STATE OF MICHIGAN
IN THE SUPREME COURT

In re:

Supreme Court File No. 158408

THE ROBERT E. WHITTON REVOCABLE TRUST u/a/d November 6, 1992, as restated June 10, 2003, and as amended July 30, 2003, January 5, 2012, and again November 21, 2013

COA Docket No. 337828
Oakland County Probate Court
File No. 2016-372,116-TV

MOLLY MICHALUK,

Petitioner/Appellant,

v.

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

Respondents/Appellees.

RESPONDENTS/APPELLEES' RESPONSE BRIEF TO PETITIONER/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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PREFACE

Petitioner/Appellant Molly Michaluk will be referred to as "Michaluk."

Respondents/Appellees Richard Whitton and Eddie Whitton will be collectively referred to as the "Successor Co-Trustees."

The Robert E. Whitton Revocable Trust will be referred to as the "Trust."

Robert E. Whitton will be referred to as "Whitton."

Michaluk's Application for Leave to Appeal will be cited as "Appl at ____."

Record cites are to the exhibits attached to Michaluk's Application for Leave to Appeal and will be cited with a short name of the document, followed by "(Michaluk Ex __)."

STATEMENT OF QUESTIONS INVOLVED

1. Did the Court of Appeals correctly conclude that the probate court should have dismissed Michaluk's Petition for Instructions as unripe and non-justiciable?

   The Court of Appeals says, "Yes."

   Michaluk says, "No."

   The Successor Co-Trustees say, "Yes."

Michaluk's Statement of Questions Involved asks this Court to rule on matters that the Court of Appeals did not address. Because Michaluk has addressed them, the Successor Co-Trustees re-frame the Questions as follows:

2. Did the probate court err by ruling that it did not have authority to modify the Trust under MCL 700.7412 because there were no circumstances not anticipated by the settlor on which to base modification?

   The probate court says, "No."

   Michaluk says, "Yes."

   The Successor Co-Trustees say, "No."

3. Did the probate court err in ruling that the *in terrorem* clause would be violated if Michaluk were to petition for modification of the Trust?

   The probate court says, "No."

   Michaluk says, "Yes."

   The Successor Co-Trustees say, "No."

4. Did the probate court err in ruling that there was no probable cause for Michaluk to file a petition for modification of the Trust?

   The probate court says, "No."

   Michaluk says, "Yes."

   The Successor Co-Trustees say, "No."

5. Did the probate court err in denying the Petition for Instructions without permitting discovery?

   The probate court says, "No."

   Michaluk says, "Yes."

   The Successor Co-Trustees say, "No."

STATEMENT OF FACTS

Without belaboring all of the details set forth in Michaluk's Statement of Facts, the Successor Co-Trustees provide these additional facts and clarifications to place the issues in context.

Whitton was a sophisticated, successful businessman. *See* Pet Ex 3 at 8 (Michaluk Ex 15). He created the Trust in 1992, restated it on June 10, 2003, and amended it on July 30, 2003, January 5, 2012 and November 21, 2013. Pet Exs 1-4 (Michaluk Exs 13-16). Whitton did not "fall ill" in 2014. *See* Pet ¶ 19 (Michaluk Ex 11). To the contrary, Sandy Rhineberger stated in her affidavit that she had known Whitton since 1997 and was aware that he had heart problems throughout the time that she had known him. Pet Ex 7, ¶¶ 4, 6 (Michaluk Ex 8).

Whitton passed away on July 11, 2015. Pet ¶ 1 (Michaluk Ex 11). His brothers, Richard Whitton and Eddie Whitton, became Co-Personal Representatives of Whitton's estate and Successor Co-Trustees of the Trust.

A. The Terms of the Trust.

The 2003 Restatement of the Trust ("Restatement") provided in Article VII that Michaluk was to receive one-third of the value of a certain H&R Block Financial Advisors brokerage account. Pet Ex 1 at 3 (Michaluk Ex 13). As of the 2003 Restatement, that account "had an approximate value of $2 Million dollars." *Id.* The Restatement was amended three times: July 30, 2003 ("First Amendment"), January 5, 2012 ("Second Amendment"), and November 21, 2013 ("Third Amendment").[1] The Second Amendment amended Article VII in its entirety. Pet Ex 3 at 1 (Michaluk Ex 15). Although the terms remained largely the same, the Second Amendment changed the source of funds for the "Molly Michaluk Trust" to one-third of the

[1] Whitton had a draft Fourth Amendment prepared while he was in Baylor, but it was not what he asked for, and it was never executed.

value of the stock and other securities in two Comerica Securities Accounts – in essence, moving the accounts from H&R Block to Comerica. *Id.* at 2. Significantly, from the time of the Restatement in 2003, years before Whitton connected with Michaluk in 2008, through the Third Amendment, the provision for Michaluk of the two securities accounts never substantively changed.

Article VII(A)(2) of the Trust laid out very specifically how the Molly Michaluk Trust was to be administered. As long as Michaluk's mother, Marla Michaluk, was alive, the Successor Co-Trustees were to hold the principal and income in the Molly Michaluk Trust. *Id.* at 2. Upon the earliest of her mother's death or Michaluk turning 21, the Successor Co-Trustees could, in their discretion, distribute income and principal of that trust for the benefit of Michaluk's health, education, support, and maintenance. *Id.* at 2-3.

