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' SUPPLEMENTAL BRIEF ON JURISDICTION ON 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."

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

Michaluk's Appendix to her Supplemental Brief will be cited as "App ___a."

The Successor Co-Trustees stipulate that the Appendix filed by Michaluk will be used by the Successor Co-Trustees as well.

STATEMENT OF QUESTION INVOLVED

Did Michaluk present an actual case or controversy in her Petition for Instructions, giving the Oakland County Probate Court jurisdiction to consider and rule on the Petition for Instructions, in light of *McLeod v McLeod*, 365 Mich 25; 112 NW2d 227 (1961) ("*McLeod*")?

The probate court did not address this question.

The Court of Appeals said "No."

Michaluk says "Yes."

The Successor Co-Trustees say "No."

STATEMENT OF FACTS

The Successor Co-Trustees adopt the Statement of Facts presented in their Response Brief to Michaluk's Application for Leave to Appeal.

ARGUMENT

I. Standard of Review

The Successor Co-Trustees agree that the standard of review is de novo.

II. Summary of the Argument

The declaratory judgment rule is not without boundaries. This case presents the question of where the line should be drawn with respect to trusts with *in terrorem* clauses.

The Estates and Protected Individuals Code ("EPIC") provides broad jurisdiction over all proceedings that concern trusts, including the power to issue a "declaration of rights that involve a trust, trustee, or trust beneficiary." MCL 700.1302(b). But EPIC does not supersede the constitutional requirement that there must be an actual case or controversy before any court may render a decision. The subject matter jurisdiction authorized by EPIC does not eliminate the parallel need for constitutional justiciability. They work together. Otherwise, courts would have to render declaratory judgments on anything brought before them, no matter how unrealistic or far-fetched.

Michaluk's argument is that the scope of declaratory judgments has become so broad that it now covers asking a court to issue a declaration on something that she is thinking about doing in the future but would like to know the outcome ahead of time. But simply asking for an advisory opinion on a possible future event, although couching it in the form of a declaratory action, does not create an actual controversy where otherwise none exists. This case presents virtually the same scenario as in *McLeod*. Nothing in declaratory judgment law has changed to support a different outcome.

III. Subject matter jurisdiction over trust proceedings does not automatically confer justiciability.

The question is not whether the probate court has subject matter jurisdiction to render declaratory judgments regarding trusts—it does. The question is whether Michaluk presented an actual case or controversy on which the probate court could render a decision, as opposed to an advisory opinion. As the Court of Appeals noted, "Ripeness is a question of constitutional jurisdiction, not one of subject matter jurisdiction." *In re Robert E Whitton Revocable Trust*, No 337828, 2018 WL 3788381 *4 (Mich App August 9, 2018) ("*Whitton*") (unpublished per curiam opinion), quoting *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 543 n1; 904 NW2d 192 (2017); App 23a.

Contrary to Michaluk's assertion, *McLeod* was not superseded by EPIC. The cases cited by Michaluk, *Hoste v Shanty Creek Management, Inc*, 459 Mich 561; 592 NW2d 360 (1999), and *In re Rhea Brody Living Trust*, Docket Nos 343813, 345233, 2019 WL 3058972 (Mich App July 11, 2019), App 166a-177a, do not support that conclusion.

Hoste involved the distinction between employees and independent contractors under the Worker's Disability Compensation Act. Originally, "employee" was simply defined as a person under a contract of hire. Courts distinguished between employees and independent contractors under a common law economic realities test. The Legislature then undertook to define more completely the term employee, incorporating some but not all of the factors in the old test. The Court held that the new legislative language superseded the common law test based on the doctrine of *expressio unius est exclusio alterius*—because the new legislative test incorporated some but not all the factors in the common law test. But Michaluk's argument is not based on that statutory construction principle.

Michaluk cites *In re AGD*, --- Mich App ---; --- NW2d ---, No 345717, 2019 WL 1211505 (March 14, 2019), for the simple proposition that lower courts are not bound to follow a previous decision that has been "clearly superseded." Michaluk's Supp Br at 17.

