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 REPLY BRIEF ON
APPLICATION FOR LEAVE TO APPEAL

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I. Appellees Have Not Refuted the Showing That the Probate Court Has Jurisdiction to Grant a Declaratory Judgment About Whether a Petition to Modify the Trust Would Violate the No-Contest Clause

The issue here 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. This Court scheduled argument on Molly's application for leave to appeal and requested supplemental briefing on "whether the Oakland County Probate Court had jurisdiction to entertain the request for declaratory relief in light of *McLeod v McLeod*, 365 Mich 25 (1961)." Order 6/5/19.

Ms. Michaluk's supplemental brief showed: (1) the estates and protected individuals code (EPIC) confers jurisdiction on the probate court to issue a "declaration of rights that involve a trust, trustee, or trust beneficiary"[1]; (2) the Michigan trust code confers jurisdiction on the probate court over a "request for instructions" and to issue a "declaration of rights that involve a … trust beneficiary"[2]; and (3) the declaratory judgment rule, MCR 2.605(A)(1), authorizes a declaratory judgment here.[3] She also showed that *McLeod* is no longer good law and should be overruled.[4] Appellees have not persuasively refuted these arguments.

A. EPIC Authorizes a Declaratory Judgment Here

Molly filed a request for instructions seeking a declaration of rights under her late father's trust. Appendix, p 71a. EPIC says the probate court can issue a "declaration of rights that involve a trust, trustee, or trust beneficiary." MCL 700.1302(b). Appellees argue this doesn't mean what it says and there is some "constitutional requirement" that supersedes the statute. Appellees' 9/30/19 supp br, p 3. The only constitutional provision they cite is Const 1963, art 6, § 1, which vests judicial power in Michigan's one court of justice but does not define the scope of Michigan

[1] MCL 700.1302(b), discussed at Michaluk's 8/13/19 supplemental brief, pp 14-17.
[2] MCL 700.7201(3), discussed at Michaluk supp br, pp 18-20.
[3] Michaluk supp br, pp 20-22.
[4] Michaluk supp br, pp 23-29.

courts' judicial power. And appellees' citation is to a nonbinding dissent from a denial of an application for leave to appeal. Appellees' supp br, p 14.[5] They argue "constitutional justiciability" and "the constitutional principle of justiciability," but cite nothing that defines justiciability or applies it to a declaratory judgment action. *Id.*, pp 3, 5. As the Court of Appeals opinion said, justiciability includes ripeness, which *McLeod* relied on. So the question of justiciability here depends on the continuing viability of *McLeod*, which this Court should overrule for the reasons in our supplemental brief and those discussed in section I.D below.

EPIC's declaratory judgment provision was enacted 49 years after *McLeod*. Michaluk supp br, pp 14-15. We showed it supersedes *McLeod*. *Id.*, p 17. Appellees simply declare that "*McLeod* has not been overruled by EPIC" (appellees' supp br, p 5), but they don't attempt to reconcile the direct conflict between EPIC (expressly allowing a declaratory judgment) and *McLeod* (prohibiting a declaratory judgment). Appellees criticize our citation (Michaluk supp br, p 17) to cases that stand for the proposition that statutory changes can supersede case law and that the probate court's jurisdiction over trusts is broad. Appellees' supp br, pp 4-5. Yet they offer no alternative analysis and rather rely on an *ipse dixit* that "EPIC does not supersede or eliminate the constitutional principle of justiciability," without citing, defining, or discussing any constitutional provision. *Id.*, p 5.

In short, appellees have not refuted the fact that EPIC gives the probate court jurisdiction to issue a declaratory judgment involving a trust, including a declaratory judgment about application of a no contest clause.

B. The Trust Code Authorizes a Declaratory Judgment Here

The probate court has jurisdiction over "proceedings … brought by a … beneficiary that

[5] Appellees' discussion of dictum and non-binding dissents in the *Perry Trust* opinions (appellees' supp br, pp 13-14) doesn't support their position. They do not dispute that these are not authoritative precedent applying *McLeod*.

concern the administration of a trust." MCL 700.7203(1). Molly filed a request for instructions seeking a declaration of rights. The probate court can consider a "request for instructions" and enter a "declaration of rights that involve a … trust beneficiary." MCL 700.7201(3). Appellees admit that. Appellees' supp br, p 7. Yet, inconsistently, they say the trust code "does not authorize a trust beneficiary to request instructions from the probate court." *Id.,* p 5. They don't reconcile that statement with the directly opposite provision of MCL 700.7201(3), which expressly authorizes a beneficiary to request instructions and seek a declaration of rights.

