STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

In re:

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.

MOLLY MICHALUK,

Petitioner/Appellant,

v.

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

Respondent/Appellees.

Supreme Court Case No.: 158408

Court of Appeals
Case No. 337828

Oakland County Probate Court
Case No. 2016-372,116-TV

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BRIEF OF *AMICUS CURIAE* PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN IN SUPPORT OF PETITIONER-APPELLANT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of approximately 3,360 members, who practice in the area of estate planning and probate law. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate Section only and not that of the State Bar of Michigan.

This Court, in a June 5, 2019 Order, invited the Probate Section to file an *amicus* brief on the question "whether the Oakland Probate Court had jurisdiction to entertain the request for declaratory relief in light of *McLeod v McLeod*, 365 Mich 26 (1961)." By making this invitation, the Court assumed that this is an issue that practitioners in the area would want to address, and it was correct. The Probate Section governing body, by a vote, agreed to file this brief and take the position that the probate courts do have jurisdiction to decide via a petition for declaratory judgment whether a potential will or trust contestant possesses probable cause to commence a will or trust contest, where the will or trust includes an *in terrorem* clause. Thus, it files this brief supporting granting Petitioner's application for leave to appeal and reversing the Court of Appeals.[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or a party made a monetary contribution to fund the preparation or submission of this brief.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Whether this Court should grant leave to appeal and hold that *McLeod v McLeod*, 365 Mich 25; 112 NW2d 227 (1961), is no longer good law and the Oakland County Probate Court had jurisdiction to entertain Petitioner's request for declaratory relief, because such a request may be brought by the beneficiary of a will or trust that includes an *in terrorem* clause?

The Probate Court did not address this question.
The Court of Appeals answered: No.
Petitioner-Appellant answers: Yes.
Defendants-Appellees answer: No.
Amicus Curiae The Probate and Estate Planning Section answers: Yes

ARGUMENT

I. Introduction

It is the Probate Section's position that declaratory relief is available to trust beneficiaries under the Michigan Constitution, the Michigan Court Rules, the Estates and Protected Individuals Code ("EPIC"), the Michigan Trust Code ("MTC"), and case law. Trustees file declaratory judgment petitions to seek instructions regarding the management of a trust in order to both avoid potential losses in the form of liability to trust beneficiaries, and to perform their future conduct accordingly. Trust beneficiaries should be allowed to do the same thing for similar reasons, that is, to obtain instruction from the court to avoid potential losses (of their inheritance), and to conform their future conduct (whether to bring a claim against the trust). A beneficiary should be entitled to seek the court's instruction to determine if probable cause exists when a trust contains an *in terrorem* clause. The case law – excepting *McLeod* – the court rules, and the statutes themselves, dictate such an outcome. *McLeod* is no longer "good law" and should be over-turned and the Court of Appeals should be reversed.

II. Standard of Review

All parties, and the Probate Section, agree that the standard of review is *de novo*. This Court reviews issues involving the interpretation of the Michigan Court Rules *de novo*. *Hinkle v Wayne Co Clerk*, 467 Mich 337, 340; 654 NW2d 315 (2002). Also, this Court reviews issues of statutory interpretation *de novo*. *In re Rasmer Estate*, 501 Mich 18, 30; 903 NW2d 800 (2017). Finally, the Probate Court's ruling also included an interpretation of trust language which this Court also reviews *de novo*. *In re Pollack Trust*, 309 Mich App 125, 160; 867 NW2d 884 (2015).

III. Summary of the Argument

The definition of "actual controversy" for declaratory judgment purposes as stated by the Court in *McLeod* is no longer good law based upon both previous case law, and, more significantly, post-*McLeod* holdings. In addition, a review of the legislative history and current laws regarding trust proceedings, and the availability of declaratory relief, further establish that *McLeod's* narrow interpretation of the definition of "actual controversy" is misplaced and should be expressly overruled. An "actual controversy" is one that seeks a determination of parties' rights, which will help guide the parties' future conduct without the peril of unnecessary loss (or damages). The Petition for Instructions filed by Petitioner in the probate court is just that. A potential will or trust contestant who may have probable cause to commence a will or trust contest where the will or trust in question includes an *in terrorem* clause should be allowed to seek a determination of rights to guide their future conduct. Declaratory relief is justiciable for a determination of whether probable cause exists, and seeking declaratory relief does not trigger the *in terrorem* clause, but merely provides instruction to the beneficiary. It should be permitted.