Notwithstanding these restrictions, upon Michaluk turning 18, the Successor Co-Trustees were authorized to distribute income and principal out of the Molly Michaluk Trust to pay for Michaluk's college education if, in the Successor Co-Trustees' sole discretion, her mother was unable to pay for it. *Id.* at 3. Subsection (c) defined "education" and gave the Successor Co-Trustees discretion to use the funds in her trust sufficient for that purpose. *Id.* Subsection (d) then directed the Successor Co-Trustees to distribute the accumulated income and principal of the Molly Michaluk Trust to her without reservation or restriction when she turned 25. *Id.*

Article VII(A) of the Second Amendment specifically limited Michaluk's grant of the Comerica Securities Accounts as follows:

> This grant is intended to be specific as to the named account and is not intended, nor shall it be construed or interpreted as a grant of any portion or percentage of Grantor's estate or this trust, or any other asset of Grantor, except as specified in this Article VII, Paragraph A.

Id. at 1. This limitation was also contained in the earlier Restatement of the Trust. Pet Ex 1 at 3 (Michaluk Ex 13). Thus, the Trust provided that the Molly Michaluk Trust was set up specifically to provide for Michaluk if her mother died until she turned 21, to provide for her health, education, support, and maintenance as necessary after from age 21 to 25; to provide for her college education if her mother could not; and then to distribute the remainder of the trust to her when she turned 25.

B. The Allegations in the Petition for Instructions.

Michaluk alleged in her Petition for Instructions Regarding Modification of Trust ("Petition for Instructions") that her distributive share of the Molly Michaluk Trust was at least $1,041,401.95. Pet ¶ 36 (Michaluk Ex 11). With respect to the entire Trust, however, she alleged, "On information and belief, the combined assets of the Trust are worth approximately One Hundred Fifty Million ($150,000,000.00) Dollars." *Id.* at ¶ 8.

With respect to the money she seeks through modification, Michaluk alleges that, even before Whitton's admission to the hospital in November 2014, Whitton told Ed Raschke, a long-time employee and personal friend, that he planned to give Michaluk "one-third of everything." *Id.* at ¶¶ 20, 21. She also alleges, "During a visit by John [Rhineberger] to Bob [Whitton] in May of 2014, Bob told John that he intended to give Molly 'one-third of everything.'" *Id.* at ¶ 24. These alleged statements as to what Whitton allegedly told other people were all well before his "sudden" hospitalization.

C. The Probate Court Proceedings.

Michaluk filed her Petition for Instructions, treating it as a complaint, and attached as an exhibit her proposed Petition for Modification of Trust Pursuant to MCL 700.7412(2) ("Petition for Modification"). (Michaluk Ex 10). On February 10, 2017, the Successor Co-Trustees filed a Response to the Petition, answering the allegations, and a Brief in Support of Response to the

Petition ("Response Brief"). The Response Brief asked the court to "dismiss all claims made against it in Michaluk's Petition." Michaluk filed a Reply Brief, and the Successor Co-Trustees filed a Sur-Reply Brief. The Sur-Reply Brief argued for a decision based on the terms of the Trust and Michaluk's allegations, asserting that the affidavits reflected only hearsay conversations. The probate court heard argument on February 15, 2017 and entered the Opinion and Order Regarding Michaluk's Petition for Instructions Regarding Modification of Trust ("Order") on February 17, 2017, denying the Petition for Instructions. (Michaluk Ex 2) . The probate court also denied Michaluk's motion for rehearing. (Michaluk Ex 3).

In the Order, the probate court found (1) that a petition seeking to amend the Trust would violate the *in terrorem* clause, (2) that there was no probable cause to file a petition to amend the Trust, reasoning that the "illness and death of the settlor do not constitute 'circumstances not anticipated by the settlor' under MCL 700.7412," (3) that MCL 700.7105(2)(d) applies only where the court has the authority to modify the Trust under MCL 700.7412, but the facts presented were not sufficient to modify the Trust, (4) that there was no probable cause to contest the Trust based on Whitton's alleged statements to third parties, and (5) that Michaluk was not entitled to the protection of MCL 700.7113, which covers probable cause related to *in terrorem* clauses. *Id.* at 7-8. It also found that the filing of the Petition for Instructions itself did not challenge or contest the terms of the Trust and was not a violation of the *in terrorem* clause. The probate court then denied the Petition for Instructions. *Id.* at 8.

D. The Court of Appeals' Opinion.

Michaluk appealed the probate court's Order. In its opinion, the Court of Appeals framed the issue as: "[P]etitioner now seeks to have us declare that the probate court's advisory opinion was in error, and essentially issue a contrary advisory opinion holding that a hypothetical future

petition would not violate the *in terrorem* clause." (Op at 3). The Court of Appeals followed this Court's ruling in *McLeod v. McLeod*, 365 Mich 25; 112 NW2d 227 (1961), reasoning, "Whether the *in terrorem* clause will have any effect on a future petition for modification is a purely hypothetical question until such time as petitioner may actually file such a petition. It is petitioner and her counsel, not the probate court, who must determine whether the risk of such an action is worth the potential reward." (Op at 5-6). The Court of Appeals then held that the claims in the petition were not ripe and should have been dismissed without reaching the merits.

ARGUMENT

Michaluk is a disappointed beneficiary of her father's Trust who sought to "modify" her father's grant to her of slightly over $1 million to one-third of his entire Trust assets. Yet she seeks to avoid triggering the *in terrorem* clause of the Trust whereby Whitton specified that any beneficiary who challenged or contested the terms of the Trust should receive nothing. By filing the Petition for Instructions, rather than her actual Petition for Modification, Michaluk sought a preliminary ruling on whether the *in terrorem* clause would apply to her Petition for Modification. She also sought a preliminary ruling on whether or not there was probable cause for her to file the Petition for Modification, such that the *in terrorem* clause would not be enforced.