First, citing an Alabama case, they argue the probate court "must have some other reason to take jurisdiction." Appellees' supp br, p 6. But that case concluded the beneficiaries there had a right "to have the terms of the trust construed and their rights under it *declared* and enforced"—authorizing a declaration of rights. *Gilmer v Gilmer,* 245 Ala 450, 455; 17 So 2d 529 (1944) (emphasis added). Even if it were adverse (which is it not), this 1944 Alabama case does not supersede Michigan statutory law.

Second, appellees say Molly can't bring a petition for instructions under MCL 700.7201(3)(f), which allows the probate court to "[i]nstruct a trustee." Appellees' supp br, p 6.[6] But the relief requested in her petition asked only for the court to "determine whether the *in*

[6] This is a disingenuous argument. MCL 700.7201(3) is extremely broad and expressly states:

> (3) 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.
>
> (f) Instruct a trustee …." (Emphasis added.)

"Any" means "all." *Dep't of Agriculture v Appletree Mktg, LLC,* 485 Mich 1, 8; 779 NW2d 237 (2010). "[T]he Legislature's use of the phrase 'including, but not limited to'… indicates that it intended an expansive and inclusive reading …. [T]his particular phrase is not 'one of limitation,'

terrorem clause … either will or will not be given effect as to Molly's Petition to Modify Trust." Appendix, p 81a. And, even if she had asked for instructions to the trustees, nothing in the trust code prohibits a beneficiary from asking for that. A "proceeding involving a trust" can include "*any* matter involving the trust's administration" (MCL 700.7201(3); emphasis added), including instructions to a trustee. MCL 700.7201(3)(f). A beneficiary can bring a proceeding involving administration of a trust. MCL 700.7203(1). Appellees are just wrong to say the trust code barred Molly's petition.

C. There Is an "Actual Controversy" Within the Scope of the Declaratory Judgment Rule

1. There Is an "Actual Controversy"

Appellees acknowledge that the declaratory judgment rule applies when there is "a case of actual controversy." Appellees' supp br, p 7, quoting MCR 2.605(A)(1). "[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. Accord, *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). The declaratory judgment rule must 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). Accord, *Shavers*, 402 Mich at 588. Appellees do not cite this Court's latest articulation of the elements of an "actual controversy" in *Michigan Ass'n of Home Builders*. Rather they argue there must be "a present obligation … under a written instrument." Appellees' supp br, p 18. But that's not what the case law says.

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but is instead meant to be illustrative and purposefully capable of enlargement." *People v Feeley*, 499 Mich 429, 438; 885 NW2d 223 (2016).

Applying the correct definition of "actual controversy," Molly pled "facts demonstrating an adverse interest": she wishes to modify her father's trust to carry out his actual intentions and appellees, the adverse parties, want to stop her from doing so. A declaratory judgment is needed "to preserve [her] legal rights"—the right she has to her inheritance under the trust that could be lost if the no-contest clause were triggered. Thus there is an "actual controversy."

Appellees do not analyze the case-law definition of "actual controversy" and do not apply it to the facts of this case. Rather they set up straw-man arguments unconnected to the actual facts, claiming that Molly argues the declaratory judgment rule is "without boundaries" and she claims "courts would have to render declaratory judgments on anything brought before them, no matter how unrealistic or far-fetched." Appellees' supp br, p 3. These exaggerations are no substitute for reasoned analysis of the case-law elements of an "actual controversy" discussed above and in our supplemental brief. To belittle Molly's situation, they say she is only "thinking about doing [something] in the future but would like to know the outcome ahead of time." *Id.* Setting aside the pejorative characterization, that is the exact purpose for which the declaratory judgment rule was designed. The point of a declaratory judgment is to seek a legal ruling before a person puts her rights at risk. The purpose is to "guide … future conduct" (*Allstate*, 442 Mich at 74); "to obtain an adjudication of their rights before actual injuries or losses have occurred." *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Services*, 431 Mich 172, 191; 428 NW2d 335 (1988).

