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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PETITIONER-APPELLANT MOLLY MICHALUK'S
SUPPLEMENTAL BRIEF ON APPLICATION FOR LEAVE TO APPEAL

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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." Appellant's application was 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

The issue is whether Molly Michaluk can seek a declaratory judgment about her deceased father's trust without triggering an *in terrorem* clause that would disinherit her. The Court of Appeals said she can't because the issue is not ripe.

This is an appeal from an August 9, 2018 Court of Appeals opinion. Appendix, p 18a. Petitioner-appellant Molly Michaluk 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 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 significant liability and risk of loss. 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.

Statement of Question Involved[1]

Did the Oakland County Probate Court have jurisdiction over a request for declaratory relief from a trust beneficiary regarding her rights under a trust, before requesting modification of the trust, in order to guide the beneficiary's future conduct in light of *McLeod v McLeod*, 365 Mich 25; 112 NW2d 227 (1961), which rejected a declaratory judgment in a situation similar to this but was superseded by the declaratory judgment rule and the later development of declaratory judgment law?

The probate court did not address this question.

The Court of Appeals said "no."

Appellant Molly Michaluk says "yes."

[1] See the application for a more detailed statement of questions involved. This supplemental brief focuses on the question the Court posed in its June 5, 2019 MOAA order.

Introduction

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, "it is the purpose and intent behind the grant of declaratory relief to provide litigants with court access in order to preliminarily determine their rights." COA opinion, p 4 (appellant's appendix, p 21a), quoting *Huntington Woods v Detroit*, 279 Mich App 603, 616; 761 NW2d 127 (2008). Thus 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." *Id.*

In 2000, the Michigan Legislature codified this principal in the context of trust proceedings by specifically providing that the probate court "has exclusive legal and equitable jurisdiction of … [a] proceeding that concerns … the declaration of rights that involve a trust, trustee, or trust beneficiary …." MCL 700.1302(b). Ten years later, in 2010, the Legislature affirmed this grant of jurisdiction by enacting the Michigan trust code, which expressly provides: "A proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions … 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: … (e) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a trust." MCL 700.7201(3)(e) (emphasis added).

The Court of Appeals thwarted the two statutes and the underlying purposes of declaratory judgments by holding that Molly Michaluk could not seek a declaration of her rights and liabilities as a beneficiary if she filed a petition to modify her late 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.[2] 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 "[i]t 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 (appendix, pp 21a, 23a, 20a).

In requiring a "certainty" that future action take place, the Court of Appeals undermined the purpose of a declaratory judgment, a purpose specifically incorporated in MCL 700.1302(b) and MCL 700.7201(3). The reason for a declaratory judgment is to guide future conduct *before* a person risks liability by acting. By definition, the contemplated future conduct is "hypothetical." If a declaratory judgment is unavailable to 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[3] 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 followed an old decision that this Court and the legislature later repudiated, particularly in the context of trust proceedings. *McLeod v McLeod,* 365 Mich 25; 112 NW2d 227 (1961). The Court of Appeals decision requires Molly to either give

[2] Molly Michaluk is *not* challenging or contesting any provision of her late father's executed trust or its signed amendments. There is no question those documents were properly executed and express Robert Whitton's intent *at the time* he signed each of them. Rather, under MCL 700.7412(2), Molly wants to petition the court to modify the dispositive terms of her father's trust because, due to circumstances not anticipated by her father, modification will further his probable intention.

[3] Molly's risk would be substantial. Currently, her father's trust provides that she receive a distribution that was valued as of the date of her father's death at approximately $1,000,000.

up an attempt to carry out her father's intent or risk being disinherited if she goes forward, imposing on this trust beneficiary the type of draconian choice that MCL 700.1302(b), MCL 700.7201(3), and the declaratory judgment rule are intended to avoid.

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.[4]

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 (appendix, p 112a); Michaluk affidavit, ¶ 4 (appendix, p 135a). Robert had an estranged and litigious relationship with Molly's mother.[5] Initially, Robert was not a part of Molly's life. Raschke affidavit, ¶ 5 (appendix, p 112a); Michaluk affidavit, ¶ 4 (appendix, p 135a). This was one of Robert's greatest regrets. Raschke affidavit, ¶ 5 (appendix, p 112a). 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 (appendix, p 112a); Michaluk affidavit, ¶¶ 5-6 (appendix, p 135a). 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 (appx, p 112a).