IV. *McLeod* was virtually overruled by subsequent case law and should now be expressly overruled.

A. *McLeod*'s narrow definition of an "actual controversy" is no longer good law.

In *McLeod*, the Court held that while courts may make binding declarations of rights, whether or not any consequential relief is claimed—including the construction of a will or other instrument in writing, and a declaration of the rights of interested parties—the Court will not decide as to the future rights, but will wait until the event has happened, unless special considerations require otherwise.[2] *McLeod* relied on *Anway v Grand Rapids Railway Co*, 211

[2] In *McLeod*, the plaintiff asked the 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". The plaintiff was seeking a declaration

Mich 592; 179 NW 350 (1920), which held that the then declaratory judgment rule, Act No 150, Pub Acts 1919 ("1919 Act") —deemed "[a]n act to authorize courts of record to make binding declaration of rights" —was unconstitutional. After *Anway* held the 1919 Act to be unconstitutional, the Legislature, undaunted, enacted the Declaratory Judgment Act of 1929 ("1929 Act"). Section 1 of that Act provided for declaratory judgments in "cases of actual controversy" and further provided that declaratory judgments would have the same effect as final judgments.[3]

The Constitutionality of the 1929 Act was then attacked in *Washington-Detroit Theatre Co v Moore*, 249 Mich 673; 229 NW 618 (1930), and this Court held the 1929 Act to be constitutional. Section 1 of the 1929 Act stated that the act applies only to a "case of actual controversy", and Section 6 of the 1929 Act stated that "[d]eclaration of rights made under this act shall have the effect of final judgments." In its opinion, the Court in *Washington-Detroit Theatre Co* noted, "some of the adjudged requirements of a proper case for declaratory relief, especially as approved by American courts", which included seven requirements. 1) although the courts have discretion to exercise jurisdiction where no consequential relief is requested, this jurisdiction must be exercised by the courts with great care, extreme caution and only where the facts and circumstances demand it; 2) there must be an actual and bona fide controversy as to which the judgment will be *res judicata* and all interested persons/parties must be before the court;[4] 3) the court will not decide future rights, but will wait until the event has happened unless

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of whether a petition for specific performance would trigger the no-contest clause in his father's will.

[3] *See* 1929 Mich Pub Acts No 36 (as amended by MCL 691.501-07 (1961).

[4] Pursuant to MCL 700.1105(c), an interested person includes a fiduciary, devisee, beneficiary, or any other person who has a property right or claim against a trust estate. Under MCL 700.1104(e), a fiduciary includes a trustee, and under MCL 700.1104(d), a beneficiary includes a trust beneficiary as defined under MCL 700.7103.

special considerations require otherwise; 4) a declaration will not be made where the interest of a plaintiff is contingent merely upon the happening of some event; 5) where the Court is asked for no consequential relief, it will not intervene in the matter if the effect is to interfere with the rights of a party to appeal to a court having jurisdiction over the matter by statute; 6) ordinarily the court will refuse a declaration which can only be made after a judicial investigation of disputed facts; and 7) a declaration cannot be had in an action where the defendant has no claim against the plaintiff, although the defendant refuses to waive any rights thereunder. 249 Mich at 677. The Court highlighted the judicial support for the construction of the 1929 Act which provided for a broad and liberal interpretation of "actual controversy". The Court supported its holding by referencing a large number of illustrative justiciable declaratory judgment cases. *Id* at 678.

The Court held that a claim for declaratory judgment must rest upon an actual controversy, be formally presented with proper parties, and is not a substitute for any other action. *Id* at 678. The Court pointed out that declaratory judgment laws have been held constitutional in several cases, and noted (referring to the prior *Anway* decision) that "[n]o court except our own has held a declaratory judgment law unconstitutional". *Id* at 678-679.

The defendant argued that the 1929 Act improperly provided for rights before the rights in question had been invaded or wronged. The Court disagreed and held:

> [t]here is no constitutional restriction on the power of the legislature to recognize the complexity of modern affairs and to provide for the settlement of controversies between citizens without the necessity of one committing an illegal act or wrongdoing or threatening to wrong the other. There is no constitutional expression of limitation upon the power of the court to decide such disputes.

Id at 679.

The Court also rejected the argument that a declaratory judgment is not an exercise of judicial power because no consequential relief is granted, stating that "[i]n many cases of

ordinary actions, the mere determination of rights by judgment or decree ends the controversy." *Id.* at 681. Further, the Court noted that like any ordinary judgment, the declaratory judgment is self-enforcing to the extent it is a final judgment constituting *res judicata*. And it noted that Section 3 of the 1929 Act provided that if further relief may be necessary or proper, it may be sought on application of a party. *Id.* at 683. The Court added that in many equity proceedings the judgment is declaratory and enforced by subsequent applications for contempt or similar orders. Finally, the Court specifically called out probate claims as ones cognizable for declaratory judgment:

> [a]ctions to quiet title and to construe wills are recognized methods of invoking judicial action which do not originate in the actual commission of a wrong nor terminate in a judgment inflicting a penalty, granting compensation or injunction, or otherwise giving "consequential relief", the declaration of rights being all that is necessary to fit the requirements of the case.

Id. at 683.

In other words, the Court held that the 1929 Act gave courts jurisdiction to declare parties' rights so as to guide their future conduct prior to the commission of a wrong or unlawful act. This includes the jurisdiction of the probate courts to issue declaratory judgments in the context of construing wills.[5] *Washington-Theatre* defined the requirement of an "actual controversy" for purposes of the 1929 Act.[6]

Although *Washington-Theatre* was valid case law, analyzing the same declaratory judgment statute that was at issue in *McLeod*,[7] *McLeod* not only did not rely on *Washington-*

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[5] Rules for wills also apply to trusts. "The rules of construction applicable to wills also apply to the interpretation of trust documents." *In re Reisman Estate*, 266 Mich App 522, 527; 702 NW2d 658 (2005).

