trust and where the trust provides that the beneficiaries shall be bound by an order modifying the trust?

The probate court said "yes."

The Court of Appeals did not address this question.

Appellant says "no."

4. If a petition to modify the trust here would be within the scope of the trust's no-contest clause, is there probable cause to file the petition, making the no-contest clause inapplicable?

The probate court said "no."

The Court of Appeals did not address this question.

Appellant says "yes."

5. If a petition to modify the trust here would be within the scope of the trust's no-contest clause, was the probate court wrong to dismiss the petition for instructions without allowing appellant to conduct discovery on the issue of probable cause?

The probate court said "no."

The Court of Appeals did not address this question.

Appellant says "yes."

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Introduction and Reasons for Granting Leave

The purpose of a declaratory judgment is to obtain guidance before a party takes action that may result in liability. As the Court of Appeals said in its opinion, declaratory relief is appropriate "to guide or direct future conduct. In such situations, courts are not precluded from reaching issues before actual injuries or losses have occurred." COA opinion, p 4 (exhibit 1), quoting *Huntington Woods v Detroit,* 279 Mich App 603, 616; 761 NW2d 127 (2008). But the Court of Appeals here undermined that purpose by holding that Molly Michaluk could not seek a declaratory judgment of her rights and liabilities if she filed a petition to modify her deceased father's trust. She sought this ruling because the trust has an *ín terrorem* clause that would disinherit Molly if she challenged provisions of the trust.[1] It was not clear whether that clause would apply to a petition to modify the trust, as distinguished from one that directly challenged a trust provision. The Court of Appeals concluded that "It is by no means a certainty that [Ms. Michaluk] will, in the end, file a petition to modify the trust" and therefore her "hypothetical future petition" presented "an unripe and nonjusticiable issue." COA opinion, pp 4, 6, 3.

In requiring a "certainty" that future action take place, the Court of Appeals undermined the purpose of a declaratory judgment. The reason for a declaratory judgment is to guide future conduct *before* a person risks liability by taking action. By definition, the contemplated future conduct is "hypothetical." If a declaratory judgment is unavailable to

[1] Molly Michaluk is *not* challenging or contesting any provision of her late father's trust or its amendments. There is no question those documents were properly executed and express Robert Whitton's intent at the time he signed each of those instruments.

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guide possible future action, a person must then risk liability by actually taking the action and cannot seek court guidance beforehand. Here that means that Molly must risk being disinherited if she files a petition to modify her father's trust and she cannot seek a declaratory judgment to guide her future conduct. By eliminating the basic purpose of a declaratory judgment, the Court of Appeals opinion presents "a legal principle of major significance to the state's jurisprudence" that deserves this Court's review. MCR 7.305(B)(3). The Court of Appeals followed an old decision that this Court later repudiated. That also is reason for granting leave. MCR 7.305(B)(5)(b). And, the decision requires Molly to either give up an attempt to carry out her father's intent or risk being disinherited if she goes forward. The decision is "clearly erroneous and will cause material injustice," another reason for this Court's review. MCR 7.305(B)(5)(a).

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Statement of Facts

I. Nature of the Action

Molly Michaluk is the only child of decedent Robert E. Whitton and a beneficiary of his trust. Robert was never married to Molly's mother, with whom he had an estranged and litigious relationship. Despite that, Robert and Molly in 2008 developed a strong and loving father-daughter relationship. Following the death of his girlfriend, Robert's view of his relationship with his daughter changed and he told his closest friends he wanted Molly to receive one-third of his entire trust and estate upon his death. In November 2014, when he went to the hospital for what he thought was a "meet and greet" with a heart specialist, he learned that his condition was far more serious than initially thought. He was immediately admitted to the hospital and the doctors determined he needed a heart and liver transplant. Soon after that, Robert met with his lawyer to draft an amendment to his trust. The amendment didn't carry out his intentions and Robert fired the lawyer shortly before he underwent double transplant surgery to replace his heart and liver. His condition deteriorated and he passed away without the opportunity to amend his trust as he said he wanted to before the surgery. After his surgery, Robert's brother sequestered him and lied to Molly about his condition. Robert passed away without the opportunity to even speak to his daughter again.

Molly Michaluk wants the probate court to modify the trust to carry out Robert's intent, which he expressed to not fewer than three different people, not including Molly. But, because the trust has a no-contest clause, Molly first asked the court to rule that a petition to modify either did not come within the scope of the no-contest clause or, if it did,

there was probable cause for a petition to modify, making the no-contest clause inapplicable. The issue on appeal is whether the Court of Appeals was wrong in saying that this petition was not ripe and was nonjusticiable.

II. Summary of Facts

The facts here are from Molly Michaluk's petition, attachments to the petition, and other filings in the case.[2]

Robert Whitton was a successful businessman who accumulated a substantial estate. He had one daughter, Molly Michaluk, who was born out of wedlock. Raschke affidavit, ¶ 5 (exhibit 6); Michaluk affidavit, ¶ 4 (exhibit 10). Robert had an estranged and litigious relationship with Molly's mother.[3] Initially, Robert was not a part of Molly's life. Raschke affidavit, ¶ 5; Michaluk affidavit, ¶ 4. This was one of Robert's greatest regrets. Raschke affidavit, ¶ 5. In 2008, Robert connected with Molly and began to build with her the father-daughter relationship that eventually became for him the most valuable thing in his life. Raschke affidavit, ¶ 6; Michaluk affidavit, ¶¶ 5-6. Over the following years, Robert often spoke about his love for his daughter and the pride he felt in the person that Molly had become. Raschke affidavit, ¶ 7.

[2] As discussed in the standard of review section of the argument, the probate court decision on review here is a summary disposition decision under MCR 2.116(I)(1). In deciding a summary disposition motion, the facts are viewed in the light most favorable to the party opposing summary disposition. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (summary disposition under MCR 2.116(C)(10)); *Ellison v Dep't of State*, 320 Mich App 169, 175; 906 NW2d 221 (2017) (under 2.116(I)(1)).