Rhea Brody is likewise not pertinent to the question before this Court. It involved a determination of whether the probate court or the business court had mandatory jurisdiction of an existing dispute over whether to sell an apartment complex in which the Brody Trust had an interest.

The trust jurisdiction granted by the Legislature in EPIC does not supersede or eliminate the constitutional principle of justiciability and the need for an actual case or controversy before a case is properly before the court. The Court of Appeals is bound to follow Supreme Court precedent that has not been clearly overruled by this Court or superseded by subsequent legislation or constitutional amendment, *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 192; 880 NW2d 765 (2016), and that is exactly what it did. *McLeod* has not been overruled by EPIC or by this Court, nor should it be.

IV. The Michigan Trust Code does not authorize a trust beneficiary to request instructions from the probate court.

Michaluk notes that one of the purposes of the Michigan Trust Code is "[t]o foster 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) (emphasis added). The Successor Co-Trustees could not agree more. Michaluk is undermining that confidence by challenging the instructions of the settlor of this trust as expressed in the terms of the trust, after his death. She wants to completely alter the distributive shares of the trust, despite the fact that Whitton had provided for her in the trust, had expressly included a no-contest clause,

and had expressly provided that it could be modified "by instrument in writing delivered to the Trustee."

The probate court has jurisdiction to "instruct a **trustee** and determine relative to a trustee the existence or non-existence of an immunity, power, privilege, duty, or right." MCL 700.1302(b)(*vi*); MCL 700.7201(3)(f) (emphasis added). This general principle permits a trustee to seek instructions from the court when the trustee is in reasonable doubt about the extent of his powers or about the proper manner in which to proceed under the trust.

But when a beneficiary is seeking a construction of a will or trust, a 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. *Gilmer v Gilmer*, 245 Ala 450, 454; 17 So 2d 529 (1944). 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.*

The probate court is a court of limited jurisdiction, deriving all of its power from statutes, and the Legislature is presumed to have intended the meaning it plainly expressed. *Manning v Amerman*, 229 Mich App 608, 611-12; 582 NW2d 539 (1998). Michaluk, as a beneficiary, could not bring a Petition for Instructions, as contemplated by MCL 700.1302 and MCL 700.7201(3)(f). Instead, Michaluk was seeking declaratory relief, as she "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." *Whitton*, 2018 WL 3788381 at *3; App 21a. "In determining jurisdiction, this Court will look beyond a plaintiff's choice of labels to the true nature of the plaintiff's claim." *Manning*, 229 Mich at 613.

V. The declaratory judgment rule does not authorize the Petition for Instructions or declaratory relief here because there is no actual controversy.

The declaratory judgment rule provides, "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 granted." MCR 2.605(A)(1) (emphasis added). The Successor Co-Trustees do not dispute that the Trust Code authorizes the probate court to enter a "declaration of rights that involve a trust, trustee or trust beneficiary." MCL 700.7201(3). But that statement merely gives the probate court subject matter jurisdiction over a declaratory judgment action involving a trust or trust beneficiary. It still does not answer the question of whether there is an actual case or controversy.

The requirement of an "actual controversy" has not changed since the time it was invoked in *McLeod*. Even when deciding *McLeod*, this Court recognized, "The rights to be adjudicated in a suit for a declaratory judgment or decree extend to such as are in force and effect at the time that the action is brought, or which are bound to arise, or to become fully vested, at some future time." *McLeod*, 365 Mich at 33. That formulation of what constitutes an actual controversy remains essentially the same today.

The purpose of the declaratory judgment rule 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. *Barrow v Detroit Election Comm'n*, 305 Mich App 649, 662; 854 NW2d 489 (2014), involved construing Detroit's city charter together with a Michigan statute to determine whether the write-in votes and absentee ballots in a particular election could be counted. The court noted that arguably the question was moot since the election had already

taken place, but a moot issue could be reviewed if it was likely to recur yet 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. Michaluk's Supp Br at 20. 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 had to pay for them, which was an actual controversy between the insured and the insurer, as are many other insurance coverage disputes.