[6] Viviano, *The Use of Declaratory Judgments to Test the Enforceability of No-Contest Clauses*, 50 Real Prop, Trust & Estate LJ 75 (2015).

[7] *McLeod* is a 1961 case and the Declaratory Judgment Act of 1929 was not repealed until 1963.

Theatre – as it could and should have – but instead it went the opposite way, citing to the earlier case of *Anway*, which *McLeod* had criticized, and narrowly construed the definition of "actual controversy". The Court found that because Mr. McLeod had not brought a petition to re-enforce decedent's verbal agreement, which was not incorporated into his estate planning documents, he did not yet have an actual controversy. 365 Mich at 33. Thus, the Court held, determining whether the no-contest clause in the will instrument would be triggered by his future petition was a hypothetical scenario, and was not a determination of his rights as a beneficiary *without having brought the petition*. *Id.* at 34 (emphasis added). According to *McLeod* the "actual controversy" would not be present or "ripen" until the petition triggering the possible hazardous loss was actually filed.

However, just one year later, the Court decided *Merkel v Long*, 368 Mich 1; 117 NW2d 130 (1962), in which it stated, "[o]ne great purpose [of the declaratory judgment rule] is to enable parties to have their differences authoritatively settled in advance of any claim of invasion of rights, that they may guide their actions accordingly, and often may be able to…avoid the expense…of law suits." 368 Mich at 13. The Court further stated, "it is sometimes necessary to determine rights which will arise or become complete only in the contingency of some future happening." *Id.* at 13. *Merkel* is in stark contrast to *McLeod.*

B. *McLeod* is misplaced in modern caselaw.

In *Shavers v AG*, 402 Mich 554, 588; 267 NW2d 72 (1978), the Court held that, in general, an "actual controversy" exists where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve his or her legal rights. "It is essential that a plaintiff pleads facts entitling him to the judgment he seeks and proves each fact alleged and those facts indicate an adverse interest necessitating the sharpening of the issues raised." 402 Mich at 589.

The Court in *Allstate Ins Co* v *Hayes*, 442 Mich 56; 499 NW2d 743 (1993) continued to trend towards a more liberal approach to the interpretation of "actual controversy".

> Contemporary courts have repeatedly recognized that the purpose of the rule is to allow parties to avoid multiple litigation by enabling litigants to seek a determination, and that the rule is to be 'liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people.'

442 Mich at 64, citing *Detroit Base Coalition for Human Rights of Handicapped v Dep't of Social Services*, 431 Mich 172; 428 NW2d 335 (1988). The Court in that case even expressly denounced *McLeod*, stating that it applied the "actual controversy" requirement too strictly. "At times an overly strict application made declaratory judgment unavailable in the very type of situation where it was intended to offer relief." 442 Mich at 65.

In *Durant v Michigan*, 456 Mich 175, 208-209; 566 NW2d 272 (1997), this Court found that "[a]ctions for declaratory relief are intended to minimize avoidable losses and the unnecessary accrual of damages." Similarly, *McLeod's* definition of "actual controversy" is contrary to *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014), in which the Court of Appeals held that "[t]he purpose of declaratory judgments is to definitively declare parties' right and duties, to guide their future conduct and relations, and to preserve their rights." And it is contrary to *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006), in which the court stated that declaratory judgments allows parties to "obtain adjudication of rights before an actual injury occurs".

If the facts of *McLeod* were presented today and analyzed under this more recent case law, the result would almost certainly be a finding that there was an "actual controversy", with the material issue being the determination of Mr. McLeod's rights in light of the language of the no-contest clause, so as to guide his future conduct. That is because the modern case law provides a liberal definition of "actual controversy" to let parties avoid multiple litigations by

allowing them to seek a preliminary determination. Under all of these cases, *McLeod* has effectively been overruled.

V. The Probate Court has jurisdiction over declaratory judgment actions brought by trust beneficiaries to guide the beneficiary's future conduct even when the trust includes an *in terrorem* clause.

A. The Probate Court has legal and equitable jurisdiction to declare the rights of a trust beneficiary.

The Constitution provides subject matter jurisdiction to Probate Courts. Pursuant to Article VI, §1, the judicial power of the state vests in one supreme court, one court of appeals, and trials court of general jurisdiction which are known as the circuit courts, probate courts, and courts of limited jurisdiction that the legislature has the power to establish. Const 1963, Art VI, §1.

Probate courts have limited jurisdiction, which is defined by statute. *In re Estate of Vansach*, 324 Mich App 371, 922 NW2d 136 (2018). Today, the probate courts have jurisdiction as conferred upon them under EPIC; the Mental Health Code, 1974 PA 258, MCL 330.1001 *et. seq.*; the Revised Judicature Act; and pursuant to "another law or compact" under MCL 600.841(1)(d). Probate courts are also subject to the Michigan Court Rules, which govern practice and procedure in all courts established by the constitution and laws of the State of Michigan, MCR 1.103, including Chapter 5 of those rules, specific to probate courts.