Robert created a trust in 1992, restated it in 2003, and amended it in 2003, 2012, and 2013. Appendix, pp 24a, 43a, 49a, 61a. The trust included a gift to Molly of one-third of two securities

[4] The probate court decision on review here is a summary disposition decision under MCR 2.116(I)(1). The court decided the matter on motions, without a trial. 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 MCR 2.116(I)(1)).

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

accounts. Second Amendment, pp 1-4 (appendix, pp 49a-52a). 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 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 (appendix, pp 55a-56a).[6]

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 (appendix, p 112a); Eddie Whitton[7] deposition, p 10 (appx, p 85a) (Robert went there for a checkup); Sandy Rhineberger affidavit, ¶ 11 (appendix, p 126a) (went there for a "meet and greet"; Robert thought he would need a heart transplant in three years); Richard Whitton[8] deposition, p 13 (appendix, p 101a) (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 (appendix, p 112a); Sandy Rhineberger affidavit, ¶¶ 9-11 (appendix, p 126a). "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 (appendix, p 101a). He was immediately admitted to the hospital on November 11, 2014. Sandy Rhineberger affidavit, ¶ 10 (appx, p 126a). His heart stopped twice shortly after that and the medical staff revived him. *Id.*, ¶ 14 (appendix, p 127a).

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[6] As is clear from the text, the no-contest clause mentions nothing about prohibiting modifications to the trust. In fact, Article XV(B) of Robert's trust makes clear that Robert contemplated the need for modifications and that they would be binding on the beneficiaries: "In any proceeding involving the construction, operation or *modification* of this Agreement, the then living beneficiary or beneficiaries to whom income is currently payable or for whose benefit it may currently be expended shall represent any unknown and undetermined beneficiaries, and any order, judgment or decree rendered in such proceeding shall be binding not only upon such known persons but also upon all unknown and undetermined beneficiaries." Trust, Art. XV(B), p 12 (appendix, p 35a) (emphasis added).

[7] Eddie was Robert's brother.

[8] Richard was Robert's brother.

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 (appendix, p 112a); Sandy Rhineberger affidavit, ¶¶ 19-20 (appendix, p 127a); John Rhineberger affidavit, ¶¶ 13-15 (appendix, p 132a).

A couple 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 (appendix, p 112a); Sadecki deposition, pp 10, 14-15 (appendix, pp 117a, 118a);[9] Richard Whitton deposition, pp 22-23 (appendix, pp 103). The attorney drafted an amendment. Sadecki deposition, pp 30-31 (appendix, pp 122a);[10] Unsigned fourth amendment (appendix, p 63a). 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 (appendix, pp 89a-90a, 91a). *Accord,* Richard Whitton deposition, pp 28, 43-44 (appendix, pp 104a, 108a); Eddie Whitton deposition, p 25 (appendix, p 89a). He fired Sadecki as his attorney on Christmas Eve. Sadecki deposition, pp 28-29 (appendix, pp 121a-122a). In the intervening week between Christmas and New Year's—while he was in his hospital bed in 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.

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[9] Mark Sadecki was Robert Whitton's attorney. Sadecki deposition, pp 6-7 (appendix, pp 116a).

[10] 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 (appendix, p 118a), regarding a nonprivileged part of that discussion.

Robert had double transplant surgery, receiving a new heart and liver on January 1, 2015. Sandy Rhineberger affidavit, ¶¶ 16, 28 (appendix, pp 127a, 129a); Eddie Whitton deposition, pp 13, 18 (appendix, pp 86a, 87a). After the surgery, Robert's brother restricted access to Robert and lied to Molly about her father's condition. Sandy Rhineberger affidavit, ¶ 29 (appendix, p 129a); Eddie Whitton deposition, p 19 (appendix, p 87a); Michaluk affidavit, ¶¶ 13-14 (appx, p 136a). 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 (appx, pp 101a, 102a-103a); transcript 2/15/17, p 15 (appx, p 154a) (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 (appx, p 125a).

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 (appendix, pp 136a). She didn't know about his health situation until the day of his death. *Id.*, ¶¶ 15-19 (appendix, pp 137a). Robert's family immediately threatened Molly that, if she questioned how they handled Robert's estate, she would get nothing. *Id.*, ¶¶ 24-25 (appendix, pp 138a-139a).