2. The Federal "Case or Controversy" Limits Don't Apply in Michigan Courts

The discussion above shows there is an actual controversy within the scope of the declaratory judgment rule. Appellees repeatedly argue there must be a "case or controversy" to allow the probate court to grant a declaratory judgment. Appellees' supp br, pp 1, 3 ("constitutional

requirement that there must be an actual case or controversy"), 4, 7, 15. But the case-or-controversy requirement is based on the federal constitution and "the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 363; 792 NW2d 686 (2010), quoting *ASARCO Inc v Kadish*, 490 US 605, 617; 109 S Ct 2037; 104 L Ed 2d 696 (1989). Thus "Michigan courts' judicial power to decide controversies was broader than the United States Supreme Court's interpretation of the Article III case-or-controversy limits on the federal judicial power." *Id.*, 487 Mich at 364. Therefore, appellees' "case or controversy" arguments are not relevant.

D. *McLeod's* Narrow View of Declaratory Judgments Is No Longer the Law

Molly showed that declaratory judgment law has evolved, moving from judicial hostility to today's view that the rule must be "liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people." *Allstate*, 442 Mich at 65; *Detroit Base*, 431 Mich at 191; Michaluk supp br, pp 23-25. Appellees admit "cases since *McLeod* involving declaratory judgments may have expanded the scope of individual situations in which declaratory relief can be obtained." Appellees' supp br, p 16. But they ignore this evolution and proclaim, without citation, that "[n]othing in declaratory judgment law has changed" since *McLeod*. *Id.*, p 3; accord, *id.*, p 7. That's just not true, as set out in Michaluk's supplemental brief, pp 23-25.

Appellees do not rebut the criticisms of *McLeod*, cited at Michaluk's supplemental brief, p 24. Rather, they make three insubstantial arguments. First, they attempt to distinguish the cases we cited (which approve broad availability of declaratory judgments) based on the particular facts of each case rather than the general principles the cases set out about the availability of declaratory judgments. Appellees' supp br, pp 7-9 (arguing that none of the cases involved the precise issue presented here). Second, they construct a straw-man to knock down, saying Molly wants "to

judicially do away with the 'actual controversy' requirement for declaratory judgments." *Id.*, p 9. To the contrary, the discussion in section I.C.1 above shows we applied the case-law definition of "actual controversy" to the facts here—something appellees failed to do. Finally, they criticize reliance on law review articles and commentary that universally disapproved of *McLeod*, as though scholarly commentary is irrelevant. *Id.*, p 9. Yet this Court itself previously cited those same authorities. *Allstate*, 442 Mich at 64-65 and n 8 (quoting commentary that said *McLeod* applied "an overly strict application" that "made declaratory judgment unavailable in the very type of situation where it was intended to offer relief").[7]

Our supplemental brief cited cases from other jurisdictions that approved declaratory judgments about application of a no-contest clause. Michaluk supp br, p 27. Appellees try to distinguish the cases by saying they "decided procedurally whether a proposed course of action would violate the *in terrorem* clause, but none of them decided the underlying factual issues …." Appellees' supp br, p 11. They argue that Molly asked the probate court to decide whether her proposed petition to modify her father's trust would succeed. But that is not what this case is about. All that Molly sought then and seeks now is a ruling on whether the mere filing of the petition to modify her father's trust would violate its no-contest clause. See Petition, ¶ 45 (appendix, p 80a) (alleging the no-contest clause does not "prevent the Petitioner from seeking to modify the Trust"). Whether the petition to modify would ultimately be successful is for another day. As appellees themselves say: "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." Appellees' supp br, p 12. All Molly seeks now is a ruling "whether the procedural

[7] Appellees note that part of this Court's criticism of *McLeod* was in a footnote in *Allstate.* Appellees' supp br, p 9. That doesn't make it any less applicable. Language in a footnote can constitute binding precedent. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 438; 751 NW2d 8 (2008).

type of action proposed"—filing a petition to modify the trust—would violate the no-contest clause. She is not asking at this time for "a substantive ruling on the facts"—whether the trust should be modified. Appellees are wrong when they say "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." *Id.,* p 13. In fact, that's exactly what she asked for: "It is Petitioner's position that this clause neither applies nor operates to prevent the Petitioner from seeking to modify the Trust …." Petition, ¶ 45 (appendix, p 80a). It is only the filing of a petition to modify the trust that is at issue. Whether the probate court would actually modify the trust is a decision for later proceedings.