The purpose of a declaratory judgment action is to determine rights and potential liabilities of the parties, usually in the context of construing a contract or a statute, so that the parties are not faced with an ambiguity that puts them in doubt about those rights and liabilities. Here, there is no doubt that Michaluk has a right to file the Petition for Modification. She will suffer no liability if she does not. She is not seeking to avoid liability – rather, she is seeking an advance opinion on whether she will win on the Petition for Modification and thus obtain a greater piece of Whitton's estate than her father provided for her in the Trust. That is not a proper use of the declaratory judgment rule.

The very purpose of an *in terrorem* clause is to avoid expensive litigation against an estate or trust by a disgruntled beneficiary by placing a steep price on initiating litigation – the loss of any interest in the trust. Michaluk cannot have her cake and eat it too. She seeks to end run the purpose of the *in terrorem* clause by bringing her litigation disguised as a Petition for

Instructions, thus precipitating the very litigation such a clause is intended to preclude. Such a technique would completely eviscerate the intent and value of *in terrorem* clauses.

I. Michaluk does not meet the standard for granting an application for leave to appeal to this Court.

Michaluk goes too far when she claims that the "Court of Appeals followed an old decision that this Court later repudiated." (Appl at 2). Michaluk wrongly concludes that this Court effectively overruled *McLeod* in *Allstate Insurance Co v Hayes*, 442 Mich 56; 499 NW 2d 743 (1993). *Allstate* was a case involving a declaratory judgment action challenging insurance coverage. In footnote eight of the *Allstate* case, this Court referred to a treatise on declaratory judgments and outlined a history of the Declaratory Judgment Act, noting that the *McLeod* case had been criticized in a law review note. That hardly constitutes this Court repudiating *McLeod*.

The Court of Appeals' opinion in this case did not "eliminate[e] the basic purpose of a declaratory judgment," as Michaluk claims, and does not present "a legal principle of major significance to the state's jurisprudence." Thus it is not grounds for this Court to grant the Application for Leave to Appeal. Moreover, the decision does not require Michaluk to give up an attempt to carry out her father's intent. She simply must take on the risk that the *in terrorem* clause intended – that the effect of her decision could have unpleasant consequences. The decision is not clearly erroneous causing a material injustice. The Application for Leave to Appeal should be denied.

II. The Court of Appeals correctly concluded that Michaluk's Petition for Instructions was not ripe.

A. A petition for instructions is a vehicle for a trustee to ask the court for direction, not for a beneficiary to ask for an advisory opinion.

In order to avoid the application of the *in terrorem* or no-contest clause in the Trust and lose what Whitton had already provided for her, Michaluk presented a Petition for Instructions

that attached a proposed Petition for Modification of the Trust. She asked the trial court for an advance ruling as to whether, *if* she filed the Petition for Modification, she would be in violation of the *in terrorem* clause. As the Court of Appeals put it, "Petitioner sought legal advice from the probate court regarding whether she would lose her inheritance if she were to seek to modify the trust." Op at 4. She presented the court with a hypothetical question and asked for an advisory opinion – the classic definition of a non-justiciable controversy.

> MCL 700.1302 provides exclusive jurisdiction of the probate court over the following:
>
> (b) A proceeding that concerns the validity, internal affairs, or settlement of a trust, the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do all of the following:
>
> * * *
>
> (*vi*) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.

(Emphasis added). MCL 700.7201 adopts the jurisdictional extent of the probate court's intervention in trust administration, providing:

> (3) A proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and a determination regarding the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do any of the following:
>
> * * *
>
> (f) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.

MCL 700.7201(3)(f) (emphasis added).

Michaluk asserts that the Michigan Trust Code specifically provides for a petition for instructions by a beneficiary, citing to *In re Edwards Trust*, Docket No 317114, 2014 WL 5163663 (Mich App October 14, 2014). Michaluk is correct in noting that *Edwards* explicitly

upheld a petition for instructions, but it was a petition for instructions by the trustee, not a beneficiary.

The distinction is that, as a general principle, when a trustee is in reasonable doubt as to the extent of his powers or as to the proper manner in which to proceed under the trust, he may apply to the court for directions on how to proceed. *Gilmer v Gilmer*, 245 Ala 450, 453-454; 17 So 2d 529 (1944). But when a beneficiary is seeking a construction of a will or trust, the court of equity must have some other reason to take jurisdiction, such as to declare and enforce a trust or the protection of property rights in the trust. *Id.* at 454. The Alabama Supreme Court in *Gilmer* was considering the same question as here – whether there was an actual case or controversy presented by the beneficiary – and held that a construction in the abstract was not appropriate. *Id.*

Michaluk, as a beneficiary, was not entitled to bring a Petition for Instructions, as contemplated by MCL 700.1302 and MCL 700.7201(3)(f). As the Court of Appeals noted, Michaluk "was really asking the probate court for a declaration regarding whether a petition to modify the trust would violate the *in terrorem* clause of the trust." Op at 4.

B. The declaratory judgment rule does not authorize the court to rule where there is no actual case or controversy.

The purpose of the declaratory judgment rule, MCR 2.605(A)(1), is to declare parties' rights and duties and guide future conduct, but the cases Michaluk cites do not support the proposition that the rule authorizes advisory opinions on hypothetical situations. (Appl at 15) .

In the case of *Barrow v Detroit Election Commission*, 305 Mich App 649, 854 NW2d 489 (2014), the Court of Appeals construed Detroit's city charter together with a Michigan statute that established requirements for write-in candidates to determine whether the city could count the write-in votes cast in a particular election and whether the absentee ballots were

adequate. While the court noted that arguably the question was moot since the election had already taken place, a moot issue would be reviewed if it is likely to recur, yet likely to evade judicial review. *Id.* at 659-60.