Michaluk cites *Durant v Michigan*, 456 Mich 175, 208-09; 566 NW2d 272 (1997), for the proposition that "[a]ctions for declaratory relief are intended to minimize avoidable losses and the unnecessary accrual of damages." Michaluk's Supp Br at 20. *Durant* involved the interpretation of the Michigan Constitution and proper school funding. *Durant*, 456 Mich at 184, 188-89. *Durant* 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, this was another situation in which the Court found that the case would be moot but addressed the issue because it was capable of arising again. *Id.* at 201 n29.

Finally, in *Detroit Base Coalition for Human Rights of Handicapped v Department of Social Services*, 431 Mich 172, 175; 428 NW2d 335 (1988), plaintiffs (and their advocacy organizations) were recipients of state benefits who sued the Department of Social Services ("DSS"). The lower court entered a declaratory judgment 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 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 those cases involves anything close to the question of whether a trust beneficiary may obtain a declaratory judgment about whether she will lose her inheritance under an *in terrorem* clause if she challenges the trust. Instead, those cases either found that there was an actual controversy or that the case should be decided even though the question was moot. None of them involved a declaratory judgment as to a future hypothetical question.

VI. *McLeod* is still good law, and this Court should not overrule it.

A. This Court should distinguish between declaratory judgment suits that ask whether bringing a particular type of action violates an *in terrorem* clause and those that ask for an advisory ruling on the merits.

Michaluk claims that *McLeod* is from an "era of judicial resistance to declaratory judgments." Michaluk Supp Br at 23. Yet the declaratory judgment rule has not effectively changed—it still requires an "actual controversy." Instead, Michaluk is asking this Court to judicially do away with the "actual controversy" requirement for declaratory judgments. But that goes beyond courts' constitutional judicial power.

Other than claiming that this Court effectively overruled or superseded *McLeod* via footnote eight of *Allstate Insurance Company v Hayes*, 442 Mich 56; 499 NW2d 743 (1993), an insurance coverage case unrelated to trust law, Michaluk relies only on law review articles and commentary. She cites no Michigan cases to support her position that settled law has changed. In fact, the cases Michaluk cites from Georgia effectively illustrate the line this Court should draw between an actual controversy and an advisory opinion.

In *Sinclair v Sinclair*, 284 Ga 500; 670 SE2d 59 (2008), a will beneficiary filed a complaint for declaratory relief to determine whether a request for an accounting and removal of

an executor on grounds of incompetence, self-dealing, and flagrant abuses of fiduciary duties would violate the *in terrorem* clause of the will. The Georgia court held that an action for removal of the executor did not amount to a contest of the will or any provision of it and was clearly not an effort to break the will. *Id.* at 502. It reasoned that an *in terrorem* clause cannot make an executor unanswerable for any violations of the will or the laws governing personal representatives. *Id.* at 503. The Court analogized the complaint to a claim for construction of a will or a determination that it violates public policy. *Id.* at 504.

In a similar but earlier case cited by Michaluk, a beneficiary brought a declaratory action to determine whether she would violate the *in terrorem* clause of a will if she brought litigation intended to show that the executor had wrongfully withheld assets of the estate from her. *Cohen v Reisman*, 203 Ga 684, 685; 48 SE2d 113 (1948). That clause provided for a forfeiture of any interest "in the event that any of the beneficiaries under this will shall seek to involve my estate in litigation." *Id.* at 685. The Georgia Supreme Court held that this was a justiciable controversy because there was uncertainty about whether a forfeiture would occur by bringing an action of the character indicated, given the phrase "to involve my estate in litigation." *Id*. The court held that such a clause, if applied to prevent enforcement of the will, would contradict public policy and under those circumstances would be invalid. *Id.*

This same enforcement principle applies equally to trusts as it does to wills. *See Snook v Sessoms*, 256 Ga 482; 350 SE2d 237 (1986) ("A beneficiary assuredly is empowered to enforce the provisions of a trust, no matter the terms of any *in terrorem* clause."). Here, however, Michaluk was not asking the court to <u>enforce</u> the trust, which would not implicate the *in terrorem* clause. Instead, she was seeking a declaration that she could <u>challenge</u> the trust without triggering the *in terrorem* clause.