[3] The Court of Appeals issued an opinion in *Michaluk v Whitton,* unpublished opinion per curiam issued August 27, 1996 (docket no. 170452), on the litigation about child support between Molly's mother and Robert.

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Robert created a trust in 1992, restated it in 2003, and amended it in 2003, 2012, and 2013. Exhibits 13-16. The trust included a gift to Molly of one-third of two securities accounts. Second Amendment, pp 1-4 (exhibit 15). As amended, the trust also contains the following no-contest clause:

> D. Challenge to Trust Terms: Loss of Interest or Reduction of Share by Costs of Challenge. If any beneficiary under this Trust, or any person acting with or without court approval on behalf of a beneficiary or heir of this Trust, challenges or contests any provision of this Trust Agreement, or becomes an adverse party in a proceeding for restatement of the terms of this Trust, including specifically Lura (Ann) Maples, it is Grantor's intention that such beneficiary shall receive no portion of Grantor's estate, nor any benefits under this Trust Agreement and such beneficiary or beneficiaries shall forfeit his or her interest under this Trust and such forfeited interest shall be divided proportionately among the residual beneficiaries of this Trust as provided in Article VII, Paragraph B, above. If a Court of competent jurisdiction blocks the above provisions disinheriting such person(s), it is Grantor's desire that, at a minimum, all actual legal fees and costs incurred by the Trust in defending against the claims of such challenge or challenges shall reduce the trust share of the challenging beneficiary or beneficiaries on a dollar for dollar basis by the actual legal fees and costs expended by the Trust to defend against such action or actions. It is Grantor's desire that this special allocation of fees and costs be done to not penalize any non-challenging beneficiary of this Trust for a beneficiary's challenge, and to prevent a challenging beneficiary (or more than one) from creating pressure on the non-challenging beneficiaries to settle with such beneficiary because of legal fees incurred or estimated will be incurred as a result of such challenge. The purpose of this paragraph D is not and shall not be construed to limit the appearance by any heir or beneficiary as a witness in any proceeding for the construction of this Trust or a term of this Trust, nor to limit his or her appearance in any capacity in a proceeding for its construction. Nor will it be a challenge or contest if the Trustee or a beneficiary seeks court interpretation of ambiguous or uncertain provisions in this Agreement or to collect a debt owed to a beneficiary provided that probable cause exists for such challenge or contest. "Probable cause" shall exist only when the contesting party's retained legal representative: (1) has conducted a reasonable investigation; (2) has determined that there is admissible evidence that would cause a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest would be successful on its merits; and (3) has delivered a written

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> certified report to the contesting party; which report specifies the factual evidence that the legal representative relies on to conclude that 'probable cause' exists. The Successor Trustees have the right to request a ruling by the court hearing such action as to the merits of the contesting party's probable cause for bringing the action under the above standard after review of the certified report of the contesting party's legal representative. If no report is submitted or if the court rules that no probably [*sic*] cause existed at the time that the action was initiated then the Successor Trustees are authorized to allocate the expenses of the Trust's actual legal fees and costs to reduce the separate share of the beneficiary or beneficiaries that initiated the legal action.

Second Amendment, ¶ D, pp 7-8 (exhibit 15).

In November 2014, Robert went to the Baylor University Medical School Hospital in Dallas, Texas for what he thought was a "meet and greet" with a heart specialist. Raschke affidavit, ¶ 8 (exhibit 6); Eddie Whitton[4] deposition, p 10 (exhibit 4) (Robert went there for a checkup); Sandy Rhineberger affidavit, ¶ 11 (exhibit 8) (went there for a "meet and greet"; Robert thought he would need a heart transplant in three years); Richard Whitton[5] deposition, p 13 (exhibit 5) (Robert "was hoping he had a couple of years to go on that heart"). But, on the day of his arrival, he learned his condition was much more serious than he thought and that he needed a heart and liver transplant. Raschke affidavit, ¶ 8; Sandy Rhineberger affidavit, ¶¶ 9-11. "As soon as they looked at him they knew that that heart was about at the end of the line. They told him that he wouldn't be leaving there, that he would need a transplant." Richard Whitton deposition, p 13. He was immediately admitted

[4] Eddie was Robert's brother.

[5] Richard was Robert's brother.

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to the hospital on November 11, 2014. Sandy Rhineberger affidavit, ¶ 10. His heart stopped twice shortly after that and the medical staff revived him. *Id.,* ¶ 14.

Both before and after his admission to the hospital, Robert told his close friends on many occasions that he planned to give Molly one-third of his entire trust and estate. Raschke affidavit, ¶¶ 9-10 (exhibit 6); Sandy Rhineberger affidavit, ¶¶ 19-20 (exhibit 8); John Rhineberger affidavit, ¶¶ 13-15. Exhibit 9.

A couple of weeks after his admission into the hospital, Robert flew his lawyer from Michigan to Texas and met with him to draft an amendment to his trust. Raschke affidavit, ¶ 11 (exhibit 6); Sadecki deposition, pp 10, 14-15 (exhibit 7);[6] Richard Whitton deposition, pp 22-23 (exhibit 5). The attorney drafted an amendment. Sadecki deposition, pp 30-31;[7] exhibit 7 (unsigned fourth amendment). But the amendment did not provide for one-third of the entire trust and estate to go to Molly Michaluk and did not provide for other things that Robert had discussed with his attorney, Ed Raschke, and his brothers. Robert refused to sign it because "This is not what I asked for." Eddie Whitton deposition, pp 28-29, 33 (exhibit 4). *Accord,* Richard Whitton deposition, pp 28, 43-44; Eddie Whitton deposition, p 25. He fired Sadecki as his attorney on Christmas Eve. Sadecki deposition, p 29. In the intervening week between Christmas and New Year's—while he was in his hospital bed in

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[6] Mark Sadecki was Robert Whitton's attorney. Sadecki deposition, pp 6-7 (exhibit 7).