Under MCL 700.1302(a)(iii), the probate courts have jurisdiction to declare rights involving devisees or heirs. Similarly, under MCL 700.1302(b) the probate courts have jurisdiction regarding the "…**declaration of rights** that involve a trust, trustee **or trust beneficiary"** (emphasis added). And MCL 700.1302(b)(v) provides the probate courts with jurisdiction to "[d]etermine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust." The probate courts' jurisdiction is further

highlighted by MCL 700.1303(1), which states that EPIC conferred upon the probate courts concurrent legal and equitable jurisdiction in regards to an estate of a decedent, protected individual, ward or **trust** (emphasis added) to determine a property interest or right (MCL 700.1303(1)(a)), or to impose a constructive trust. The Michigan Trust Code also provides probate courts with subject matter jurisdiction under MCL 700.7203, giving them exclusive jurisdiction over proceedings brought by beneficiaries that concern the administration of a trust. Finally, "the probate court has 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.

MCR 2.605 is the current rule governing declaratory judgments. Pursuant to MCR 2.605(A)(1), a court 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. Pursuant to MCR 2.605(A)(2), "…an action is considered within the jurisdiction of the 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." And, "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief…" MCR 2.605(C). As in prior legislation, [d]eclaratory judgments have the force and effect of, and are reviewable as, final judgments." MCR 2.605(E).

As discussed above, this court rule was interpreted by this Court in *Allstate v Hayes,* which held that MCR 2.605 confirms the authority of a court to declare the rights and other legal relations of an interested party seeking a declaratory judgment in a case of actual controversy. Pursuant to MCR 1.103 (and with no prohibition in Chapter 5), and the EPIC statutory provisions discussed above, the probate courts have jurisdiction over actions for declaratory

judgments, including to declare the rights of trust beneficiaries, and to determine questions regarding trust distribution or administration.

B. The Michigan Trust Code allows beneficiaries to use Petitions for Instructions for declarations of rights, which are a form of declaratory judgment.

An example of an action for declaratory relief is a trustee seeking the probate court's instructions prior to carrying out his or her duties, in order to ensure proper future conduct. Trustees seek protection in advance to avoid liability to the beneficiaries. (MCL 700.7901-7910). Under MCL 700.1302(b)(vi), the probate courts have jurisdiction to instruct a trustee. And the Reporter's Comment to that provision states, "[t]he exclusive jurisdiction of the probate court is broader than might be suggested by a casual reading of the language of this section." The Reporter's Comment further states that "disputes ***or other matters*** that are within the exclusive jurisdiction" (emphasis added) of the probate court may be brought against a trustee. Since probate courts have jurisdiction to provide declarations of rights as to a trust beneficiary (MCL 700.1302(b)), and given that the probate courts have jurisdiction to enter declaratory judgments pursuant to MCR 2.605, like the above discussed trustees' petitions for instructions, trust beneficiaries also have the right to bring Petitions for Instructions. Typically, a beneficiary seeks a determination of his or her rights to guide his or her future conduct. This form of relief should specifically be available to beneficiaries where there is a no-contest clause in the trust, yet the beneficiary is aware of facts and circumstances that substantially change the Grantor's intent.

Pursuant to MCL 700.8201(1), the Michigan Trust Code shall be construed and applied to promote its underlying policies. Although MCL 700.1302 does not expressly state that beneficiaries are allowed to seek instruction, as it does for trustees, read in its entirety, and in the context of the Reporter's Comment, the Probate Section believes that the MTC allows beneficiaries to seek instructions in the form of declaratory judgment actions. The principal is the

same—a person with an interest in trust may seek instruction from the court for a declaration of his or her rights, to guide his or her future conduct.

C. Beneficiaries may seek declaratory relief to determine if probable cause exists rendering a no-contest clause invalid.

Pursuant to MCL 700.7113, penalty clauses for contest of trust are provisions in trusts which purport to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust, but which will not be given effect if probable cause exists for bringing a proceeding contesting, or otherwise relating to, the trust. By definition, a no-contest clause is "[a] provision designed to threaten one into action or inaction; especially a testamentary provision that threatens to dispossess any beneficiary who challenged the terms of the will." Black's Law Dictionary 1073 (9th ed 2009). (The same definition applies to no-contest clauses found in trusts.) They are also known as *in terrorem* clauses.

In *In re Miller Osborne Perry Trust*, 299 Mich App 525; 831 NW2d 251 (2013), the petitioner was a trust beneficiary who sought declaratory relief from the trustee to determine whether he had probable cause to challenge the trust under MCL 700.7113. The trust contained the following no-contest clause:

> If any beneficiary under this trust or any heir of mine, or any person acting with or without court approval, on behalf of a beneficiary or heir, shall challenge or contest any provision of this trust, the beneficiary or heir shall receive no portion of my estate, nor any benefits under this trust. However, it will not be a "challenge or contest" if my personal representative, trustee, or a beneficiary seeks court interpretation of ambiguous or uncertain provisions of the trust.