In *Kesler v Watts*, 218 Ga App 104, 105; 460 SE2d 822 (1995), the court held that a declaration about whether the *in terrorem* clause itself was valid was a justiciable controversy. The court would not speculate, however, on the outcome or whether a challenge would lead Kesler to lose her devise. *Id.*

The New Jersey case cited by Michaluk follows the same principle. In *Estate of Badenhop*, 61 NJ Super 526, 529; 161 A2d 318 (Probate Div 1960), a will and two codicils were submitted for probate. The surrogate court raised doubts about the proper execution of the second codicil, entered judgment denying probate of it, and a beneficiary appealed. *Id.* The trustees and executors, who were also beneficiaries, filed a declaratory action to determine whether they were required to participate in the appeal based on their directive to "do all lawful things to carry out [the will's] terms" or whether the very act of contesting the appeal would violate the will's *in terrorem* clause. *Id.* at 530. The court determined that was a justiciable controversy and ruled that if they went on to contest the appeal, they would do so at their peril. *Id.* at 535.

These cases all decided procedurally whether a proposed course of action would violate the *in terrorem* clause, but none of them decided the underlying factual issues of whether the particular proposed challenge violated the *in terrorem* clause. "Typically, these proposed actions involve questions of whether and how an interested party may challenge actions by an executor, trustee, or other fiduciary in the face of an in terrorem clause." *In re Estate of Burkhalter*, 343 Ga App 417, 421; 806 SE2d 875 (2017). That was not what this Court faced in *McLeod*, and it is not what is at issue in this case.

As discussed in further detail below, Michaluk asked the probate court to make a ruling on whether filing her specific petition for modification of the trust distributions would violate the

trust's *in terrorem* clause. Michaluk's Petition requested a ruling on the merits of her challenge before she actually made the challenge to avoid the *in terrorem* clause penalty. The only circumstance in which Michaluk would not file the petition for modification of the trust is if the court first determined that the substance of it violated the *in terrorem* clause. Michaluk's request for a sneak preview of whether the facts of her case violated the *in terrorem* clause of the trust is, by definition, an advisory opinion and not a justiciable controversy.

B. Both McLeod and Michaluk asked the court for a declaration of whether an *in terrorem* clause would be applied if they did not prevail on the merits in their proposed action.

In *McLeod*, the plaintiff was "in effect asking this Court to declare whether or not, if he institutes the suit for specific performance that he has in mind and fails to accomplish the desired result, he will, in consequence, be precluded from taking property interests devised or bequeathed to him under the provisions of his father's will." *McLeod*, 365 Mich at 29-30. This Court found that the legal question the plaintiff sought to have answered would not arise unless he instituted a suit for specific performance and failed to prevail, as opposed to asking whether rights would vest in the future or for the interpretation of a written instrument purported to create such rights. *Id.* at 34. Asking for a substantive ruling on the facts markedly differs from asking a court to determine whether the procedural type of action proposed would violate the specific language of an *in terrorem* clause. That is why the Court said that declaratory judgment actions are not a substitute for regular actions. *Id.* at 33.

Michaluk's Petition asserts, "Petitioner intends to file a petition to modify the distributive provisions of the Trust based on the above facts and supporting exhibits, that would result in Molly receiving one-third (1/3) of the entirety of Decedent's Trust (and his Estate, which should pour into the Trust)." App 79a. She asked the probate court to "determine whether the *in*

terrorem clause contained in the Trust either will or will not be given effect as to Molly's Petition to Modify Trust for the reasons set forth herein." App 81a.

Just as in *McLeod*, Michaluk sought a ruling from the probate court whether, if she instituted the petition for modification and failed to achieve the desired result, she would violate the *in terrorem* clause and lose the bequest she had already been provided. The device of calling Michaluk's petition one for "modification" of the trust, rather than a contest or challenge, is a transparent attempt to avoid the otherwise clear application of the *in terrorem* clause to her claim.