[7] Although Sadecki's testimony is somewhat evasive, the parties do not dispute that the amendment was drafted as a result of the meeting in which Robert Whitton discussed matters regarding disposition of his assets. *See* Sadecki deposition, pp 14-15 (exhibit 7), regarding a nonprivileged part of that discussion.

Texas waiting for his upcoming double transplant surgery on New Year's Day, Robert did not retain a new attorney or have another amendment drafted.

Robert had double transplant surgery, receiving a new heart and liver on January 1, 2015. Sandy Rhineberger affidavit, ¶¶ 16, 28 (exhibit 8); Eddie Whitton deposition, pp 13, 18 (exhibit 4). After the surgery, Robert's brother restricted access to Robert and lied to Molly about her father's condition. Sandy Rhineberger affidavit, ¶ 29; Eddie Whitton deposition, p 19; Michaluk affidavit, ¶¶ 13-14 (exhibit 11). For the rest of his life, Robert was in hospitals or rehabilitation facilities and was either on drug cocktails, in a coma, or not coherent. Richard Whitton deposition, pp 15, 20-22 (exhibit 5); transcript 2/15/17, p 15 (exhibit 12) (statement by appellees' attorney that "he never fully recovered. He was somewhat non-responsive from then until the end of his life …"). Robert passed away on July 11, 2015. Sandy Rhineberger affidavit, ¶ 3.

While all this was happening, Robert's brothers isolated Molly and didn't let her know about her father's situation. Michaluk affidavit, ¶¶ 11-14 (exhibit 10). She didn't know about his health situation until the day of his death. *Id.,* ¶¶ 15-19. Robert's family immediately threatened Molly that, if she questioned how they handled Robert's estate, she would get nothing. *Id.,* ¶¶ 24-25.

III. Proceedings Below

A. Probate Court

Molly Michaluk filed her petition for instructions seeking a ruling that (1) the no-contest clause would not apply to a petition to modify the trust or, (2) if the no-contest clause applied, it would not be enforceable because there was probable cause under

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MCL 700.7113 to seek to modify the trust. Exhibit 11. The petition did not seek to modify the trust. Rather it sought a declaratory ruling that, if Ms. Michaluk did file a petition to modify the trust, it would not run afoul of the no-contest clause. *Id.,* ¶ 45. The petition was supported by five affidavits and the transcript of a deposition taken in a related matter.[8] The respondents were Eddie and Richard Whitton, Robert's brothers, who were successor co-trustees of the trust.

The parties filed several briefs. Appellees filed no affidavits supporting their briefs. The court held a hearing. Transcript 2/15/17 (exhibit 12). Two days later, it entered an opinion and order denying the petition. Exhibit 2.

The opinion summarized the facts set out above. Probate opinion, pp 2-3 (exhibit 2). In one paragraph, the opinion concluded that "a petition seeking to amend the Trust would violate the *in terrorem* clause." *Id.,* p 7. The opinion went on to address the alternative argument that, even if a petition to modify the trust would violate the no-contest clause, the clause would not be enforceable because there would be probable cause to file a petition to modify. It concluded that there would be no probable cause to seek to modify the trust under MCL 700.7412(2) because that requires a showing of "circumstances not anticipated by the settlor" and illness and death of the settlor cannot be unanticipated circumstances. Probate opinion, p 7. The court denied the petition. *Id.,* p 8.

Appellees argued that Ms. Michaluk violated the no-contest clause by merely filing the petition for instructions. The probate court rejected that claim because the petition

[8] The pertinent exhibits to the petition are attached separately to this brief.

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“does not challenge or contest the terms of the Trust” and Ms. Michaluk was only “seeking instruction from this Court, which is not a violation of the *in terrorem* clause of the Trust.” Probate opinion, p 8 (exhibit 2).[9]

On reconsideration, the probate court entered an opinion that said a petition to modify the trust is something that “‘challenges or contests’ the provision of the Trust.” Opinion on reconsideration, p 4 (exhibit 3). It denied the motion for reconsideration. *Id.,* p 1.

B. Court of Appeals

The Court of Appeals affirmed on alternative grounds. Exhibit 1. It held “the probate court should have denied the petition as presenting an unripe and nonjusticiable issue.” *Id.,* p 3. It correctly characterized Ms. Michaluk’s petition as one “seeking declaratory relief.” *Id.,* p 4. But it held that the issue was not ripe because “[i]t is by no means a certainty that petitioner will, in the end, file a petition to modify the trust ….” *Id.* It said Ms. Michaluk “sought legal advice from the probate court” on “a hypothetical future petition.” *Id.,* pp 4, 6. Relying on this Court’s opinion in *McLeod v McLeod,* 365 Mich 25; 112 NW2d 227 (1961), the court held “it is not permissible to ask a probate court to anticipatorily rule that a particular course of action will or will not violate an *in terrorem* clause.” COA opinion, p 5. The Court of Appeals held *McLeod* was binding. *Id.,* pp 5, 6. Having decided that the case was not ripe and should have been dismissed without reaching the merits, the Court

[9] We mention this part of the opinion only for completeness. Appellees did not challenge this holding on appeal because they did not file a cross-appeal. “An appellee is limited to the issues raised by the appellant unless it files a cross-appeal as provided in MCR 7.207.” *Martin v The Rapid Inter-Urban Transit Partnership*, 271 Mich App 492, 502; 722 NW2d 262 (2006), *rev’d on other grounds,* 480 Mich 936; 740 NW2d 657 (2007). The Court of Appeals opinion did not address this issue because it was not before it.

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of Appeals vacated the probate court's opinion on whether the no-contest clause applied and, if it did, whether there was probable cause to file a petition to modify the trust. *Id.*, p 6.