Michaluk cites *Rose v State Farm Mutual Automobile Insurance Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006), for the proposition that the declaratory judgment rule "allows a party 'to obtain adjudication of rights before an actual injury occurs.'" But *Rose* involved the interpretation of the no-fault statute and whether a jury or a judge should determine what future benefits would be reasonable and necessary for treatment of the plaintiff before the insurer was required to pay for them, which was an actual controversy between the insured and the insurer.

Mchaluk cites to the case of *Durant v Michigan*, 456 Mich 175; 566 NW2d 272 (1997), for the broad principle that "[a]ctions for declaratory relief are intended to minimize avoidable losses and the unnecessary accrual of damages." *Durant* involved three actions brought by groups of taxpayers and school districts to compel the State of Michigan to properly fund the public school system. *Id.* at 184. It concerned an interpretation of the Michigan Constitution to answer the question whether, even though state law mandated certain public school funding special education, the state was required to do so when the same funding was mandated by federal law. *Id.* at 188-89. In *Durant*, this Court held that a declaratory judgment was not an exclusive remedy but could be coupled with an action for damages. *Id.* As to an actual case or controversy, the Court addressed the fact that the case would be moot, noting that funding for the school years that were the subject of the suits was no longer at issue, but exercised its discretion to address the issue because it was capable of arising again. *Id.* at 201 n.29.

Finally, in *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Services*, 431 Mich 172; 428 NW2d 335 (1988), plaintiffs were recipients of state benefits and

their advocacy organizations who brought suit against the Department of Social Services ("DSS"). *Id.* at 175. The lower court entered a declaratory judgment determining that DSS's promulgation of a policy of holding telephone hearings without first going through the Administrative Procedures Act's ("APA") rule-making procedures violated the APA. This Court also held that there was an actual controversy as to whether the DSS was under a duty to comply with the notice and public hearing requirements of the APA. *Id.* at 191.

None of these cases involve anything close to the question of whether a trust beneficiary may obtain a declaratory judgment as to whether she will lose her inheritance under an *in terrorem* clause if she challenges the trust. These cases also raised the question of whether there was an actual case or controversy, but they either found there was a controversy or this Court decided the case even though the question at issue had become moot. None of them involved a declaratory judgment as to a future hypothetical question.

C. *McLeod* is still good law and the Court of Appeals properly followed it.

Virtually the same factual situation as here was presented in *McLeod v. McLeod*, 365 Mich 25; 112 NW2d 227 (1961), which is directly on point. Plaintiff asked for a declaration as to whether he would be precluded by an *in terrorem* clause from receiving property interests devised to him under his father's will if he instituted a suit for specific performance of a purported oral agreement with his father and failed to accomplish the desired result. *Id.* at 28-31. He did not know whether the proceeding would be a "contest" of the will, and asserted that, without the declaration of the court, the proceeding could be perilous and hazardous and result in the loss of the relatively small portion bequeathed to him under the will. *Id.* at 29. The trial court dismissed the complaint on the basis that there was no foundation for invoking the jurisdiction of the court under the statute relating to declaratory judgments. *Id.* at 30.

The statute under which *McLeod* was brought stated that "the court may, in cases of actual controversy, make binding declarations of rights. . . ." *Id.* (emphasis added). Similarly, the current declaratory judgment rule states, "(1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(1) (emphasis added).

Michaluk claims that the *McLeod* case is from "an era of judicial resistance to declaratory judgments." Appl at 16. Yet the declaratory judgment rule has not effectively changed – it still requires an actual case or controversy. Other than claiming that this Court effectively overruled or superseded *McLeod* via footnote eight in *Allstate v. Hayes*, an insurance coverage case completely unrelated to trust law, Michaluk relies only on law review articles and commentary. She cites no cases to support her position that settled law has changed.

Michaluk also asserts that the Court of Appeals' reliance on *In re Perry Trust*, 299 Mich App 525; 831 NW 2d 251 (2013) was misplaced. Appl at 18. To the contrary, the *Perry Trust* case is right on point. Just like Michaluk, Mark Perry claimed that he was not challenging the trust itself, but he asked the probate court to find that the existence of probable cause rendered the no-contest clause unenforceable. *Id.* at 531. The Court of Appeals rejected this argument, reasoning: "Because he stated in the body of his petition that he was not actually challenging the trust – and the no-contest clause is a provision in the trust – the probate court would have no authority to grant the requested relief." *Id.* at 530 (emphasis added). The court went on to state, "When the petition is examined as a whole, it is clear that Mark Perry asked the probate court to examine his evidence and determine whether that *would* give him probable cause . . . if he *were* to challenge the Trust." *Id.* at 531. Thus, "he essentially posed a hypothetical scenario to the

probate court and asked it to advise him about the probable application of a statute – MCL.700.7113 – to his proposed scenario." The court concluded that "Mark Perry likely failed to allege a justiciable controversy," but that the question before the court was whether Mark Perry's petition itself amounted to a challenge that would trigger the no-contest clause, and the court held that it did not.

Here, following *McLeod*, the Court of Appeals held that "[t]he probate court should not have opined on the applicability of the *in terrorem* clause and should have dismissed petitioner's petition as unripe and not presenting an actual case or controversy." (Op at 4). Nonetheless, applying *Perry Trust*, the probate court properly found that filing the petition itself did not trigger the *in terrorem* clause.

This case is analogous to *Van Buren Charter Township v Visteon Corp*, 319 Mich App 538; 904 NW2d 192 (2017). There, the plaintiff township claimed that a disagreement existed regarding a provision in an agreement obligating the defendant to provide certain assistance in the event the plaintiff township suffered a shortfall in funds. *Id.* at 546. The township wanted to force negotiations with the defendant before any shortfall actually occurred. *Id.* at 546-47. The court held that because the contract was clear and unambiguous, there was no actual controversy until such time as the contract was breached, noting that a court does not create ambiguities to rewrite or rebalance the equities of a contract. *Id.* at 548-49. Likewise, a court should not rewrite trust agreements for the settlor.