Michaluk never asked whether bringing a petition for modification of the terms of the trust would be the type of action that would violate the *in terrorem* clause. Instead, she sought an advisory opinion on whether her petition for modification, under the facts of her case, would violate the *in terrorem* clause. Michaluk also asked the probate court whether she would prevail on the probable cause exception to the *in terrorem* clause based on the facts alleged in her petition for modification. Not only did she ask for a preview ruling, but the probable cause exception is an affirmative defense to the invocation of the *in terrorem* clause that would only arise after filing the actual petition for modification.

As the Court of Appeals put it, "[P]etitioner sought legal advice from the probate court regarding whether she would lose her entire inheritance if she were to seek to modify the trust." *Whitton*, 2018 WL 3788381 at *3; App 21a. As in *McLeod*, Michaluk's Petition was an impermissible request for an advisory ruling and did not arise from an actual controversy, as required by the declaratory judgment rule.

Michaluk brushes aside the court's comment in *In re Miller Osborne Perry Trust*, 299 Mich App 525, 531; 831 NW2d 251 (2013), as dicta, and the relevant dissents in *Perry v Perry*,

495 Mich 892; 839 NW2d 195 (2013), as non-binding. To the contrary, the *Perry* cases go right to the heart of the jurisdictional question now before this Court.

Just like Michaluk, Mark Perry claimed that he was not challenging the trust itself, but he then asked the probate court to determine whether he had probable cause to challenge the Trust under MCL 700.7113. *Perry Trust*, 299 Mich App at 528. The court found, "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." *Id.* The court stated, "Mark Perry likely failed to allege a justiciable controversy," but noted that the question before the court was solely 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.

In *Perry v Perry*, this Court denied leave to appeal, but Justice Markman dissented, stating that he would have granted leave to appeal to consider, "as addressed at greater length in Justice Viviano's thoughtful dissent, whether in light of MCL 700.7113 the trial court possessed jurisdiction to hear the instant declaratory judgment action," citing *McLeod*. 495 Mich at 892.

Justice Viviano also dissented, believing that the lower courts may have erred by reaching a nonjusticiable question. *Id.* at 893. He would have remanded the case to the Court of Appeals to determine "whether the probate court exceeded the constitutional limits of its 'judicial power' under Const. 1963, art. 6, § 1," noting that *McLeod* appeared to be on point. *Id.* Justice Viviano stated, "*McLeod* may be read as establishing the following rule: a party may not use a declaratory action to preview whether a specific course of conduct would violate an *in*

terrorem clause." *Id.* at 894. He also recognized that Perry, just as in *McLeod*, "sought a judgment that would be res judicata in the event that someone tried to enforce the *in terrorem* clause against him in a subsequent litigation." *Id.*

C. *McLeod* should not be overruled.

This case presents the opportunity that Justice Viviano thought had been passed over in *Perry* for this Court "to bring clarity to this area of the law and police the constitutional limits of the judicial power."[1]

Here, the Court of Appeals followed *McLeod,* holding, "[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." *Whitton*, 2018 WL 3788381, at *2; App 21a. The Court of Appeals explained that if it had been asked to consider the probate court's conclusion that the filing of the Petition itself did not violate the *in terrorem* clause, it could have done so without reference to the doctrines of ripeness and justiciability. *Id.* at *4; App 22a. Since the Petition had already been filed, whether that filing triggered the clause would be neither hypothetical nor contingent. *Id.* Indeed, just as the courts did in the Georgia cases discussed above, the probate court found that the Petition itself did not challenge or contest the terms of the Trust and thus did not violate the *in terrorem* clause. App 12a.

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 had a right to file her petition for modification. Instead, she asked the probate court to declare an outcome—that

[1] This Court has not granted the application for leave to appeal at this time. In this case, however, regardless of the outcome, Michaluk has already obtained the benefit of the advisory opinion of the probate court.

she would not invoke the *in terrorem* clause by doing so—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, 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." App 147a. This type of fishing expedition, extended litigation, and dissipation of assets is exactly what an *in terrorem* clause is intended to prevent. Allowing beneficiaries to get around *in terrorem* clauses in this way would eviscerate them and render them useless 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. *In terrorem* clauses serve a legitimate purpose, and beneficiaries should not be able to end run them with impunity.