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Argument

I. Standard of Review

Review is *de novo*. The important issues on appeal involve application of the general declaratory judgment rule, MCR 2.605, and MCL 700.7201(3), which expressly authorizes trustees and trust beneficiaries to seek a "declaration of rights that involve a trust, trustee, or trust beneficiary." This Court reviews interpretation of court rules *de novo. Hinkle v Wayne Co Clerk,* 467 Mich 337, 340; 654 NW2d 315 (2002). It reviews questions of statutory interpretation *de novo*. *In re Rasmer Estate,* 501 Mich 18, 30; 903 NW2d 800 (2017).

The case also involves review of the probate court's summary disposition order. That court reviewed the pleadings, attachments, and briefs, heard oral argument, and "render[ed] judgment" for respondents. This was done under MCR 2.116(I)(1): "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." This rule requires the court to summarily dispose of a case when the record supports that. "[I]f no factual dispute exists, a trial court is required to dismiss an action when a party is entitled to judgment as a matter of law, and a motion for summary disposition is unnecessary." *In re Baldwin Trust*, 274 Mich App 387, 398-399; 733 NW2d 419, *aff'd* 480 Mich 915; 739 NW2d 868 (2007) (citing MCR 2.116(I)(1)). The Court of Appeals held the probate court's order "was effectively a decision under MCR 2.116(I)(1)." COA opinion, p 2 (exhibit 1).

This Court reviews summary disposition *de novo*. *Rasmer Estate,* 501 Mich at 30. In addition, the probate court's decision interpreted trust language. Interpretation of trust

language is reviewed *de novo*. *In re Pollack Trust*, 309 Mich App 125, 160; 867 NW2d 884 (2015).

II. The Petition Was a Prototypical Request for a Declaratory Judgment. The Court of Appeals Was Wrong to Reject It as Unripe

A. The Trust Code Specifically Authorizes a Petition Seeking Guidance Regarding Contemplated Future Conduct

The Michigan Trust Code specifically provides for a petition in a case like this. MCL 700.7203(1) provides for jurisdiction over "proceedings … brought by a … beneficiary that concern the administration of a trust." MCL 700.7201(3) says: "A proceeding involving a trust may relate to *any matter involving the trust's administration* …." (Emphasis added). "The word 'any' is all-inclusive and 'is defined as "every; all."'" *In re Stan Estate,* 301 Mich App 435, 443; 839 NW2d 498 (2013), quoting *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010). The list of proceedings the statute allows includes "a request for instructions" and a "declaration of rights that involve a … trust beneficiary." MCL 700.7201(3). That includes a proceeding to "[d]etermine a question that arises in the administration or distribution of a trust …." MCL 700.7201(3)(e). The list of authorized trust proceedings in MCL 700.7201(3) is a verbatim copy of the list of matters within the probate court's exclusive jurisdiction under MCL 700.1302(b). The probate court has subject matter jurisdiction over all these matters.

The fact that the Legislature expressly granted jurisdiction to the probate court to hear requests for instructions and to answer questions about the rights of beneficiaries

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shows that the probate court has the power to give instructions regarding conduct contemplated—but not yet acted upon—by a beneficiary.[10] *In re Edwards Trust*, unpublished per curiam opinion of the Court of Appeals, issued October 14, 2014 (docket no. 317114), p 3 [2014 WL 5163663, at *2] ("[i]n any event, pursuant to the Michigan Trust Code, . . . "[a] proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions . . . . Therefore, the successor trustee had authority to petition the court for instruction regarding the distribution of trust funds.")[11]

To hold that such petitions are nonjusticiable would render MCL 700.7201(3) nugatory. "Whenever possible, every word of a statute should be given meaning. And no word should be treated as surplusage or made nugatory." *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007). Therefore, the trust code expressly authorizes Molly Michaluk's petition for instructions.

B. The Declaratory Judgment Rule Authorizes the Petition for Instructions

Wholly apart from the specific authorization in the trust code, the declaratory judgment rule authorizes exactly the kind of petition here—a request for a ruling on contemplated future action before a party acts. MCR 2.605(A)(1) allows a court to "declare the rights and other legal relations of an interested party." "The purpose of a declaratory judgment is to definitively declare the parties' rights and duties, *to guide their future conduct*

[10] "The probate court . . . is a court of limited jurisdiction, deriving all of its power from statutes." *Manning v Amerman*, 229 Mich App 608, 611, 582 NW2d 539 (1998).

[11] We cite this unpublished case because it explicitly upholds a petition for instructions before the trustee took action, citing MCL 700.7201(3). MCR 7.215(C)(1).

and relations, and to preserve their legal rights." *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014) (emphasis added). It allows a party "to obtain adjudication of rights before an actual injury occurs …." *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006). "Actions for declaratory relief are intended to minimize avoidable losses and the unnecessary accrual of damages." *Durant v Michigan*, 456 Mich 175, 208-209; 566 NW2d 272 (1997). *Accord, Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Services,* 431 Mich 172, 191; 428 NW2d 335 (1988). The declaratory judgment rule is to be "liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Allstate Ins Co v Hayes*, 442 Mich 56, 65; 499 NW2d 743 (1993); *Detroit Base Coalition,* 431 Mich at 191.

This type of relief is what Molly Michaluk sought here—a declaration of her rights and a guide for her future conduct before she risks loss of her inheritance.

C. *McLeod* Is No Longer Good Law and Does Not Control

In rejecting a declaratory judgment here, the Court of Appeals cited two cases: *McLeod v McLeod,* 365 Mich 25; 112 NW2d 227 (1961), which the court viewed as controlling, and its own opinion in *In re Perry Trust,* 299 Mich App 525; 631 NW2d 251 (2013), *lv den sub nom Perry v Perry,* 495 Mich 892; 839 NW2d 195 (2013). COA opinion, pp 4-5 (exhibit 1). Those cases are not good law.

