STATE OF MICHIGAN
SUPREME COURT

In re:

THE ROBERT E. WHITTON
REVOCABLE TRUST.

Supreme Court No. 158408

Court of Appeals
Case 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.

/

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MOLLY MICHALUK'S REPLY BRIEF ON HER APPLICATION FOR LEAVE TO APPEAL

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I. This Court Should Clarify When a Declaratory Judgment Is Available

What is a declaratory judgment for? It is "to guide … future conduct and relations …." *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014). *Accord*, *UAW v Central Michigan Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). This is critical in cases involving decedent's estates and trusts where, as this Court recently reaffirmed, the "'guiding polar star' in probate law is that the intentions of the decedent control." *In re Mardigian Estate*, 502 Mich 154, 179; 917 NW2d 325 (2018). "[C]ourts are not precluded from reaching issues before actual injuries or losses have occurred." *UAW*, 295 Mich App at 495. This case fits that purpose.

Molly Michaluk's father repeatedly told others he intended to give her one third of his estate. Application, p 7 and affidavits in exhibits 6, 8, and 9 to application. Her father tried to amend his trust right before his final illness, but rejected the draft his lawyer wrote and fired the lawyer on Christmas Eve in 2014 because the draft was not what the father intended. Application, pp 7-8. He underwent double transplant surgery a week later, on January 1, 2015, from which he never recovered. *Id.*, p 8. Molly wants to ask the probate court to carry out her late father's expressed intentions. But her uncles, trustees of the father's trust, sequestered Robert Whitton from his only child, lied about his condition for months, and then threatened and continue to threaten her with losing everything from the trust if she seeks to enforce her late father's wishes, applying an *in terrorem* clause. *Id.*

So Molly faces a legal decision: If she files a petition to modify the trust to carry out her father's expressed intentions and does not succeed, the *in terrorem* clause could take away everything. This is exactly what a declaratory judgment action is intended to

deal with. This is not "a purely hypothetical question." COA opinion, p 6 (exhibit 1 to application). It is a real decision with real-world consequences. It is the kind of case where a party can ask the court to decide a legal question before the party risks liability by taking action. It is the kind of case the legislature envisioned when it enacted MCL 700.7201, which expressly states a trust beneficiary may request instructions from the court or a declaration of rights that involve a trust, trustee, or trust beneficiary. It is the kind of situation presented in multiple declaratory judgment cases. For example, in *UAW*, the union sought a declaratory judgment on whether a university's policy regulating employee candidacy for public office violated employees' statutory rights to run for office. The court rejected the argument that the claim was hypothetical and injury was only speculative even though no employee had actually become a candidate after the policy was announced. Applying the principle that "courts are not precluded from reaching issues before actual injuries or losses have occurred," the court held "[A]lthough no university employee has yet sought to run for office, it is appropriate for the Union to seek an adjudication of its members' rights and responsibilities before the candidacy policy causes actual injury or ripens into a violation of the law." 295 Mich App at 495, 496-497. Similarly here, Molly need not suffer the actual injury of losing her inheritance before seeking a decision about her rights.

The situation here is the same as when a party to a contract seeks a declaratory judgment as to whether certain action would be a breach exposing them to damages. That is the prototypical invocation of a declaratory judgment when an insurer asks for a ruling about whether it would be in breach if it refused to provide a defense to its insured. In that situation, "[a] declaratory judgment action is *especially suitable and available*" to decide

the coverage dispute before the underlying case is tried. *Group Ins Co v Morelli*, 111 Mich App 510, 514; 314 NW2d 672 (1981) (emphasis added). "[T]he declaratory remedy is an especially appropriate vehicle for resolving insurance coverage disputes." *Allstate Ins Co v Hayes*, 442 Mich 56, 65; 499 NW2d 743 (1993). No one contests the right in those cases to get a court ruling *before* a party takes action that would expose them to liability.

In such cases, one could say that the contemplated action (running for political office, refusing to provide a defense) is "hypothetical" because, depending on the declaratory judgment ruling, the party may not take the action if it would expose them to liability. That's what we have here: a declaration of Molly's rights as a trust beneficiary when seeking to modify a trust to conform to her father's intent. Molly seeks a declaratory judgment as to whether she will be exposed to liability if she seeks to have the probate court carry out her late father's expressed wishes. This fits squarely into the purpose of a declaratory judgment.