Importantly, the declaratory judgment rule is intended to preserve rights and liabilities and is not a substitute for regular actions. *Rott v. Standard Accident Ins. Co.*, 299 Mich 384, 390; 300 NW134 (1941) (North, J., concurring specially). An actual controversy exists when a

declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights. *Shavers v. Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978).

Here, there is no question that Michaluk has a right to file her petition for modification. Instead, she is asking the probate court to declare an outcome – that she will not invoke the *in terrorem* clause – which would then be *res judicata* as to her petition for modification. The result would be that Michaluk – and all other disappointed beneficiaries – would be free to cause the same lengthy litigation, family feuds, angst, and attorneys' fees and expense to the estate that the Trust intended to avoid by including the *in terrorem* clause. Indeed, at the hearing on the Petition for Instructions, apparently recognizing the insufficiency of the hearsay affidavits Michaluk presented and deposition testimony from a different claim against the Whitton Trust, Michaluk's counsel said, "Now, if we – if the Court rules that the *in terrorem* clause doesn't apply to prohibit in any way this petition to modify the trust, you know, we'll find – we'll conduct discovery, and who knows what else we'll find." (2/15/17 Hearing Transcript, p 8:3-7, Michaluk Ex 12) . This type of fishing expedition, extended litigation, and related attorneys' fees and expenses is exactly what the *in terrorem* clause was intended to prevent. Allowing beneficiaries to get around *in terrorem* clauses in this way would completely eviscerate them and render them unenforceable for all practical purposes.

Courts are bound to enforce the settlor's intent and to not rewrite trusts by removing an *in terrorem* clause. Michaluk claims that *McLeod* defeats the letter and spirit of the Declaratory Judgment Act, but says nothing about defeating the purpose of *in terrorem* clauses. Unless this Court determines that *in terrorem* clauses are against public policy, beneficiaries should not be able to end run them with impunity.

D. The Court of Appeals' Opinion did not "effectively eliminate the availability of declaratory relief."

Michaluk presents a parade of horribles that she contends will result if this Court does not grant her leave to appeal, claiming that no one would be able to obtain interpretation of a contract, insurance companies could not bring coverage disputes, and trustees could not seek guidance from the probate court. The declaratory judgment rule remains alive and well and available to construe contracts, statutes, and even trusts and wills, but where there is no right or liability to be determined, there is no basis for a declaratory action.

As noted, Michaluk has the right to bring a petition for modification. She will suffer no liability or injury if she does not bring the petition. Instead, what Michaluk is asking for is an advisory opinion on how the court will likely view the evidence if she does bring the petition. She does not need a remedy – she wants to know ahead of time if she will lose. But the declaratory judgment rule is not available for every plaintiff to ask a court to give them a preliminary opinion on whether they will recover damages if they bring suit.

III. Michaluk is not entitled to a decision on the merits of her petition from this Court.

This case amply demonstrates why courts do not render advisory opinions. The probate court reached a decision on the merits of Michaluk's Petition for Instructions and concluded that the proposed Petition for Modification would violate the *in terrorem* clause and that there was no probable cause to bring it. Not happy with that result, Michaluk wanted the Court of Appeals to reverse that hypothetical decision on the merits. Now she wants this Court to consider the hypothetical decision on the merits – all so that she can go back, file the Petition for Modification, and go through the entire process again.

This Court should deny the Application for Leave to Appeal and put an end to the advisory opinions. The remaining issues raised by Michaluk are factual and relevant to

Michaluk's claims only. These issues are not of significant public interest and do not involve legal principles of major significance to the state's jurisprudence and thus are not grounds to grant an application for leave to appeal. *See* MCR 7.305(b). Even if this Court were to grant the Application, it could not opine on the merits of Michaluk's other claims with respect to the probate court's opinion, as there is no Court of Appeals' opinion on these points for this Court to review. However, as Michaluk has asked this Court to grant leave to appeal, reverse the courts below, remand the case with instructions to grant the petition, and hold that Michaluk would not violate the *in terrorem* clause by filing a petition to modify the trust, the Successor Co-Trustees will respond to these issues.

A. The court's power to modify the Trust is limited to the statutory basis for modification found in MCL 700.7412(2).

Michaluk's argument that the no-contest clause cannot divest the court of its statutory authority to modify the Trust is off the mark. MCL 700.7105 provides in pertinent part:

> (2) The terms of a trust prevail over any provision of this article **except** the following:
>
> * * *
>
> (d) The power of the court to modify or terminate a trust under sections 7410, 7412(1) to (3), 7414(2), 7415, and 7416.

(Emphasis added.) There is no dispute that the only exception that applies in this case is found in MCL 700.7412(2), which reads:

> (2) The court may modify the administrative or dispositive terms of a trust or terminate the trust **if, because of circumstances not anticipated by the settlor, modification or termination will further the settlor's stated purpose** or, if there is no stated purpose, the settlor's probable intention.

MCL 700.7412(2) (emphasis added). In this case, the Trust terms prevail, including the *in terrorem* clause, because the circumstances alleged by Michaluk did not constitute circumstances not anticipated by the settlor, and the modification would not further the settlor's stated purpose.

Michaluk's flawed logic puts the cart before the horse by claiming that there were circumstances not anticipated by the settlor (which the Successor Co-Trustees categorically deny) and thus that the *in terrorem* clause does not apply to her proposed modification. From there, Michaluk illogically expands the limitations on the court's power and asserts that any petition "to invoke the power" of the court to modify the Trust cannot be penalized by an *in terrorem* clause. She then argues that there were circumstances not anticipated by Whitton that justify seeking a binding ruling that the *in terrorem* clause will not apply to her proposed Petition for Modification.