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McLeod rejected a declaratory judgment in a case similar to this. But the case is from an era of judicial resistance to declaratory judgments.[12] This Court itself criticized earlier decisions that limited the scope of the declaratory judgment statute that preceded MCR 2.605. *Allstate,* 442 Mich at 64 n 8 (noting decisions of this Court that "narrowed the availability of [declaratory] relief"); *see* Viviano, *The Use of Declaratory Judgments to Test the Enforceability of No-Contest Clauses,* 50 Real Prop, Trust & Estate LJ 75, 84-91 (2015) ("Viviano") (setting out the history of judicial hostility to declaratory judgment statutes in Michigan). Indeed, this Court characterized *McLeod* as a case where "an overly strict application made declaratory judgment unavailable in the very type of situation where it was intended to offer relief." *Allstate*, 442 Mich at 64 n 8. *Accord* Viviano, at 91-92 (noting "*McLeod* was roundly criticized by commentators"); Recent Decisions, *Declaratory Judgments—Avoidance of Peril—Refusal to Adjudicate Rights of Will Beneficiary Under No-Contest Clause,* 61 Mich L Rev 191, 196 (1962) ("Declaratory Judgments") (stating *McLeod* "defeated both the letter and the spirit of the declaratory judgments act") (cited by this Court in *Allstate,* 442 Mich at 64 n 8). If *McLeod* were the law today, "no party seeking to avoid a perilous situation may do so by a declaratory judgment, as the parties will never have done all they might do until the controversy has produced an otherwise justiciable 'wrong.'" Declaratory Judgments, p 195.

[12] *McLeod* precedes the enactment of MCL 700.7201 by 49 years.

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The narrow view of declaratory judgments changed when this Court adopted the declaratory judgment rule in 1963—GCR 1963, 521, the predecessor to MCR 2.605. "Narrow interpretations of the availability of declaratory relief were decisively rejected with the advent of GCR 1963, 521." *Allstate*, 442 Mich at 64 n 8. The rule repudiated narrow decisions such as *McLeod.* 3 Michigan Court Rules Practice, Text § 2605.1 (citing *McLeod* as an example of "an overly strict application"); Viviano, at 91 ("*McLeod* effectively made declaratory judgments unavailable"); *id,* at 92. ("the Michigan Supreme Court overturned *McLeod* by adopting the General Court Rules of 1963"). This Court recognized the change wrought by the declaratory judgment rule when it characterized the result in *McLeod* as "an overly strict application" that precluded a declaratory judgment "in the very type of situation where it was intended to offer relief." *Allstate,* 442 Mich at 64 n 8.

MCR 2.605, its predecessor GCR 1963, 521, and this Court's more recent declaratory judgment cases all supersede *McLeod's* rejection of a declaratory judgment in this situation. *Allstate* is on point and rejects the reasoning of *McLeod.* 442 Mich at 64 n 8. *McLeod* is no longer good law. The Court of Appeals should have recognized that and should have rejected *McLeod's* narrow view of the availability of declaratory judgments. Although it might have felt bound to follow *McLeod* because it has not been explicitly overruled, the Court of Appeals should have recognized that the declaratory judgment rule, MCL 700.7201(3), and modern declaratory judgment authority—including *Allstate,* which the Court of Appeals did not cite—superseded *McLeod.* In any case, this Court is not bound by the outdated and justly criticized decision in *McLeod.* The Court effectively overruled

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McLeod in *Allstate*. If there is any doubt about that, this Court can take the opportunity now to explicitly overrule *McLeod*.

The Court of Appeals' reliance on *Perry Trust* was likewise misplaced. In that case, the Court of Appeals, in dictum, questioned whether there was a justiciable case but held the issue "is not now before us." 299 Mich App at 532. This Court denied leave to appeal in a one-sentence order. 495 Mich 892. A denial of leave to appeal is not a ruling on the merits and has no precedential value. MCR 7.301(E) ("The reasons for denying leave to appeal … are not to be regarded as precedent"); *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 313-314 n 3; 901 NW2d 577 (2017) ("When denying leave to appeal, 'the Supreme Court expresses no present view with respect to the legal questions dealt with in the opinion of the Court of Appeals.'").[13]

D. The Court Should Grant Leave to Correct the Court of Appeals' Error in Effectively Eliminating the Availability of Declaratory Relief

Both MCL 700.7201(3) and the declaratory judgment rule, properly interpreted, expressly authorized Molly Michaluk's petition. To hold that the issue was not ripe would undercut the purpose of a declaratory judgment and would require people to expose themselves to liability to test their legal rights. For example, a person contemplating a certain action under a contract would not be able to obtain a declaratory judgment as to whether

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[13] The two dissents from denial of leave, like the denial of leave itself, have no precedential value. Justice Viviano's dissent relied on *McLeod* and the standards used in a 1930 opinion that emasculated Michigan's 1929 declaratory judgment act and did not discuss either the declaratory judgment rule or more recent declaratory judgment precedent. 495 Mich at 893-895. Justice Markman would have granted leave. *Id.* at 892-893. Thus at least two justices thought this Court should address this issue. This case provides the opportunity to do that.

that would be a breach of the contract. An insurance company contesting coverage under its policy to defend its insured would have to refuse coverage and risk liability rather than filing a declaratory judgment action to determine coverage. A trustee could no longer seek guidance from a probate court, as expressly allowed under the Michigan Trust Code, as to his obligations to beneficiaries under the trust before taking action that would affect the beneficiaries and expose him to a possible breach of fiduciary duty claim. In each of these situations, it is "by no means a certainty" (COA opinion, p 4 (exhibit 1)) that the person will take the contemplated action. In each of these situations, the device of a declaratory judgment is the way for the person to obtain a ruling before actually taking action that may result in liability. But the Court of Appeals forecloses that option by saying that the situation presents "a purely hypothetical question" (*id.,* p 6) until the person actually takes the disputed action. That requirement means a declaratory judgment would not be available to "declare the rights and other legal relations of an interested party." MCR 2.605(A)(1). It runs against the purpose of a declaratory judgment "to guide their future conduct and relations." *Barrow*, 305 Mich App at 662. It bars an action "to obtain adjudication of rights before an actual injury occurs …." *Rose*, 274 Mich App at 294. It is a narrow construction of the declaratory judgment rule, contrary to the requirement that it is to be "liberally construed to provide a broad, flexible remedy." *Allstate*, 442 Mich at 65; *Detroit Base Coalition,* 431 Mich at 191.