299 Mich App at 528. The court found there was no probable cause, but also that his petition was not construed as a challenge to the trust and therefore did not trigger the no-contest clause.[8]

[8] In dicta, the court discussed that Mr. Perry "essentially posed a hypothetical scenario" asking the Probate Court to "advise him about the probable application of a statute—MCL 700.7113 to his proposed scenario." *Perry*, 299 Mich at 531. But, unlike in this case, in *Perry* the

Perry highlights the significance of reviewing the no-contest clause language to determine whether or not a particular petition triggers that clause. No-contest clauses are generally valid and enforceable. *Id.*, citing *Farr v Whitefield*, 322 Mich 275, 280; 33 NW2d 791 (1948). But 2009 PA 46 amended the Michigan Trust Code to limit the scope of no-contest clauses. MCL 700.7113. When interpreting a trust, the court must ascertain and abide by the settlor's intent based upon the words of the trust itself. *Perry; In re Kostin*, 278 Mich App 47, 53; 748 NW2d 583 (2008); *Saier v Saier*, 366 Mich 515, 520; 115 NW2d 279 (1962). The importance of the settlor's intent was also emphasized by this Court in *In re Mardigian Estate*, 502 Mich 154, 179; 917 NW2d 325 (2018), which stated that the "guiding polar star" of probate law is that settlor's intentions should control. In *Perry*, the court held that the petitioner's distributions could be forfeited only if his actions were strictly within the express terms of the no-contest clause. It found that the petition for declaratory relief did not constitute a challenge of the trust under the trust's no-contest clause because the petition did not come within the types of actions prohibited by the no-contest clause.

Likewise, MCL 700.7113 voids the operation of a no-contest clause for which there may be probable cause for bringing a challenge. The Court of Appeals in *(In re Gerald R Mahoney Trust & Nancy W Mahoney Trust*), unpublished opinion of Court of Appeals, issued Aug 20, 2015 (Case No 320074) (attached as Exhibit A), held that "the use of a no-contest provision is foreclosed if an interested person raises a single reasonable objection to the trust or proceedings as a whole." There, the court found the petitioner had probable cause to challenge the validity of

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issue of whether the court had the authority to make the probable cause determination was not before the court. *Id.* at 532.

the trust amendments due to claims of undue influence and overturned the probate court's ruling triggering the no-contest clause.

D. Appellant's Petition was a valid request for declaratory relief.

Ms. Michaluk filed a Petition for Instructions regarding whether she could file a petition for trust modification. In other words, she was trying to obtain a declaration of her rights to guide her future conduct based on the evidence regarding the actual controversy. She did so because the trust of which she is a beneficiary contained a no-contest clause. But MCL 700.7113 provides the probable cause exception to the applicability of a no-contest clause. It provides that the clause will not apply to a beneficiary who wishes to bring an action regarding the written instrument if probable cause exists. The Catch-22 is that in order for the clause to not apply, there must be some determination of whether probable cause exists, and the way to get that is to file a petition with the probate court seeking instructions regarding the existence of probable cause.

The Court of Appeals relied on *McLeod* to hold that Petitioner's request did not present a justiciable issue or actual controversy, and that the probate court may not rule on hypothetical scenarios, such as what will happen *if* Petitioner files a petition for trust modification. The analysis above shows how both the case law and the statutes adopt a liberal interpretation of "actual controversy," contrary to *McLeod.* It is time for the Court to officially overturn *McLeod,* at which it has picked away over the years.

The determination to overrule a previous decision requires consideration of four factors: 1) whether the earlier case was incorrectly 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)

Since 1962, the Court has held repeatedly that declaratory judgments may be used to guide future conduct to avoid unnecessary losses. That is exactly what Petitioner sought to do. And the Legislature enacted statutes that provided for the more liberal and/or expansive definition of "actual controversy" and the availability of declaratory relief to interested parties, as well as broad statements about what probate courts can do. The decision in *McLeod* defies "practical workability" because, given the cases cited above, combined with the statutes enacted since *McLeod, McLeod's* holding has been effectively overruled.

McLeod is not so embedded as part of the law that overruling it would cause an undue-hardship on parties and the courts. It is actually to the contrary – having *McLeod* continue to be on the books as "good law" is only causing conflict in the interpretation and availability of declaratory judgments in the probate world. Practitioners in this area need consistency and clear direction from this Court that declaratory judgment actions like the one brought here are permitted. Current case law seems to allow it. The Court Rules seem to allow it. The probate statutes seem to allow it. And common sense and equity would allow it.

Petitions for Instructions brought by trustees are motivated by their desire to obtain a decision in advance to avoid an adverse consequence and more protracted litigation. Similarly, beneficiaries should be allowed to bring petitions seeking declaratory judgment as to whether a potential will or trust contestant possesses probable cause to commence a will or trust contest, where the will or trust includes an *in terrorem* clause. The ultimate goal in probate law is to ascertain and give effect to a grantor's intent. In cases where the grantor's intent is at issue, and where the grantor may have been unduly influenced, declaratory actions will provide an advance determination regarding the facts that may support events that interfered with the grantor's intent. A beneficiary seeking a declaration of rights when a trust or will contain an *in terrorem*

clause (where the risk of loss of inheritance may be significant) are cases that are unique to probate courts. The availability of declaratory judgments to beneficiaries will promote less litigation because if there is an advance determination that probable cause does not exist, then no further litigation will occur. This will result in less expense to both the beneficiaries and trustees, and will likely result in less burden to the court dockets and judicial economy.