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 MCL 700.7113 to seek to modify the trust. Appendix, p 71a. 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 (appendix, p 80a). The petition was supported by five

affidavits and the transcript of a deposition taken in a related matter.[11] 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 (appendix, p 140a). Two days later, it entered an opinion and order denying the petition. Appendix, p 5a.

The opinion summarized the facts set out above. Probate opinion, pp 2-3 (appendix, pp 6a-7a). In one paragraph, the opinion concluded that "a petition seeking to amend the Trust would violate the *in terrorem* clause." *Id.*, p 7 (appendix, p 11a). 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 (appendix, p 11a). The court denied the petition. *Id.*, p 8 (appendix, p 12a).

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 "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 (appendix, p 12a).[12]

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[11] The pertinent exhibits to the petition are in appellant's appendix.

[12] 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*

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 (appendix, p 16a). It denied the motion for reconsideration. *Id.*, p 1 (appendix, p 13a).

B. Court of Appeals

The Court of Appeals affirmed on alternative grounds. Appendix, p 18a. It held "the probate court should have denied the petition as presenting an unripe and nonjusticiable issue." *Id.*, p 3 (appendix, p 20a). It correctly characterized Ms. Michaluk's petition as one "seeking declaratory relief." *Id.*, p 4 (appendix, p 21a). 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 (appendix, pp 21a, 23a). 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 (appendix, p 22a). *McLeod* rejected a declaratory judgment in a situation similar to this (but, as discussed in the argument below, *McLeod* is no longer good law). The Court of Appeals held *McLeod* was binding. *Id.*, pp 5, 6 (appendix, pp 22a, 23a). Having decided that the case was not ripe and should have been dismissed without reaching the merits, the Court 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 (appendix, p 23a).

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other grounds, 480 Mich 936; 740 NW2d 657 (2007). Appellants did not file a cross-appeal in this Court. MCR 7.307(A). The Court of Appeals opinion did not address this issue because the issue was not before it.

Ms. Michaluk filed a timely application for leave to appeal. The Court scheduled oral argument on the application and requested supplemental briefs addressing whether the probate court had jurisdiction to entertain the request for declaratory relief in light of *McLeod*. Order, 6/5/19.

Argument

I. Standard of Review

Review is *de novo*. The issue on appeal involves (1) whether the probate court had jurisdiction to entertain the request for declaratory relief in light of *McLeod v McLeod*, 365 Mich 25; 112 NW2d 227 (1961), and application of (2) the general declaratory judgment rule, MCR 2.605; (3) MCL 700.1302(b), which authorizes the probate court to enter a "declaration of rights that involve a trust, trustee, or trust beneficiary"; and (4) MCL 700.7201(3), which authorizes trustees and trust beneficiaries request instructions and 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).

II. Summary of the Argument

The Court asked for supplemental briefing on whether the probate court could issue a declaratory judgment in light of *McLeod*, which rejected a declaratory judgment in a similar case. *McLeod* is no longer good law for several reasons. First, the estates and protected individuals code, enacted 59 years after *McLeod*, authorizes a declaratory judgment in a case like this. Section III. Second, the Michigan trust code, enacted after *McLeod*, authorizes a declaratory judgment in a case like this. Section IV. Third, the declaratory judgment rule, adopted after *McLeod*, and the case

law developed under that rule, authorize a declaratory judgment in a case like this. Section V. Finally, *McLeod's* narrow view of declaratory judgment law is no longer viable. Section VI.

III. The Probate Court Has Exclusive Legal and Equitable Jurisdiction Over Trust Proceedings, Including a Declaration of Rights That Involve a Trust, Trustee, or Trust Beneficiary

Article VI, § 1 of the Michigan Constitution provides that "[t]he judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house." Const. 1963, Art. VI, § 1. "The jurisdiction, powers and duties of the probate court … shall be provided by law." Const. 1963, Art. VI, § 15. "Probate courts are courts of limited jurisdiction, and their jurisdiction is defined entirely by statute." *In re Vansach Estate*, 324 Mich App 371, 388; 922 NW2d 136 (2018) (quotation marks omitted).

The probate court has jurisdiction and power as follows:

> (a) *As conferred upon it under the estates and protected individuals code,* 1998 PA 386, MCL 700.1101 to 700.8206.
>
> (b) As conferred upon it under the mental health code, 1974 PA 258, MCL 330.1001 to 330.2106.
>
> (c) As conferred upon it under this act [the revised judicature act].
>
> (d) As conferred upon it under another law or compact.