Viewed in light of modern declaratory judgment law as it evolved since *McLeod*, that case is a relic of the past. This Court should overrule it and uphold the availability of declaratory judgments, both in this case and in cases where parties need guidance on the consequences of proposed actions without having to risk irreversible adverse consequences. This is exactly the purpose declaratory judgments are intended to serve.

We analyzed the considerations in deciding whether to overrule a previous decision in our supplemental brief, pp 28-29, and showed that they favor overruling *McLeod*. Appellees don't discuss those factors at all.

II. Appellees' Policy Argument Is Wrong

Appellees say that asking for a declaratory judgment is an attempt "to get around *in terrorem* clauses" that would "eviscerate them and render them useless for all practical purposes," allowing beneficiaries "to end run them with impunity." Appellees' supp br, p 16. They say: "Courts are bound to enforce the settlor's intent and to not rewrite trusts by removing an *in terrorem* clause." *Id.* A declaratory judgment in this case would be "defeating the purpose of *in*

terrorem clauses." *Id.*

This exaggerated rhetoric mischaracterizes what Molly Michaluk is doing. She presented substantial evidence of her father's intent; his regret for not earlier being part of his daughter's life; the close relationship they developed; his attempt to amend his trust just before his double transplant surgery; his firing his attorney a week before his New-Year's-day surgery because the attorney did not draft the trust amendment he wanted; and his final illness from which he never recovered. Michaluk supp br, pp 7-9. Molly has a legitimate claim to modify the trust to carry out what her father repeatedly told others he wanted to do to provide for his only daughter. This is not an "end run" around the no-contest clause, let alone an attempt to set a precedent that would "evis-cerate" no-contest clauses "and render them useless for all practical purposes." It is Molly's good faith effort to carry out her father's intent.

Appellees' empty florid rhetoric advocates enforcing no-contest clauses regardless of the circumstances of a case. It assumes they are sacrosanct. In their view, a clearly-expressed intent that there should be no contest to the written terms of a will or trust is the end of the analysis.

But that is not what the legislature intended and not what it said in EPIC and the trust code. Rather than adopting appellees' suggested policy that no-contest clauses that clearly express a testator's or settlor's intent must be strictly enforced, the statutes craft a balance between discern-ing a settlor's or testator's intent by reference to external evidence versus strict enforcement of a no-contest clause. MCL 700.7113 says a no-contest clause "shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust."[8] This is "a compromise between those who believe no-contest or *in terrorem* clauses should be universally prohibited and those who believe these clauses should be given absolute effect."

[8] Similarly, MCL 700.2518 and MCL 700.3905 limit enforcement of a no-contest clause in a will.

Martin & Harder, Michigan Probate Sourcebook, comments on MCL 700.7113. The trust code likewise provides for several instances where a trust can be modified or reformed. MCL 700.7410 to MCL 700.7416. This includes changing trust terms "even if unambiguous." MCL 700.7415. Appellees' argument that no-contest clauses should always be enforced regardless of the circumstances is contrary to the legislative policy in EPIC and the trust code.

Appellees argue that seeking a declaratory judgment about application of a no-contest clause encourages litigation that such clauses were intended to prevent. Appellees' supp br, p 16. That is another policy argument for absolute enforcement of no-contest clauses regardless of the circumstances. It is inconsistent with the balance the legislature struck in EPIC and the trust code, which carefully considered both sides. It is a policy argument for the legislature, not the courts. Allowing a declaratory judgment carries out the legislative policy of looking at the circumstances of a particular case to determine whether a no-contest clause should apply.

III. Conclusion

Molly is not contesting her father's trust. She simply wants to present the issue of what her father actually intended—and not be penalized by disinheritance for doing so. A declaratory judgment, available in all other similar situations, is the way to raise the issue. *McLeod's* narrow and outdated view should not prevent that. Ms. Michaluk asks the Court to reverse and remand with instructions to grant Ms. Michaluk's petition for instructions.

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