Appellees attempt to distinguish various declaratory judgment cases based on factual distinctions, rather than focusing on the broader principles that underlie the rulings, principles that apply equally as well here. Answer to application, pp 9-11. They want to narrowly focus on the facts of various cases rather than consider the implications of the court of appeals decision, which could be used in a broad array of situations to prevent a party from seeking guidance before irrevocably incurring liability. This narrow view undermines the intent and utility of declaratory judgments.

The court of appeals said Molly can't ask a court to decide this question but rather must decide on her own whether "to take on the risk" of disinheritance by seeking to modify her father's trust. COA opinion, p 6 (exhibit 1 to application); answer, p 7. This is so, the court said, because "[i]t is by no means a certainty" that Molly would seek to modify her father's trust and her decision "would be informed by the probate court's ruling on this first petition." COA opinion, p 4. But, if getting a declaratory judgment requires a "certainty" that a person take the action at issue, then there is no point in seeking a declaratory judgment at all. The declaratory judgment couldn't be a "to guide … future conduct and relations" (*Barrow,* 305 Mich App at 662) if the person seeking the judgment must take the disputed action and can't in advance "be informed by the … court's ruling." This "[makes] declaratory judgment unavailable in the very type of situation where it was intended to offer relief." *Allstate,* 442 Mich at 64 n 8.

There is obviously a dispute here as to the availability of declaratory relief. This Court should grant leave to clarify the law and give guidance to lower courts and practitioners, particularly in the area of trust administration, where petitions for instructions are a frequent and legitimate means of seeking guidance as to potential future actions.

II. *In Terrorem* Clauses Are Not Sacrosanct and Not Always Enforceable

Appellees characterize Molly's petition as an "end run" around "the purpose of the *in terrorem* clause." Answer, p 6. But this assumes *in terrorem* clauses are sacrosanct and must always be enforced: Take your chances on winning and, if you don't, you lose everything. Period. You can't get an advance ruling on the question. You must put everything at risk to present the question to a court.

But that's not what the legislature intended and not what it said in the estates and protected individuals code and the Michigan trust code. The statute crafts a balance between discerning a settlor's or testator's intent by reference to external evidence versus strict enforcement of an *in terrorem* clause. MCL 700.7113 says an *in terrorem* clause "shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust."[1] This is "a compromise between those who believe no-contest or *in terrorem* clauses should be universally prohibited and those who believe these clauses should be given absolute effect." Martin & Harder, Michigan Probate Sourcebook, comments on MCL 700.7113.[2]

Thus appellees' premise—that seeking a declaratory judgment about the applicability of an *in terrorem* clause "precipitat[es] the very litigation such a clause is intended to preclude" (answer, p 7)—is inconsistent with the balance the legislature struck in EPIC and the trust code, which *does* allow such litigation.

III. *McLeod* Is No Longer Good Law

Appellees contest our showing (application, pp 16-18) that *McLeod v McLeod*, 365 Mich 25; 112 NW2d 227 (1961)—which rejected a declaratory judgment in a case similar

[1] Similarly, MCL 700.2518 and MCL 700.3905 limit enforcement of an *in terrorem* clause in a will.

[2] John H. Martin and Mark K. Harder were the reporters for the EPIC and MTC drafting committees of the Michigan State Bar Probate and Estate Planning Section. The courts and probate practitioners refer to their treatise for authority on the history and interpretation of EPIC and MTC provisions. Their commentary is often used as an interpretive aid. *In re Bittner*, 312 Mich App 227, 241-242; 879 NW2d 269 (2015); *In re Lundy Estate*, 291 Mich App 347, 355; 804 NW2d 773 (2011).

to this—is no longer good law. Although this Court did not expressly overrule *McLeod,* it said it was 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. Appellees say this Court should just ignore its previous statement because it appeared in a footnote.[3] Answer, p 12. But that is a footnote to a more complete discussion that notes "the remedial advantages of declaratory relief" and says the declaratory judgment rule must be "liberally construed to provide a broad, flexible remedy." *Allstate*, 442 Mich at 64-65. And it is an opinion that relies not only on more "contemporary" case authority but also on the law review and commentary authority that appellees blithely dismiss. *Id.* Appellees rely on the technical argument that *McLeod* remains the law of Michigan because it has not been overruled. But this Court said adoption of the declaratory judgment rule in 1963 (after *McLeod* was decided), "decisively rejected" previous "[n]arrow interpretations of the availability of declaratory relief." *Allstate*, 442 Mich at 64 n 8.[4]

Rather than relying on technical distinctions (footnote versus text, rule versus previous statute, commentary versus case authority), this Court should look at the basic issue here: When is a declaratory judgment available? This Court is not bound by *McLeod* and

[3] But "Language set forth in a footnote can constitute binding precedent if the language creates a 'rule of law' and is not merely dictum." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 438; 751 NW2d 8 (2008).