MCL 600.841(1) (emphasis added).

The governing statute here is thus the estates and protected individuals code (EPIC). EPIC became effective on April 1, 2000; provides the probate court with broad jurisdiction over trust

matters; and explicitly includes jurisdiction over a "declaration of rights that involve a trust, trustee, or trust beneficiary." MCL 700.1302(b). EPIC was effective 49 years after the 1961 *McLeod* opinion. MCL 700.8101(1).

EPIC's preamble states it is an act "to codify … the law … relating to trusts, …; to provide for the powers and procedures of the court that has jurisdiction over these matters; … [and] to provide procedures to facilitate enforcement of certain trusts; …."

> [EPIC] shall be liberally construed and applied to promote its underlying purposes and policies, which include all of the following:
>
> (a) To simplify and clarify the law concerning the affairs of decedents, missing individuals, protected individuals, minors, and legally incapacitated individuals.
>
> (b) To discover and make effective a decedent's intent in distribution of the decedent's property.
>
> (c) To promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors.
>
> (d) To make the law uniform among the various jurisdictions, both within and outside of this state.

MCL 700.1201. In EPIC the legislature granted the probate court[13] broad and—

> exclusive legal and equitable jurisdiction of all of the following:
>
> (b) A proceeding that concerns … settlement of a trust; the administration, distribution, modification, … of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, all of the following proceedings:
>
> * * *
>
> (v) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust.
>
> * * *

[13] As used in EPIC, "'Court' means the probate court or, when applicable, the family division of circuit court." MCL 700.1103(j).

> (d) A proceeding … to order, upon request of an interested person, instructions or directions to a fiduciary that concern an estate within the court's jurisdiction.

MCL 700.1302. "When considering a word or phrase that has not been given prior legal meaning, resort to a lay dictionary such as Webster's is appropriate." *Citizens Ins Co v Pro–Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007), quoting *Greene v AP Products, Ltd*, 475 Mich 502, 510; 717 NW2d 855 (2006). "Concerns" is defined as "to relate to; be connected with; be of interest or importance to; affect: *The water shortage concerns us all* . . . . to interest or engage . . ."[14]

MCL 700.1303(1)(a) provides that "[i]n addition to the jurisdiction conferred by section 1302 and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust . . . Determine a property right or interest."

"In the exercise of jurisdiction vested in the probate court by law, the probate court shall have the same powers as the circuit court to hear and determine *any* matter and make *any* proper orders to fully effectuate the probate court's jurisdiction and decisions." MCL 600.847 (emphasis added).

Thus the probate court has broad jurisdiction over trusts, including the jurisdiction to issue a "declaration of rights that involve a trust, trustee, or trust beneficiary." MCL 700.1302(b). That grant of jurisdiction "shall be liberally construed" to carry out EPIC's purposes, including carrying out the decedent's intent and efficiently dealing with a decedent's estate. MCL 700.1201(b), (c).

[14] http://dictionary.reference.com/browse/concern?s=t.

The Court of Appeals recently discussed the legislature's broad grant of exclusive jurisdiction to the probate court over trust matters. *In re Rhea Brody Living Trust,* unpublished per curiam opinion of the Court of Appeals, issued July 11, 2019 (docket no. 343813), 2019 WL 3058972, at *8 ("*Brody IV*"). Appendix, p 166a. In *Brody IV*, the proceeding before the probate court involved a question of whether to sell an apartment complex that was 100% owned by a limited liability company, which was co-managed and owned 50% by another limited liability company, which in turn was owned 98% by a trust. The Court of Appeals held the proceeding concerned the administration, distribution, or settlement of a trust under MCL 700.1302(b). In so ruling, the panel held that a proceeding involving real property *two entities removed from trust ownership* nonetheless fell within the exclusive legal and equitable jurisdiction of the probate court.

The issue here is not as remote from a trust as that in *Brody IV*. Rather it is integral to Robert Whitton's intent for his trust. Molly Michaluk had a right to seek a ruling on whether filing a petition to modify the trust would violate the *in terrorem* clause of the trust. Unlike *Brody IV*, where the trust was two levels away from the contested issue, the dispute here directly involves the trust. If the probate court had jurisdiction in *Brody IV*, it certainly has jurisdiction here.