A congressman, describing the purpose of a declaratory judgment, picturesquely put it this way: "Under the present law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light

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and then take the step." 69 Cong Rec 2108 (1928), quoted in Borchard, *Judicial Relief for Peril and Insecurity*, 45 Harv L Rev 793, 807 (1932). The Court of Appeals opinion turns off that light.

The importance of the historic availability of declaratory relief makes this a matter "of major significance to the state's jurisprudence." MCR 7.305(B)(3). The Court of Appeals opinion also conflicts with this Court's decision in *Allstate*. MCR 7.305(B)(5)(b). It also conflicts with Michigan's public policy favoring the ability of trustees and trust beneficiaries to request instructions from the probate court concerning their rights under a trust. "The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials." *Skutt v Grand Rapids*, 275 Mich 258, 265; 266 NW 344 (1936) (internal citations and quotation marks omitted). This Court should grant leave and correct the Court of Appeals' erroneous narrow decision and its implications for undermining the availability of declaratory relief.

III. Ms. Michaluk Was Entitled to a Decision on the Merits of Her Petition

The probate court held that the petition to modify the trust would violate the no-contest clause and there was no probable cause to bring such a petition. Probate opinion, p 7 (exhibit 2). The Court of Appeals vacated that holding on the theory that the probate court should not have reached that issue but rather should have dismissed the case as unripe. COA opinion, p 6 (exhibit 1). As discussed above, this Court should reverse the ripeness decision. The Court can then reach the merits of Molly's claim for a declaratory judgment. Alternatively, the Court can remand to the Court of Appeals for consideration of the

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merits. For completeness, we discuss those issues below and show that Molly Michaluk was entitled to a ruling that a petition to modify the trust would not violate the no-contest clause or, alternatively, if it would, there would be probable cause to file such a petition and the clause would not apply.

A. The No-Contest Clause Does Not Apply

1. A Trust Provision Cannot Divest the Court of the Power to Modify the Trust

Generally, a settlor is free to put any desired provisions in a trust, including those that change the default provisions of the trust code. MCL 700.7105(1). But there are some statutory provisions a settlor cannot change. MCL 700.7105(2). Among those is "[t]he power of the court to modify … a trust" under the trust code. MCL 700.7105(2)(d). A court can modify a trust when, because of unanticipated circumstances, modification would carry out the settlor's purpose or probable intention. MCL 700.7412(2).

The statute gives a probate court authority to modify a trust. Trust provisions can't take that away. Regardless of the no-contest clause, the court can modify the trust. It follows that a no-contest clause cannot penalize a petition to invoke that power. Since a no-contest clause cannot limit the court's power to modify the trust, that alone justifies granting Molly Michaluk's petition for a ruling that the no-contest clause would not apply to a petition to modify the trust.

There are no Michigan cases that address whether MCL 700.7105(2)(d) prohibits a settlor from using a no-contest clause to penalize a beneficiary who seeks to modify a trust under MCL 700.7412(2). Nor is there any Michigan case law addressing whether a petition

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to modify a trust falls within the provisions of a no-contest clause that does not expressly prohibit a petition to modify the trust.[14]

However, California addressed this issue. In *Balian v Balian*, 179 Cal App 4th 1505; 102 Cal Rptr 3d 470 (2009), the petitioner sought determinations about whether a petition for two proposed modifications to a trust would violate the trust's no-contest clause. One of the two modifications involved a proposed petition to remove and replace the trustees. 179 Cal App 4th at 1509. The second proposed modification was to change the amount of monthly distributions to a beneficiary to carry out the settlor's intentions. *Id.*

After holding that a petition to remove trustees does not trigger a no-contest clause, the court went on to analyze the second proposed petition under California's version of MCL 700.7412(2). The California statute regarding "Modification or termination in changed circumstances" provides:

> (a) On petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust or terminate the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. In this case, if necessary to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument.

Cal Probate Code § 15409 (West), quoted at 179 Cal App 4th 1512.

[14] In this case, the opposite is true. In addition to not expressly prohibiting a petition to modify the trust in the no-contest clause, Robert Whitton also anticipated that there may be a need to modify the trust and provided for that contingency in that very same document. Restated Trust, Article XV, ¶ B, p 12 (exhibit 13).

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The California probate court ruled that a petition to modify the trust does not violate the no-contest clause. It noted the state's public policy that a petition under § 15409 does not violate a no-contest clause. 179 Cal App 4th at 1512-13. It concluded:

> There is no merit to the trustees' argument that the modification petition is a direct contest on the ground of mistake which seeks to void, modify, and set aside a trust provision. The gravamen of the proposed modification petition is to modify a special needs provision. … A section 15409 petition does not violate a no contest clause."

Id. at 1513. Similarly, a petition under MCL 700.7412(2) does not violate the no-contest clause in this case.