Finally, *McLeod* was wrongly decided. Although the 1929 Act was in place,[9] *McLeod* nonetheless essentially made declaratory judgments unavailable for the very purpose for which they were created—to allow parties to a lawsuit to obtain a declaration of their rights to guide future conduct.

With the conclusion that *McLeod* is no longer good law, the Court should then apply the more inclusive definition of "actual controversy" set forth in the Court's subsequent cases to this case and find that the probate court had jurisdiction over this matter. Petitioner was attempting to obtain a declaration of her rights as a trust beneficiary in light of the facts and circumstances she had available to her to guide her future conduct (namely, whether she could file a petition to modify the trust in the future). As discussed above, the probate courts have jurisdiction to hear declaratory judgment claims, and EPIC and the MTC allow beneficiaries to seek declarations of their rights. Based on this analysis, Petitioner's request for a declaration of her rights regarding whether she had probable cause to bring the petition to modify the trust was a valid petition for a

[9] As discussed above, the 1929 Declaratory Judgment Act was enacted after this Court held the 1919 Declaratory Act unconstitutional. It is obvious that the Legislature wanted to make declaratory judgments available as a form of relief for litigants to obtain a declaration of their rights to guide future conduct.

declaratory judgment which the probate court may hear. Therefore, the Probate Section supports Appellant's position that the Court of Appeals was wrong, and her petition is justiciable.[10]

CONCLUSION

The Probate and Estate Planning Section of the State Bar of Michigan supports the Application for Leave to Appeal. This Court should grant leave, reverse the Court of Appeals, and remand to the Probate Court for further proceedings.

Dated: October 21, 2019

Respectfully submitted,

By: Jill M Wheaton

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[10] The Probate Section does not take a position on whether or not there was probable cause in this case.

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INDEX TO EXHIBITS

A. *In re Geral R Mahoney Trust*, unpublished opinion of Court of Appeals, issued Aug. 20, 2015 (Case No. 320074).

CERTIFICATE OF SERVICE

This is to certify that on October 21, 2019, I caused the foregoing ***Brief Of Amicus Curiae Probate And Estate Planning Section Of The State Bar Of Michigan In Support Of Petitioner-Appellant*** to be electronically filed with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

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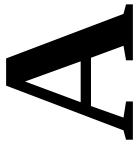

STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of GERALD R. MAHONEY TRUST & NANCY W. MAHONEY TRUST.

KIM JONES,

Appellant,

v

KEITH MAHONEY and NANCY W. MAHONEY as Co-Trustees of the Nancy W. Mahoney Trust,

Appellees.

UNPUBLISHED
August 20, 2015

No. 320074
Charlevoix Probate Court
LC No. 11-011713-TV

Before: GLEICHER, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Appellant Kim Jones appeals as of right from a judgment for appellees Keith Mahoney and Nancy Mahoney in this probate dispute involving the management of the trusts of Nancy Mahoney and her deceased spouse, Gerald. We affirm in part, reverse in part, and remand for proceedings not inconsistent with this opinion.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 1996, Gerald and Nancy Mahoney executed separate revocable living trusts for their benefit and for the benefit of the couple's three children, Keith, Karen, and Kim. At the time the initial trusts were signed, Nancy and Gerald owned approximately 20 acres of lakefront land, with a house and a cottage, on the south arm of Lake Charlevoix. The trial court explained how the property, which stands at the forefront of this dispute, came into being:

> The Mahoney Family Property entered the family through Nancy's grandfather, Fred C. Pillsbury. Fred purchased a sizable parcel of real estate with more than a mile of frontage on Lake Charlevoix in 1916. Fred had three children; in birth order they were Howard, Edna and Raymond Pillsbury. When Fred passed on portions of the lakefront property to his children, he did so by dividing the property into multiple lakefront lots and afforded his children choice

of lots according to birth order. Thus, Fred allowed Howard to choose first, Edna second and Raymond last. This was the first time that the Pillsbury/Mahoney family passed this lakefront property in any form from one generation to the next.

Raymond Pillsbury and his wife, Marian - known within the Mahoney family as "Rayray" and "Mimi" -- had two children. June Pillsbury was the older sister, and Nancy the younger. Rayray and Mimi decided that the property Rayray inherited from his father would be divided along the lakefront into two parcels, with one parcel each to be given to June and Nancy and that their children would select which parcel each would receive according to birth order. As the elder child, June first selected one lot, leaving Nancy with the remaining lot. The lot received by Nancy constitutes the Mahoney Family Property that is central to this dispute. This was the second time that the Pillsbury/Mahoney family transferred the lakefront property from one generation to the next. In both instances, the property was first divided into multiple lakefront parcels, and then the members of the succeeding generation selected the parcel according to birth order, with the oldest selecting first and the youngest selecting last.