To the contrary, if the probate court finds that there were no unanticipated circumstances, as it did in this case, then the court is without authority to modify the Trust, that is the end of the inquiry under the statute, and Michaluk *can* be penalized by the no-contest clause for seeking modification. She unsuccessfully attempts to skirt this problem by posing a hypothetical in the form of a Petition for Instructions and then, depending on the answer, she may or may not file her proposed Petition for Modification.

The California case that Michaluk relies on to support her position, *Balian v Balian*, 179 Cal App 4th 1505; 102 Cal Rptr 3d 470 (2009), is distinguishable on both the facts and the law. In *Balian*, a special needs trust was set up for two daughters with a $2,000 per month restriction on distributions, which was intended to preserve the daughters' eligibility for government benefits. *Id.* at 1509. The question was whether the trust should be modified for one daughter, whose eligibility for Social Security disability benefits was not dependent on need or financial hardship, unlike the other daughter. *Id.* at 1509-1510. The petition alleged that the mother/settlor was not aware of or did not understand the distinctions between the two types of

benefits received by her daughters and thus the trust was not carrying out her intentions. *Id.* at 1509.

Michaluk's attempt to read *Balian* as a blanket statement that "[t]he probate court ruled that a petition to modify the trust does not violate the no-contest clause" overreaches. Section 21305 of the California Probate Code specifically provided that a petition to modify a trust under section 15409 did not violate a no-contest clause, as a matter of public policy. There is no similar statute in Michigan.

Section 15409, however, is similar to MCL 700.7412(2), in that it only allows the court to modify 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." Cal Probate Code § 15409. Therefore, California imposes the same limitation on the court's power as Michigan does – a modification of a trust would not violate a no-contest clause *if* the modification was due to circumstances not anticipated by the settlor. Michaluk may bring her Petition for Modification and she would have a defense to enforcement of the *in terrorem* clause. If her argument as to changed circumstances prevails, then she would not be penalized by the no-contest clause. But she is not entitled under Michigan law to a "what if" ruling.

Michaluk's claim that MCL 700.7105(2)(d) provides that the "terms of a trust cannot prevail over the power of the court to modify a trust under MCL 700.7412" leaves out the all-important limitation that that power to modify exists *only* "if, because of circumstances not anticipated by the settlor, modification or termination would further the settlor's stated purpose or, if there is no purpose, the settlor's probable intention." MCL 700.7412(2). Here, there were

no unanticipated circumstances, and Whitton stated the purposes for creating the trust for Michaluk in great detail.

B. The proposed "modification" constitutes a challenge or contest of the provisions of the Trust.

Michaluk argues that the *in terrorem* clause in this case does not apply to any petition for modification of the Trust because the words "challenge" or "contest" do not have the same meaning as "modify." She states that "modify" means "to make minor changes in the form or structure of." Appl. at 25. Under the terms of the Trust, Michaluk would receive slightly over $1 million. She claimed in her Petition for Instructions that, "upon information and belief, the combined assets of the Trust are worth approximately One Hundred Fifty Million $150,000,000.00 Dollars." Pet ¶ 8 (Michaluk Ex 11). Changing her trust distribution from $1 million to one-third of the entire Trust would not constitute a "minor" change by Michaluk's own definition. The very nature of Michaluk's proposed Petition for Modification would clearly have the effect of taking substantial assets from Whitton's intended beneficiaries and giving them to Michaluk, who had already been provided for in the Trust. To suggest that this is not a challenge or a contest to the provisions of the Trust is patently false.

In interpreting a trust, a court must read the trust as a whole, harmonizing its terms with the intent expressed, if possible. *In re Raymond Estate*, 483 Mich 48, 52; 764 NW2d 1 (2009). Michaluk argues that if Whitton intended to prevent a beneficiary from seeking to modify the Trust, the no-contest clause should have included the word "modification," along with "challenge" and "contest." But Article XIII of the Trust provided that any modifications should be in writing: "The Grantor may **by instrument in writing** delivered to the Trustee (a) modify or alter this Agreement in any manner . . . ." Pet Ex 1 at 11 (Michaluk Ex 13) (emphasis added). The written modification requirement supports the conclusion that any modification based on

oral statements of third parties would constitute a challenge or contest of the provisions of the Trust, because Whitton had provided that any modifications were to be in writing.

Michaluk's argument that it is "illogical to suggest that the settlor of a trust can provide for and prohibit the same thing (modification) in the same document" plainly fails. Appl at 24. She claims that the probate court ignored Whitton's express wishes that a proceeding to modify the Trust be binding on all beneficiaries. Appl at 26. Yet she ignores Whitton's express wishes that all modifications be in writing. Pet Ex 1 at 11 (Michaluk Ex 13).

In terrorem clauses, by their very nature, are used to prevent exactly what Michaluk is attempting here. Their purpose is to eliminate a disgruntled beneficiary from challenging a document by making baseless arguments in an attempt to obtain something from a decedent's estate or trust to which they are not entitled. Whitton clearly indicated in his Trust who his intended beneficiaries were, including Michaluk. A modification that would dramatically change the amount to be distributed to each beneficiary, by definition, creates a challenge or contest to the provisions of the document stated by the settlor.

Finally, contrary to Michaluk's argument, the court was not required to extensively analyze in writing its basis for concluding that a request to modify the Trust was a challenge or contest to the Trust. The court's conclusion is both self-evident and legally correct. As the court well recognized, Michaluk's attempt to characterize her Petition for Instructions as not being a challenge or contest of the provisions of the Trust is nothing more than a futile exercise in semantics.