2. A Petition to Modify the Trust Would Not Be Within the Scope of the No-Contest Clause

Even if a no-contest clause could limit a court's authority to modify a trust, the party seeking to apply the clause must show that the requested modification is within the terms of the clause, applying the principle that no-contest clauses must be strictly construed against forfeiture.

a. The Court Must Strictly and Narrowly Construe a No-Contest Clause

"Courts must … construe no-contest clauses strictly." *Perry Trust,* 299 Mich App at 530. *Accord, Stan Estate,* 301 Mich App at 443. "[S]uch conditions are punitive and construable strictly." *Saier v Saier,* 366 Mich 515, 520; 115 NW2d 279 (1962). A no-contest clause is a forfeiture provision. *Id.* "Forfeiture provisions in a will are to be strictly construed, and forfeiture avoided if possible, and only where the acts of the parties *come*

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strictly within the express terms of the punitive clause of the will *may a breach thereof be declared." Id.* (emphasis in original).[15] *Accord, Perry Trust,* 299 Mich App at 530.

b. The No-Contest Clause Here Does Not Apply to a Petition to Modify the Trust

The no-contest clause here applies only if a beneficiary "challenges or contests any provision of this Trust Agreement, or becomes an adverse party in a proceeding for restatement of the terms of this Trust." Second Amendment, ¶ D, p 7 (exhibit 15). Applying the rule of strict construction, this does not include a petition to modify the trust. "Challenge," "contest," and "restate" are not the same as "modify." The drafter of this long no-contest clause could have given it a broader scope and included "modification" as one of the triggers for the no-contest clause. But he didn't.

Critically, *the trust uses the term "modification" elsewhere, but not in the no-contest clause.* Restated Trust, Article XV, ¶ B, p 12 (exhibit 13) (provision regarding "any proceeding involving the construction, operation or modification of this Agreement"). It is illogical to suggest that the settlor of a trust can provide for and prohibit the same thing (modification) in the same document. The use of different terms must be accorded meaning so that all provisions are given effect according to their express language. "Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust." *In re Stillwell Trust*, 299 Mich App 289, 294; 829 NW2d 353

[15] *Saier* applied this principle to a no-contest clause in a will. The principle applies equally to trusts, as the other cases cited above show. *E.g., Perry Trust,* 299 Mich App at 530, quoting *Saier.*

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(2012). This is particularly so when applying the rule that a no-contest clause must be strictly construed.

When strict construction is required, one cannot be sloppy in analysis and cannot equate the meanings of different words. A petition to modify the trust under MCL 700.7412(2) does not "challenge" or "contest" provisions of the trust but rather seeks to "further the settlor's purpose or … the settlor's probable intention." It would modify, not restate, the trust and would carry out the settlor's intent. *Balian*, *supra*. To "restate" means "to state again or in a new form." Webster's Third New International Dictionary, Unabridged Edition (1986). "Modify" means "to make minor changes in the form or structure of." *Id.*[16] Strictly construing the no-contest clause and given the disparate definitions, Molly's proposed petition to modify the trust does not fall within the no-contest clause's prohibition against proceedings "for restatement of the terms of the Trust."

The probate court's one-paragraph conclusion that a petition to modify the trust would violate the no-contest clause did not analyze the language of the clause. Probate opinion, p 7 (exhibit 2). Yet that is an essential part of construing that language. Although the probate court recited the legal principle that a court must resolve disputes about the meaning of a trust by determining the settlor's intent and that intent must be determined from the trust instrument (*id.,* pp 6-7), it pointed to no specific language of the trust and it did not recognize that—beyond the language of the trust itself—the trust code also provides

[16] Since neither the trust nor the trust code defines these words, dictionary definitions are appropriate. *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007).

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for modification when that will further the settlor's purpose or probable intent. MCL 700.7412(2). The probate court did no better in its opinion on reconsideration. Without analysis, it equated a request to modify the trust with a request that "challenges or contests" provisions. Opinion on reconsideration, p 4 (exhibit 3) (quoting the language of the no-contest clause). Once again, it did not acknowledge the requirement that the no-contest language be construed strictly and did not explain how these different words should be treated as meaning the same thing. More troubling is that by ignoring Article XV of the trust—which expressly mentions modification—the court ignored Robert's express wishes that an order, judgment, or decree in a proceeding to modify the trust be binding on all known and unknown and undetermined beneficiaries. Restated Trust, Article XV, ¶ B, p 12 (exhibit 13).

The probate court summarily found that Robert Whitton's intent was "to discourage litigation among the beneficiaries." Probate opinion, p 7 (exhibit 2). It was improper to make a factual finding without affording the parties the opportunity for discovery or an evidentiary hearing. In any event, this general statement is not anchored in the language of the trust, which is very specific about what kinds of challenges are within the no-contest clause, not a ban on any "litigation among the beneficiaries." This also ignored the evidence of Robert Whitton's intent, summarized in section II of the statement of facts. Keeping in mind that the decision here was before any discovery on the issues raised by the petition, Molly didn't need to conclusively prove Robert's intent. She needed only to show that there was a factual issue precluding summary disposition. The supporting affidavits

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demonstrating that Robert Whitton repeatedly told his closest friends he wanted his daughter to have one-third of his entire trust and estate—evidence that must be viewed in the light most favorable to Molly[17]—created a factual issue. At the least, Molly was entitled to discovery to marshal all the evidence of intent. A motion for summary disposition filed before the close of discovery is premature unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position. *Liparoto Constr, Inc v General Shale Brick, Inc,* 284 Mich App 25, 33-34; 772 NW2d 801 (2009).

Finally, the probate court's nod to "public policy" was wrong. The court said: "There is a public policy in favor of trusts and wills as the best evidence of a settlor's intent" and that allowing "amendments based on oral statements … would erode the effectiveness of estate planning." Probate opinion, p 7 (exhibit 2). But "public policy" is not a court's individual preference for what may seem advisable. "It is hard to think of a proposition less compatible with the 'rule of law' and more compatible with the 'rule of men' than that a judge may concoct 'public policies' from whole cloth, rather than from actual sources of the law." *Terrien v Zwit*, 467 Mich 56, 78; 648 NW2d 602 (2002). Public policy "must ultimately be clearly rooted in the law." *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 722; 706 NW2d 426 (2005). It must be based on "policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Rory v Continental Ins Co*, 473 Mich 457, 471; 703 NW2d 23 (2005).

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[17] *Maiden*, 461 Mich at 120; *Ellison*, 320 Mich App at 175.