Although cases since *McLeod* involving declaratory judgments may have expanded the scope of individual situations in which declaratory relief can be obtained from what Michaluk claims were the purported "narrow limits" at the time of *McLeod*, there is a symmetry to the decisions that does not include giving advisory opinions. From *McLeod* to now, the requirement

that there be an actual controversy has remained the same. That is the reason *McLeod* is still good law and should not be overruled.

VII. The Court of Appeals' decision did not "effectively eliminate the availability of declaratory relief."

Michaluk presents a parade of horribles that she contends will result if this Court finds that her Petition did not present an actual controversy. To the contrary, the declaratory judgment rule remains alive and well and available to construe contracts, statutes, and even trusts and wills. For instance, trustees may still seek guidance from the probate court under MCL 700.1302(b)(*vi*). Trustees and beneficiaries will still be able to file declaratory actions to construe wills and trusts where appropriate. But with no present right or liability of a trust beneficiary to be determined, there is no basis for a declaratory action.

The distinction that should be made between an actual, ripe controversy and a non-justiciable controversy is probably best shown by *Van Buren Charter Township v Visteon Corp*, 319 Mich App 538; 904 NW2d 192 (2017). There, the plaintiff township claimed that a disagreement existed about a provision in an agreement obligating the defendant to provide certain assistance if the plaintiff township suffered a shortfall in funds. *Id.* at 546. The township wanted to force negotiations with the defendant, as required by the agreement, before any shortfall actually occurred. *Id.* at 546-47. The trial 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.

In a three-three split, for lack of a majority, this Court denied the application for leave to appeal in *Van Buren*. *Van Buren Charter Twp v Visteon Corp*, 503 Mich 960; 923 NW2d 266 (2019). Justice Viviano dissented there also, believing that the case did present an actual, present

controversy. Yet he still recognized, "That a declaratory judgment must address an 'actual controversy' is central to the legitimacy of the device." 923 NW 2d at 269.[2] Justice Viviano believed that the case presented an actual controversy because it sought a declaration of the parties' present obligations under the settlement agreement. *Id.* at 271. This was true even though the exact amount of the defendant's liability could not be immediately determined, because the question was whether the township had a present obligation to negotiate with Visteon. *Id.*

Michaluk is not a party who is trying to avoid being put in a perilous situation in the future because of a present obligation she has under a written instrument. No one is seeking to put Michaluk in peril except Michaluk. Instead, she wanted (and erroneously received) an advisory opinion that she should not put herself in peril in the first place.

Michaluk claims that the public policy of EPIC is that the code should be liberally construed to "discover and make effective a decedent's intent in distribution of the decedent's property." MCL 700.1201(b). There is nothing to discover here. Whitton's intent was clearly expressed in his trust. The Michigan Trust Code is to be applied "[t]o foster 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).

Michaluk is correct that the "guiding polar star" in probate law is that the intentions of the decedent should control. In sum, Michaluk's public policy arguments lack merit because when the intent of the settlor is clearly expressed in a written trust, the settlor should be able to have confidence that his instructions will be carried out after his death. To allow beneficiaries to attempt to "modify" those instructions without penalty because the settlor told some other people

[2] The Westlaw version of the case does not have page numbers for the Michigan reporter citation.

something different, when the settlor specifically inserted a penalty for such an action, defeats the strong public policy of carrying out the settlor's intent. *McLeod* is still sound law, and this Court should not overrule it now.

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 these reasons, this Court should deny the Application for Leave to Appeal.

CERTIFICATE OF SERVICE

I hereby certify that on **September 30, 2019**, I electronically filed the foregoing document with the Clerk of the Court using the Michigan Supreme Court MiFILE e-filing system, which will send notification of such filing to all counsel of record.

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