The probate court had the jurisdiction to grant a declaratory judgment under its broad authority over trust matters and specifically its jurisdiction to make a "declaration of rights that involve a trust, trustee, or trust beneficiary." MCL 700.1302(b). To the extent that *McLeod* held otherwise, it is superseded by the subsequent enactment of EPIC. *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 572; 592 NW2d 360 (1999) (subsequent statute superseded previous common law decisions). *Cf. In re AGD*, __ Mich App __; __ NW2d __ (2019) (no 345717) (2019 WL 1211505, at *3) (lower courts not bound to follow a previous decision that has been clearly superseded). And this Court can always reconsider its previous decisions in light of the development of the law.

IV. The Michigan Trust Code Specifically Authorizes a Trust Beneficiary to Request Instructions and for a Declaration of Rights

In addition to the general provisions of EPIC that grant the probate court jurisdiction to enter a declaratory judgment about a beneficiary's rights under a trust, there is more statutory authority that confers that jurisdiction on the probate court. The Michigan trust code, enacted after *McLeod,* vests this power in the probate court.

The trust code must be construed and applied to promote its underlying purposes and policies, which include fostering "certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust." MCL 700.8201(2)(c); *In re Gerald L Pollack Trust*, 309 Mich App 125, 162-163, 867 NW2d 884 (2015). "Among the underlying purposes and policies of EPIC, reflected deeply within our state's caselaw, is the discernment and effectuation of the decedent's intentions in the distribution of his or her property. Indeed, the 'guiding polar star' in probate law is that the intentions of the decedent control in this regard." *In re Mardigian Estate*, 502 Mich 154, 179; 917 NW2d 325 (2018).

The trust code directly provides for a petition in a case like this. MCL 700.7203(1) grants the probate court 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 legal and equitable 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 shows that the probate court has the power to give instructions regarding conduct contemplated—but not yet acted upon—by a beneficiary.[15] *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] (appendix, p 162a) ("[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.")[16]

To hold 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.

The trust code is part of EPIC, which, as discussed above, was adopted after *McLeod*. The trust provisions of EPIC were later extensively revised, modelled after the Uniform Trust Code, and became effective April 1, 2010. 2009 PA 46, § 2. The trust code explicitly authorizes the

[15] "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).

[16] 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).

probate court to enter a "declaration of rights that involve a … trust beneficiary." MCL 700.7201(3). To the extent that *McLeod* held otherwise, it is superseded by the subsequent enactment of the trust code. *Hoste*, 459 Mich at 572.

V. The Declaratory Judgment Rule Authorizes the Petition for Instructions

Wholly apart from the specific authorizations in EPIC and 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. The rule, like the statutes discussed above, was adopted after *McLeod.*

"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). "[A]n action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment." MCR 2.605(A)(2). The rule applies to the probate court. MCR 5.001(A) ("Procedure in probate court is governed by the general rules set forth in chapter one and by the rules applicable to other civil proceedings set forth in chapter two, except as modified by the rules in this chapter.")

"The purpose of a declaratory judgment is to definitively declare the parties' rights and duties, *to guide their future conduct 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.

> One great purpose is to enable parties to have their differences authoritatively settled in advance of any claimed invasion of rights, that they may guide their actions accordingly and often may be able to keep them within lawful bounds, and so avoid the expense, bitterness of feeling, and disturbance of the orderly pursuits of life which are so often the incidents of law suits. Fully to carry out the purposes intended to be served by such judgments, it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening.

Merkel v Long, 368 Mich 1, 13; 117 NW2d 130 (1962).

To invoke MCR 2.605, there must be an "actual controversy." "[A]n 'actual controversy' exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights." *Michigan Ass'n of Home Builders v Troy*, __ Mich __; __ NW2d __ (2019); 2019 WL 3059716, at *10. "[T]he rule requires that there be 'a case of actual controversy' and that a party seeking a declaratory judgment be an 'interested party,' thereby incorporating traditional restrictions on justiciability such as standing, ripeness, and mootness." *Associated Builders & Contractors v Dir of Consumer & Indus Servs*, 472 Mich 117, 125; 693 NW2d 374 (2005), *overruled on other grounds by Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349; 792 NW2d 686 (2010).