On December 12, 2003, Nancy and Gerald formed the Mahoney Family LLC, a Michigan limited liability company (the LLC), and executed an operating agreement. Gerald and Nancy were the initial members and managers, each holding a 50 percent interest in the LLC. The real property was transferred into the LLC. Beginning in 2003, Nancy and Gerald began to transfer interest in the LLC to each child, apparently in lieu of annual cash gifts, and each child eventually owned 5.1402 percent of the LLC's "ownership units."

On January 12, 2004, Nancy and Gerald executed amendments to their respective trusts. Gerald designated Nancy as his sole "Successor Trustee" and designated his children as "Successor Co-Trustees" to serve jointly if Nancy could or would not. Nancy's first amendment contained similar provisions, and also provided for the transfer of 30 percent of the assets of the trust to the LLC to maintain the cottages and property owned by the LLC.

Gerald died on June 25, 2007. At that time, the real property in the LLC was valued at $1.8 million. With the help of Keith and a family friend, Nancy chose attorney Andrew Shotwell to help her manage the LLC and Gerald's trust. According to Shotwell and Greg Sherman, an accountant assisting Shotwell, there was a risk that the IRS would disregard the gifts of LLC assets that Gerald and Nancy had made to the children. Both recommended to Nancy that she take the property out of the LLC and dissolve it.

Discussions occurred concerning returning the children's interests in the LLC and, in August of 2008, the children gave their membership interest in the LLC back to the LLC. At the same time, rather than having the real property remain one undivided parcel that the children would share, Nancy became interested in splitting the property and gifting lots to the children, with each child to pick by birth order a lakefront lot, and with one back lot remaining commonly owned. Although the parties disagree strongly about the involvement of Keith in Nancy's ultimate decision, and in Nancy's cognitive facilities during this time period, Nancy eventually arrived at a plan by which she would transfer the 50 percent interest in the LLC that currently was held by Gerald's trust into Nancy's trust; in return, Nancy executed a 30-year promissory

note, totaling $900,000, from her trust to Gerald's trust; she also executed mortgages for each of the lakefront lots but did not record them.

Along with these actions as trustee of Gerald's trust and as the manager of the LLC, Nancy also amended her trust twice more. On November 14, 2008, Nancy amended her trust to name Keith as her co-trustee, with Keith also named as successor trustee and Karen and Kim designated as respective successor trustees, with Karen to serve first. On February 5, 2010, Nancy executed a third revision to her trust, which Keith signed as co-trustee. The trust amended the successor trustee portion of the trust to list only Keith as successor trustee. This amendment also provided that the three lakefront lots were to be divided among Nancy's children, with the oldest child having first pick of the lots. In addition, following an appraisal the values of the lots were to be equalized so that the owners of the less expensive lots would be compensated "by payment of cash or other assets." The fourth lot, along with $75,000, would be held in the trust for the benefit of all of Nancy's children. The trust also contained a provision that each child would sign a right of first refusal agreement to offer to sell the child's lot to the others at a 50 percent discount.

Effective February 2, 2011, Nancy was adjudged incapable of managing her affairs by two physicians and her children became co-trustees of the trust. Kim filed an initial petition for accounting and other relief on December 7, 2011, and filed an amended petition on July 13, 2012, raising fourteen claims, including claims that Keith had unduly influenced Nancy, who had a lack of sufficient mental capacity to enter into her latter trust amendments, and a claim that Nancy had breached her fiduciary duty as trustee of Gerald's trust through self-dealing. Nancy, Keith, and Karen counterclaimed to enforce the incontestability clause in Nancy's trust.

A four-day bench trial was held in May and October, 2013. In an 83-page opinion, the trial court held: (1) Keith did not unduly influence Nancy, and Shotwell took measures to ensure that Nancy was free from undue influence; (2) Nancy had sufficient capacity to understand and carry out her estate plan; and (3) Nancy did not breach her fiduciary duties as trustee of Gerald's trust. The trial court further found that Kim lacked probable cause to challenge the second and the third revisions of Nancy's trust at the time of the filing of her petition and that the incontestability clause in Nancy's trust would therefore be enforced against Kim, who would then have no rights as a beneficiary under Nancy's trust. Kim now appeals as of right.

II. STANDARD OF REVIEW

The standard of review on appeal in cases where a probate court sits without a jury is whether the court's findings are clearly erroneous. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm convict ion that a mistake has been made, even if there is evidence to support the finding." *Id.* "[T]his Court reviews de novo the language used in wills and trusts as a question of law." *In re Reisman Estate*, 266 Mich App 522, 526; 702 NW2d 658 (2005).

III. BREACH OF FIDUCIARY DUTY – NANCY

Kim first challenges the trial court's determination that Nancy did not violate her fiduciary duty as successor trustee of Gerald's trust when she devised individual lakefront lots

rather than leaving an undivided interest in the total lot. Kim claims that Nancy had a substantial conflict of interest and engaged in self-dealing when she transferred Gerald's trust's interest to her own trust in return for a $900,000, 30-year promissory note secured by mortgages for each of the lakefront lots. Kim maintains that the transaction was voidable pursuant to MCL 700.7802. We disagree.