[4] Appellees rely on dictum in *In re Perry Trust*, 299 Mich App 525; 831 NW2d 251 (2013), but don't refute our discussion in the application, p 18, that that opinion not only did not decide the issue here but its subsequent history in this Court shows that at least two justices thought the Court should address the availability of a declaratory judgment regarding an *in terrorem* clause. 495 Mich 892-895; 839 NW2d 195 (2013) (dissenting opinions of Markman, J. and Viviano, J.).

has already roundly criticized it in *Allstate*. Appellees offer no reason why *McLeod* should continue to govern when both the court rules and modern declaratory judgment authority—including *Allstate*—reject the overly strict reasoning of *McLeod.* The fact that the court of appeals decision ignited this dispute shows the need for the Court to clarify a party's right to a declaratory judgment.

IV. A Petition for Instructions Isn't Limited to a Trustee

Appellees cite MCL 700.7201(3)(f) for the proposition that only a trustee can file a petition for instructions. Answer, p 8. Therefore, they say, Molly couldn't petition for instructions. But the provision they cite cannot be read in isolation. *People v Cunningham*, 496 Mich 145, 153-154; 852 NW2d 118 (2014) (court must examine a provision within the overall context of the statute, to produce a harmonious and consistent enactment as a whole). It is part of a broader authorization for the probate court to "intervene in the administration of a trust" as the behest of any "interested person." MCL 700.7201(1). The subsection appellees cite is part of a nonexclusive list of examples ("including, but not limited to"). MCL 700.7201(3). And that section includes the right to request instructions from the court regarding "a declaration of rights that involve a trust, trustee, *or trust beneficiary* ..." *Id.* (emphasis added). The probate court has jurisdiction over "proceedings brought by a trustee *or* beneficiary that concern the administration of a trust …." MCL 700.7203(1) (emphasis added). Thus EPIC specifically authorizes a beneficiary to seek a declaratory judgment about her rights, which is what Molly sought here.[5]

[5] Appellees' citation of a 1944 Alabama case (answer, p 9) doesn't help them. That out-of-state case cannot overcome the Michigan statutory law discussed above. And that case upheld

Appellees' argument based on the title of Molly's petition ("petition for instructions") elevates form over substance. Courts must look at the substance, not the label of a filing. *Altobelli v Hartmann*, 499 Mich 284, 303; 884 NW2d 537 (2016) (must "look[] beyond procedural labels to determine the exact nature of the claim"). Regardless of what it was called, it was a petition for "a declaration of rights that involve a … trust beneficiary"—something the trust code specifically authorizes. MCL 700.7201(3).

V. The Court Need Not Consider the Merits of Molly's Petition But Rather Should Enforce the Legislative Directive Regarding the Availability of Declaratory Relief

The important issue here is whether a declaratory judgment is available to guide future conduct in light of an *in terrorem* clause. For completeness, we briefed the merits of Molly's petition for a declaratory judgment, even though the court of appeals did not reach that issue because it decided the petition was not ripe. The Court need not reach the merits of Molly's declaratory judgment petition but can remand to the court of appeals after correcting the court of appeals' error in holding that a declaratory judgment is not available here. Application, pp 20-21. Thus we have not further briefed the merits of the petition here. Appellees' answer to the application contains several erroneous arguments on that point. These include arguing the facts on a summary disposition appeal when the facts must be viewed in the light most favorable to Molly. Appellees also argue the merits of a potential petition to modify the trust when the issue here is not whether a petition to modify the

declaratory relief. It held trust beneficiaries were entitled "to have the terms of the trust construed and their rights under it declared and enforced …." *Gilmer v Gilmer*, 245 Ala 450, 455; 17 So 2d 529 (1944).

trust would be successful but rather whether filing such a petition would violate the *in terrorem* clause and whether Molly can obtain a declaratory ruling on that question. Those arguments are appropriate for remand and this Court need not address them now. The important issue is the right to a declaratory judgment.

VI. This Court Should Grant Leave to Uphold the Purpose of a Declaratory Judgment

The court of appeals barred a declaratory judgment "in the very type of situation where it was intended to offer relief." *Allstate,* 442 Mich at 64 n 8. It relied on an outmoded, narrow view hostile to declaratory judgments. This Court should grant leave to reverse that narrow decision and affirm the broad availability of declaratory judgments when a party is faced with potential liability for taking action in an uncertain legal state of affairs.

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