> Like in an ordinary action, ripeness in the declaratory judgment context requires a present legal controversy, not one that is merely hypothetical or anticipated in the future. Unlike an ordinary action, however, in a declaratory action a court is not precluded from reaching issues before actual injuries or losses have occurred. Indeed, the basic purpose of a declaratory judgment act is to provide for declaratory judgments without awaiting a breach of existing rights.

Van Buren Charter Twp v Visteon Corp, 503 Mich 960; 923 NW2d 266, 270 (2019) (Viviano, J, dissenting) (cleaned up).

Molly Michaluk's Petition for Instructions falls squarely within the spirit and the letter of MCR 2.605. She asked the probate court to declare her rights and duties under her late father's trust, to guide her future conduct and relations, and to preserve her legal rights.[17] Ms. Michaluk sought a ruling on her rights before an actual injury occurs.[18] She sought to minimize avoidable losses and the unnecessary accrual of damages–namely, the forfeiture of her distributive share of her late father's trust.[19] In fulfillment of the "great purpose" of MCR 2.605, it is necessary in this case to determine Ms. Michaluk's rights which will arise or become complete only in the contingency of some future happening; namely, the filing of her proposed petition to modify her father's trust and the effect, if any, that the trust's *in terrorem* clause will have relative to that petition.[20]

The declaratory judgment rule, adopted after *McLeod*, provides additional authority for the probate court to act on Ms. Michaluk's petition.

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

In rejecting Ms. Michaluk's request for declaratory judgment, the Court of Appeals held *McLeod* was controlling. This Court asked for supplemental briefing on *McLeod.*

[17] *Barrow, supra.*

[18] *Rose, supra*.

[19] *Durant, supra*.

[20] *Merkel, supra.*

McLeod is no longer good law and, to the extent it could be viewed as controlling here, this Court should overrule it.

A. *McLeod* Doesn't Apply in Light of the Development of Declaratory Judgment Law

McLeod rejected a declaratory judgment in a will case. It affirmed dismissal of a legatee's suit for a declaratory judgment about whether he could seek specific performance of an agreement about distribution of his father's estate without losing his rights under a no-contest clause. The Court of Appeals applied *McLeod* in this trust case. COA opinion, pp 4-5 (appendix, pp 21a-22a).[21]

But *McLeod* is from an era of judicial resistance to declaratory judgments[22]—resistance this Court repudiated decades ago. In *Allstate Ins Co v Hayes,* 442 Mich 56; 499 NW2d 743 (1993), this Court approved the use of a declaratory judgment, citing a "classic work" that touted the "remedial advantages" of declaratory judgments and "urg[ing] rejection of a formalistic approach that would limit its availability." 442 Mich at 64. The Court cited with disapproval its 1920 decision holding the Uniform Declaratory Judgment Act unconstitutional. *Id.* at 64, n 8. Although the Court held an amended statute constitutional (*Washington-Detroit Theatre Co v Moore,* 249 Mich 673; 229 NW 618 (1930)), in *Allstate,* it bemoaned the fact that "judicial interpretation of the phrase ["actual controversy"] narrowed the availability of relief." *Allstate,* 442 Mich at 64, n 8. See Viviano, *The Use of Declaratory Judgments to Test the Enforceability of No-Contest Clauses,* 50 Real

[21] The law on applying no-contest clauses is the same for both wills and trusts. A no-contest clause does not apply if the challenger has probable cause for contesting the will or trust. MCL 700.2518 (wills); MCL 700.3905 (wills); MCL 700.7113 (trusts).

[22] *McLeod* precedes the enactment of MCL 700.7201, the provision of the trust code that authorizes the probate court to enter a declaratory judgment, by 49 years.

Prop, Trust & Estate LJ 75, 84-91 (2015) ("Viviano") (setting out the history of judicial hostility to declaratory judgment statutes in Michigan).

McLeod touts the strict limitations on availability of declaratory judgment that this Court recited in *Washington-Detroit Theatre.* 365 Mich at 31-32 (emphasizing among other things, there can be no declaration "as to future rights" and no declaration "where the interest of the plaintiff is merely contingent upon the happening of some event"; quoting *Washington-Detroit Theatre,* 249 Mich at 677-678). But in the 63 years since *Washington-Detroit Theatre* and the 32 years since *McLeod,* this Court repudiated those narrow limits on declaratory judgment. It did so expressly in *Allstate.* As examples of cases that improperly "narrowed the availability of relief," the Court quoted a discussion in 3 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), pp 422-423, which cited cases where "[t]he 'actual controversy' requirement was applied strictly." 442 Mich at 64, n 8. *McLeod* was one of those examples. The Court approvingly quoted the MCR Practice criticism of *McLeod* as using "an overly strict application [that] made declaratory judgment unavailable in the very type of situation where it was intended to offer relief." *Id.*

Commentators roundly criticized *McLeod.* 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.