Here the Legislature codified public policy in the Estates and Protected Individuals Code. MCL 700.1201(b) says the code "shall be liberally construed and applied to promote its underlying purposes and policies, which include all of the following: … To discover and make effective a decedent's intent in distribution of the decedent's property." MCL 700.7412(2) promotes that policy by recognizing there are circumstances that will require modification of a trust "to further the settlor's stated purpose or … the settlor's probable intention." Thus public policy actually favors allowing a petition to modify the trust without imposing a penalty under the no-contest clause. To ensure that policy is satisfied, the Legislature empowered the probate court to hear requests for instructions by trustees and trust beneficiaries seeking a declaration of rights that involve a trust, trustee, or trust beneficiary. MCL 700.7201(3).

In sum, the probate court's cursory decision did not apply the proper standard of construing the no-contest clause strictly, did not analyze the language involved, ignored the evidence before it, and made improper findings. A proper analysis of the specific language in the no-contest clause requires a conclusion that a petition seeking modification of the trust so that it would carry out Robert Whitton's actual intentions would not violate the no-contest clause.

B. Even If a Petition to Modify the Trust Would Violate the No-Contest Clause, There Is Probable Cause to File a Petition and the No-Contest Clause Therefore Does Not Apply

If, as shown above, a petition to modify the trust is not within the scope of the no-contest clause that would be sufficient to rule in Molly's favor. But, even if a petition to

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modify came within the language of the no-contest clause, the clause would not be enforceable here. The trust code provides:

> A provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

MCL 700.7113.

"Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." *In re Griffin Trust*, 281 Mich App 532, 540; 760 NW2d 318 (2008), *rev'd on other grounds,* 483 Mich 1031; 765 NW2d 613 (2009), quoting 2 Restatement Property, 3d, Wills and Other Donative Transfers, § 8.5, comment c, p 195. *Accord, Stan Estate,* 301 Mich App at 444.[18]

Here there is probable cause for Molly to seek to modify the trust because she marshalled extensive evidence that (1) Robert Whitton intended that his daughter receive one-third of his entire trust and estate; (2) he was suddenly and unexpectedly hospitalized, contrary to his expectation that he had several years before he would need heart surgery; (3) almost immediately he wanted to amend his trust but his lawyer drafted an amendment that was not what Robert intended and not what he had discussed with his friends, his brothers, and a long time employee; (4) after firing that lawyer and before he could make other

[18] The no-contest clause contains a definition of "probable cause," but it applies only when "the Trustee or a beneficiary seeks court interpretation of ambiguous or uncertain provisions in the Agreement or to collect a debt owed to a beneficiary." Second Amendment, ¶ D, p 8 (exhibit 15). The petition here did not seek that relief.

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arrangements in the week between Christmas and New Year's, he had double transplant surgery from which he never recovered; and (5) his brothers kept him isolated from his friends and daughter. That evidence constituted "circumstances not anticipated by" Robert Whitton. MCL 700.7412(2).[19] Given this evidence, a reasonable person could conclude that a petition to modify the trust would be successful. *Stan Estate,* 301 Mich App at 444; *Griffin Trust*, 281 Mich App at 540. Those unanticipated circumstances show there was probable cause to seek to modify the trust to carry out Robert's repeatedly expressed intent.

The probate court did not consider all the evidence when it held there was no probable cause to seek to modify the trust. Although it recognized Molly's argument that Robert Whitton's hospitalization and sequestration were unanticipated circumstances, it dismissed the argument by saying "[t]he illness and death of the settlor do not constitute 'circumstances not anticipated by the settlor' under MCL 700.7412." Probate opinion, p 7 (exhibit 2). This improperly focused only on "illness and death" and did not consider the other evidence, including the unexpected nature, urgency, and length of Robert's hospitalization; the abortive attempt to amend the trust; the sequestration by his brothers; and the inability of his attorney to timely deliver to him an accurate trust amendment before his surgery. Further, the court's statement that allowing modification of a trust "would erode the effec-

[19] Note the limited scope of the question on appeal. Molly Michaluk need not prove now that these were sufficient unanticipated circumstances that would justify modification of the trust under MCL 700.7412(2). All that is at issue here is whether there was probable cause to make a claim for modification. MCL 700.7113.

tiveness of estate planning" (*id.,* p 7) ignores the fact that there is specific statutory authority in MCL 700.7412(2) to modify trusts when that is justified to carry out the settlor's intent. Finally, the probate court's statement that "the facts presented are not sufficient to modify the trust under MCL 700.7412" (probate opinion, p 8 (exhibit 2)) is a ruling on an issue that was not before the court. The issue here was not whether the trust should be modified. It was only whether there was probable cause to file a petition to modify the trust. If the no-contest clause does not apply and Molly files that petition, then (and only then) the parties will have the opportunity to argue whether the court should modify the trust.

C. Molly Michaluk Should Be Allowed to Seek a Court Ruling That Would Carry Out Her Father's Intent

The overriding principle that applies here is to carry out Robert Whitton's intent. "Indeed, the 'guiding polar star' in probate law is that the intentions of the decedent control ….." *In re Mardigian Estate*, __ Mich __; __ NW2d __, 2018 WL 3077084, at *12, *reh'g denied,* 915 NW2d 887 (Mich 2018). Robert Whitton expressed that intent numerous times to his close friends and his only child. The trust must be construed to carry out that intention. MCL 700.1201(b). The no-contest clause must be strictly construed. A petition to modify would "further the settlor's stated purpose or … the settlor's probable intention." MCL 700.7412(2). To further this policy, Molly Michaluk should be allowed to petition for modification without application of the no-contest clause.

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Relief Requested

The probate court was wrong in denying the petition and the Court of Appeals was wrong in considering the petition to be nonjusticiable. This Court should grant leave to appeal, reverse the courts below, and remand with instructions to grant the petition, holding that Molly Michaluk would not violate the no-contest clause by filing a petition to modify the trust. Alternatively, this Court should remand to the Court of Appeals for it to consider the merits of Molly Michaluk's petition.

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