C. There were no circumstances not anticipated by Whitton that justify overriding the terms of the Trust.

1. Michaluk's "unanticipated circumstances" are not what the statute contemplates.

Michaluk argues that Whitton (1) was "suddenly and unexpectedly hospitalized," (2) that his lawyer drafted an amendment that was not what Whitton intended, (3) that before he could make other arrangements, he had the surgery from which he never recovered, and (4) that Richard Whitton precluded her from speaking to her father during his hospitalization. These are not the types of unanticipated circumstances that would give the court authority to modify the Trust under MCL 700.7412(2)(d).

MCL 700.7412 is derived from Uniform Trust Code Section 412. As Michigan's statute has only been in place since 2010, there is a dearth of cases in Michigan courts interpreting this provision. Case law interpreting Section 412 from other jurisdictions, however, demonstrates that this section is not intended to be used to modify a trust as in this current situation or based on hearsay testimony of friends of the decedent.

Instead, the types of unanticipated circumstances contemplated usually arise after the settlor's death, as illustrated in cases from other jurisdictions. *See, e.g., In re Riddell*, 138 Wash App 485; 157 P3d 888 (Wash App Div 2 2007) (changed circumstances existed to modify a consolidated trust where the beneficiaries of the trust sought to modify it to create a special needs trust on behalf of a grandchild who suffered from schizophrenia affective disorder and bipolar disorder); *Carnahan v Johnson*, 127 Ohio App 3d 195; 711 NE2d 1093 (1998) (changed circumstances were sufficient to authorize a trustee to sell real estate that the settlor had directed be held for development of a nature that became impracticable as a result of subsequent events); *Donnelly v Nat'l Bank of Washington,* 27 Wash 2d 622; 179 P2d 333 (1947) (trust should be

extended for the grandson's legal education beyond the settlor's specified deadline in order to preserve the settlor's underlying intent, where the grandson had been drafted into military service and not discharged until after the original deadline). Those types of unanticipated circumstances are not what is at issue here.

Michaluk argued that Whitton's "sudden" hospitalization and subsequent events prevented him from amending his Trust. In fact, Whitton had modified his estate plan in the past and clearly knew what needed to be done in order to modify it again. He had plenty of time to amend the Trust to grant one-third of his entire estate to Michaluk, but he did not do so.

Michaluk asserts that Whitton's hospitalization was sudden and unexpected, but Sandy Rhineberger, a close friend of Whitton's whose affidavit Michaluk relies on, testified that she met Whitton in 1997 and was aware that he had heart problems throughout the time she knew him (approximately 19 years). Pet Ex 7, ¶¶ 4, 6 (Michaluk Ex 8). John Rhineberger states in his affidavit that Whitton told him in May 2014 – at least *six months* before Whitton entered the hospital in November – that he intended to amend his estate plan to be sure Michaluk received one-third of the entire Trust. Pet Ex 8, ¶¶ 7-15 (Michaluk Ex 9).

Therefore, by Michaluk's own evidence, Whitton was aware that he was sick well prior to being hospitalized, and he had at least a half year to amend the Trust before entering the hospital, but he did not. Even after he knew that he was very sick, Whitton had over a month and a half more after he entered Baylor Hospital, from November 11, 2014 until January 5, 2015, to amend the Trust. Thus, the last-minute firing of his attorney at the end of December 2014 did not prevent Whitton from amending his Trust. Michaluk's purported inability to speak to her father also did not prevent him from amending the Trust.

On the contrary, the proposed Fourth Amendment to the Trust that was never executed reflected a change in the account numbers at Comerica Securities but still retained the one-third distribution solely from those accounts to Michaluk. Draft Fourth Amendment at 1-2 (Michaluk Ex 17). In each signed restatement or amendment to the Trust, including the draft Fourth Amendment that was never signed, Michaluk's inheritance never changed. And Michaluk presented no evidence of *any* writing, even on a napkin, reflecting this purported intent to give Molly one-third of the entire Trust, as required by the Trust.

2. The court may only modify the Trust if it would further the settlor's stated purpose of the Trust.

Under MCL 700.7412(2) the court's power to modify a trust is only where "if, because of circumstances not anticipated by the settlor, modification or termination would further the settlor's stated purpose, or if there is none, the settlor's probable intention."[2] First there must be circumstances not anticipated by the settlor, but modification must *also* further the settlor's stated purpose. The stated purpose or the settlor's probable intention refers to the purpose or probable intent of the trust as written, not a general intent.

The stated purpose of the grant to the "Molly Michaluk Trust" was specifically to ensure that Michaluk would be taken care of if her mother died and that her education would be paid for, if her mother was unable to provide for it. Whitton took over a page to lay out exactly how this was to be done.

Moreover, with respect to the Comerica accounts from which the Molly Michaluk Trust was to be funded, Whitton further indicated his intent, as follows:

> This grant is intended to be specific as to the named account and is not intended, nor shall it be construed or interpreted as a grant of any portion or percentage of

[2] In quoting this statute on page 25 of the Application, Michaluk omitted the all-important word "stated."

> Grantor's estate or this trust, or any other asset of Grantor, except as specified in this Article VII, Paragraph A.

Pet Ex 3 at 1 (Michaluk Ex 15). Not only did Whitton expressly state the purpose of the funds that were to go to Michaluk, but he stated very clearly his intent that *only* the funds from the Comericas Securities Accounts were to go to Michaluk. Even the general purpose stated on the first page of the Restatement is "to create a trust for the benefit of the beneficiaries *as hereinafter set forth*." Pet Ex 1 at 1 (Michaluk Ex 13) (emphasis added). Modifying the Trust as Michaluk proposes would completely undermine Whitton's stated purpose and intent. Therefore, even if there were unanticipated circumstances, the proposed modification would not further Whitton's stated purpose, and it would be contrary to Whitton's express intent that he did *not* want Michaluk to receive anything else.