This Court recognized that the narrow view of declaratory judgments changed when the Court adopted the declaratory judgment rule in 1963—GCR 1963, 521, the predecessor to MCR 2.605.[23] The Court said, in what must be a reference to "narrow interpretations" in cases such as *McLeod* and *Washington-Detroit Theatre:* "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 thus repudiated 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. This Court is not bound by the outdated and justly criticized decision in *McLeod.* The Court effectively overruled *McLeod* in *Allstate.* If there is any doubt about that, this Court can take the opportunity now to explicitly overrule *McLeod,* as discussed in section VI.B below.

[23] "MCR 2.605 was adopted effective March 1, 1985. It is comparable to GCR 1963, 521. See 1985 staff comment to MCR 2.605. Previously, actions for declaratory relief were governed by MCL 691.501 et seq., prior to repeal by 236 PA 1961, effective January 1, 1963." COA opinion, p5 n 9 (appendix, p 22a). At the same time the Court adopted the declaratory judgment rule, the legislature repealed the old Declaratory Judgment Act of 1929. Viviano, at 92.

This Court more recently mentioned *McLeod* in two non-binding opinions dissenting from denial of leave to appeal. *Perry v Perry*, 495 Mich 892; 839 NW2d 195 (2013) (Markman, J., dissenting); *id.* at 893 (Viviano, J., dissenting). The petitioner there (just like Ms. Michaluk), concerned about potential application of a no-contest clause, asked for a declaratory judgment that he would have probable cause to challenge a trust amendment "*if* [he] *were* to bring such an action." *In re Perry Trust*, 299 Mich App 525, 528; 831 NW2d 251 (2013) (emphasis in original). The probate court ruled that the petition for a declaratory judgment itself did not violate the no-contest clause because it did not challenge any trust provision. *Id.*at 529. The Court of Appeals affirmed. *Id.* at 527. In the course of its discussion, *in dictum*, the Court of Appeals questioned whether there was a "justiciable controversy" "about the probable application of a statute … to his proposed scenario"—the proposed but not-yet-taken action of directly challenging the trust amendment. *Id.* at 531. This was dictum because, as the court itself said, the issue "is not now before us." *Id.* at 532.

This Court denied leave to appeal in the usual one-sentence order that denies leave. 495 Mich 892. Thus this Court said nothing about this type of case. 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.'").

The only reason we mention this case is that the two dissents from denial of leave mention *McLeod*. Those dissents, of course, have no precedential value. *People v Gronewald*, 461 Mich 985, 991; 607 NW2d 85 (2000) (statement of Young, J.) (dissents from denial of leave "have no

precedential value whatsoever"). Justice Viviano's dissent relied on *McLeod* and the standards used in the 1930 *Washington-Detroit Theatre* opinion that emasculated Michigan's 1929 declaratory judgment act. His dissent 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.

Other courts have approved declaratory judgments regarding application of no-contest clauses. *Sinclair v Sinclair,* 284 Ga 500; 670 SE2d 59 (2008) (allowing suit for declaratory judgment on whether contemplated action to remove executor would violate no-contest clause); *Cohen v Reisman,* 203 Ga 684; 48 SE2d 113 (1948) (affirming declaratory judgment that beneficiary would not violate no-contest clause if she sued executor for wrongfully withholding estate assets); *In re Burkhalter Estate,* 343 Ga App 417, 421; 806 SE2d 875 (2017) ("Our Supreme Court also sanctions the use of a declaratory judgment action to determine whether a proposed future action by the petitioner would violate an in terrorem clause"); *Kesler v Watts,* 218 Ga App 104; 460 SE2d 822 (1995) (legatee entitled to declaratory judgment on validity of no-contest clause); *In re Badenhap Estate,* 61 NJ Super 526; 161 A2d 318 (1960) (allowing suit for declaratory judgment on whether contemplated appeal from lower court judgment would violate no-contest clause). Although not binding, these cases show that the use of a declaratory judgment in cases like this is common.