The entire rationale for preparing a will and trust document is for the ultimate circumstances of grave illness and death. Contrary to Michaluk's argument, illness and death are exactly what is anticipated and the reason to have the will or trust in the first place. There must be something other than illness or death to constitute circumstances unanticipated by the settlor to warrant modification of his stated purpose and express written intent. Neither of the requirements of MCL 700.7412(2) were met, and the probate court's inquiry ends there. Thus, the probate court did not err by finding that the illness and death of the settlor did not constitute "circumstances not anticipated by the settlor" under MCL 700.7412.

IV. There was no probable cause for modification of the Trust.

Michigan's trust code provides an override to the enforcement of an *in terrorem* clause, but only "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 there is "a

substantial likelihood that the challenge would be successful." *In re Stan Estate*, 301 Mich App 435, 444; 839 NW2d 498 (2013).

Michaluk argues that she has "marshalled extensive evidence that (1) Robert Whitton intended that his daughter receive one-third of his entire trust and estate . . . ." Appl at 29. But the probable cause required here is not a showing of Whitton's purported intent to amend the Trust, but the showing of a substantial likelihood that there were circumstances unanticipated by Whitton and that the modification would further Whitton's stated purpose in the Trust. Giving Michaluk the benefit of every inference in the Petition for Instructions and without disputing any of the facts put forth in the affidavits, Michaluk has still not met the criteria of MCL 700.7412(2) that would give the court the authority to modify the Trust. Therefore, Michaluk did not show a substantial likelihood that her Petition for Modification would be successful.

The court found that Whitton's intent was to discourage litigation among the beneficiaries, but Michaluk complains this was improper fact-finding. To the contrary, the law has long recognized that the purpose of an *in terrorem* clause is to discourage litigation among beneficiaries. As early as 1929, this Court stated:

> Such provisions serve a wise purpose; they discourage a child from precipitating expensive litigation against the estate, and encourage and reward other children in their effort to sustain their parent's disposition of his property if such contest is precipitated; they discourage family strife, they discourage litigation, and the law abhors litigation.

Schiffer v Brenton, 247 Mich 512, 519; 226 NW 253 (1929); *accord In re Jauw Estate*, Docket No. 305902, 2012 WL 4039277 *5 (Mich App Sept 13, 2012).

The trial court properly concluded, as a matter of law, that the proposed Petition for Modification would violate the *in terrorem* clause based on the intent of the clause and the fact

that there were no unanticipated circumstances such that the modification would further Whitton's stated purpose and intent.

V. The court correctly denied the Petition for Instructions without permitting discovery.

The settlor's intent in interpreting a trust is the guiding principle, and this remains true even when interpreting the application of an *in terrorem* clause. Unless a will or trust is ambiguous, courts determine its intent from the plain language of the document, which is recognized as the best indication of the drafter's intent. The fact that litigants disagree regarding the meaning of a trust does not mean that it is ambiguous. *See Detroit Wabeek Bank & Trust Co v City of Adrian*, 349 Mich 136, 143; 84 NW2d 441 (1957) (noting litigants espousing different positions regarding the proper interpretation of a will did not render its terms ambiguous); *see also In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005) ("rules of construction applicable to wills also apply to the interpretation of trust documents"). "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 (2012). Where a document is not ambiguous, the court cannot look beyond it to other evidence to determine its intent.

Michaluk concedes that she was not seeking court interpretation of ambiguous or uncertain provisions in the Trust. Appl at 29 n1. Therefore, the court did not err in concluding, as a matter of law, that the intent of the settlor, as determined by the plain language of the entire Trust instrument, was to avoid litigation over his estate or the Trust by including the *in terrorem* clause and that Michaluk's proffered Petition for Modification would violate it. Even accepting without dispute, *arguendo*, all of the facts alleged, Michaluk cannot show facts that would bring

her claim within the requirements of MCL 700.7412(2) to give the probate court the power to modify this Trust, and Michaluk cannot create a genuine issue of material fact where none exists.

Michaluk claims that the affidavits show that Robert Whitton told his closest friends that he wanted his daughter to have one-third of his entire Trust and estate and that this evidence must be viewed in the light most favorable to Michaluk, thereby creating a factual issue. Appl.at 26-27. To the contrary, the court properly found from the plain language of the Trust that Michaluk's Petition for Modification would violate the *in terrorem* clause. There was no genuine issue of material fact to be determined.

For that same reason, Michaluk's argument that she was entitled to discovery to marshal all evidence of intent fails. Allowing discovery and then holding an evidentiary hearing is exactly what a settlor intends to avoid by using an *in terrorem* clause. In essence, Michaluk's request for "discovery to marshal the evidence" was asking the court to authorize a fishing expedition. *See* Appl at 26.

Finally, Michaluk spends an entire page attempting to support her argument that the probate court was wrong in stating that there is a public policy in favor of trusts and wills as the best evidence of a settlor's intent. To the contrary, the court was merely stating the underlying rationale for the longstanding rule of construction that a settlor's intent should be drawn from the plain language of the trust unless it is ambiguous. The argument that the trust code shall be liberally applied to promote its underlying purposes, one of which is to discover and make effective a decedent's intent in distribution, cannot override the specific intent expressed in the Trust or the specific statutory requirements necessary to permit its modification.

CONCLUSION

The Court of Appeals correctly found that there was no ripe, justiciable issue to be decided and that the probate court should have dismissed the Petition for Instructions without considering the remaining issues. For all of the foregoing reasons, this Court should deny the Application for Leave to Appeal.

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, I electronically filed the foregoing document with the Clerk of the Court using the Michigan Supreme Court TrueFiling System, which will send notification of such filing to all counsel of record.

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