McLeod no longer applies in light of the subsequent development of declaratory judgment law rejecting its narrow interpretation, including not only the enactment of EPIC and the Michigan trust code, but also this Court's adoption of the declaratory judgment rule and its statements in *Allstate.*

B. The Court Should Overrule *McLeod*

The discussion above shows that the declaratory judgment rule, EPIC, and the Michigan trust code supersede *McLeod*. But, if there is any doubt about that, now is the time to expressly and unequivocally overrule *McLeod*.

This Court considers the following factors in deciding whether to overrule a previous decision:

> 1) whether the earlier case was wrongly decided, 2) whether the decision defies "practical workability," 3) whether reliance interests would work an undue hardship, and 4) whether changes in the law or facts no longer justify the questioned decision.

Pohutski v Allen Park, 465 Mich 675, 694; 641 NW2d 219 (2002).

Three of these factors weigh in favor of overruling *McLeod*. First, if *McLeod* is viewed as prohibiting a declaratory judgment in this case, it was wrongly decided for the reasons stated in the previous section: It is contrary to the current state of declaratory judgment law, both generally and under the explicit provisions of EPIC and the Michigan trust code that allow a declaratory judgment here.

Second, there are no reliance interests on the rule stated in *McLeod*. It has not "become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Pohutski*, 465 Mich at 694. There is no evidence that estate planners rely on *McLeod* to force beneficiaries to risk losing their rights if they want to raise a question about a will or trust. By statute, no-contest clauses are not strictly enforceable. MCL 700.2518 (wills); MCL 700.3905 (wills); MCL 700.7113 (trusts). They will not be given effect if there is probable cause to contest a will or trust or even to file "other proceedings" relating to an estate or trust. *Id.*

Moreover, the policy of this state has long frowned on forfeitures. "It is elementary that the law abhors forfeitures and will avoid them whenever reasonable ground can be found for so doing." *Staffan v Cigarmakers' Int'l Union of Am*, 204 Mich 1, 7; 169 NW 876 (1918). Since *in terrorem* clauses operate to work a forfeiture, they are to be strictly construed. "Forfeiture provisions in a [trust] are to be strictly construed, and forfeiture avoided if possible, and only where the acts of the parties *come strictly within the express terms of the punitive clause* of the [trust] *may a breach thereof be declared.*" *Saier v Saier*, 366 Mich 515, 520; 115 NW2d 279 (1962) (emphasis in original). "Courts must … construe no-contest clauses strictly." *Perry Trust*, 299 Mich App at 530. Accord, *Stan Estate*, 301 Mich App at 443. To this end, the Legislature codified its disdain for forfeitures by codifying safe harbors for challenges to both trusts and wills. MCL 700.7113, MCL 700.2518, MCL 700.3905. Thus no one can rely on strict enforcement of a no-contest clause. Accordingly, allowing a declaratory judgment about its application does not undermine any reliance interests.

Finally, changes in declaratory judgment law, discussed in the previous section, no longer justify the result in *McLeod.* Declaratory judgment law has changed significantly in the 58 years since this Court decided *McLeod.* EPIC, the trust code, the adoption of the declaratory judgment rule, and the developments in case law all favor allowing declaratory judgments when they are appropriate to guide a party as to their legal rights in an actual controversy.

McLeod is no longer good law and hasn't been since at least 1963. This Court should overrule it.

VII. The Court Should Correct the Court of Appeals' Error, Which Effectively Eliminated the Availability of Declaratory Relief

The Court of Appeals' holding that the issue here was not ripe undercuts the purpose of a declaratory judgment and, applied in other situations, would require people to unnecessarily and dangerously expose themselves to substantial 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 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 EPIC and the Michigan trust code, as to the trustee's obligations to beneficiaries under the trust before taking action that would affect the beneficiaries and expose the trustee to a possible breach of fiduciary duty claim. In each of these situations, it is "by no means a certainty" (COA opinion, p 4 (appendix, p 21a)) 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; appendix, p 23a) 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.

Bluntly, the Court of Appeals' ruling thwarts the policy of the State of Michigan. "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). The legislature codified public policy in EPIC stating that 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 700.1201(b). 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 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).

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 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 turned off that light. It is now up to this Court to turn it back on again.

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 …." *Mardigian*

Estate, 502 Mich at 179. Robert Whitton expressed that intent numerous times to his close friends and his only child. The trust must be modified 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.

Relief Requested

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