That actions by a trustee which involve self-dealing are voidable under certain circumstances has long been recognized in Michigan. See, e.g., *Baxter v Union Indus Trust & Savings Bank*, 273 Mich 642, 646-647; 263 NW 762 (1935). Both parties cite MCL 700.7802 in support of their respective positions. This statute provides in pertinent part:

> (2) Subject to the rights of persons dealing with or assisting the trustee as provided in section [MCL 700.7912] a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee 's own personal account or which is otherwise affected by a substantial conflict between the trustee's fiduciary and personal interests is voidable by a trust beneficiary affected by the transaction unless 1 or more of the following apply:
>
> (a) *The transaction was authorized by the terms of the trust.*
>
> (b) The transaction was approved by the court after notice to the interested persons.
>
> (c) The trust beneficiary did not commence a judicial proceeding within the time allowed by section 7905.2.
>
> (d) The trust beneficiary consented to the trustee's conduct, ratified the transact ion, or released the trustee in compliance with section 7909.3.
>
> (e) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.
>
> (f) The transaction is otherwise permitted by statute.
>
> * * *
>
> (7) This section does not preclude the following transactions, *if fair to the trust beneficiaries*:
>
> * * *
>
> (c) *A transaction between a trust and another trust, decedent's estate, or conservatorship of which the trustee is a fiduciary or in which a trust beneficiary has an interest.* [Emphasis added.]

The trial court did not directly address this statutory provision, instead concluding that Kim "presented no evidence of harm to Gerald's Trust from this transaction, and to the contrary,

Gerald's Trust has increased in value as a result of the transaction." In so doing, the trial court concluded that the terms of the promissory note and mortgages were reasonable and fair. We agree. However, to the extent Kim declares that the transaction was nevertheless voidable under the statute, we conclude that decision was correct because Gerald's trust authorized the transaction and because the transaction was fair to Kim as a trust beneficiary.

Gerald's trust precluded Nancy or one of the successor trustee children from exercising any power "for his or her own direct or indirect benefit" unless he or she is "acting in concert with at least one other SUCCESSOR TRUSTEE who is an Independent Trustee or who qualifies as an 'adverse party' having a 'substantial interest' " in the action. The children were no longer "Independent Trustees" after Gerald amended his trust in 2004. Nevertheless, Keith acted "in concert" with Nancy even though only Nancy signed the documents transferring the LLC's interest to her trust in return for the promissory note and the mortgages. Although the phrase "in concert" is not defined in the trust, this Court has held, that in the context of a tort case, to prove that multiple defendants acted with concert-of-action or "in concert," a plaintiff must prove that "all defendants acted . . . pursuant to a common design." *Urbain v Beierling*, 301 Mich App 114, 132; 835 NW2d 455 (2013) (internal quotation marks and citation omitted).

At the time of Nancy's actions, Keith stood in the shoes of the other successor trustee children, each of whom had adverse interests to Nancy as the surviving spouse, given the fact that Gerald's estate would otherwise first be placed in the credit shelter trust up to the applicable exclusion amount prior to Nancy receiving any portion of it in the marital trust. In 2007, this amount was $2,000,000. Therefore, given the property valuation of $1.8 million, Nancy's ability to access Gerald's portion of the LLC was limited, and any amount she removed pursuant to the terms of the trust would be at the expense of her children's interests. Moreover, if any actual risk to Kim's interest in Gerald's trust could be said to exist as the result of the property transfer, Keith's risk of this portion of his presumed inheritance would have been identically affected. We thus find that Keith was an adverse party to Nancy and acted in concert with her to effectuate the property transfer from Gerald's trust. Gerald's trust authorized this action. Therefore, Kim's argument that Nancy violated MCL 700.7802(2) is without merit.

IV. *IN TERROREM CLAUSE*

Kim next argues that the trial court erred when it found that the *in terrorem* clause had been triggered by Kim's challenges to the second and third amendments to Nancy's trust.

> In Michigan, *in terrorem* clauses [in trusts as well as wills] are generally valid and enforceable. *Schiffer v Brenton*, 247 Mich 512, 520; 226 NW 253 (1929); *In re Penny Trust*, 299 Mich App 525, 530; 831 NW2d 251 (2013). However, such clauses must be strictly construed by the courts. *Id.;* see also *Saier v Saier*, 366 Mich 515, 520; 115 NW2d 279 (1962). *[In re Stan Estate*, 301 Mich App 435, 443; 839 NW2d 498 (2013).]

See also *In re Miller Osborne Perry Trust*, 299 Mich App 525, 530; 831 NW2d 251 (2013). Another limitation is contained in MCL 700.7113, which provides: "A provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding

relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust."

This Court has held that "[p]robable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." *In re Stan Estate*, 301 Mich App at 445 (citation and internal quotation marks omitted). "[T]he issue whether probable cause existed necessarily turns on the evidence that the challenging party had at the time he or she instituted the challenge . . . ." *In re Miller Osborne Perry Trust*, 299 Mich App at 532 n 1. The "[w]ant of probable cause is a question of fact." *Rivers v Ex-Cell-O Corp*, 100 Mich App 824, 834; 300 NW2d 420 (1980).

Here, Nancy's initial trust contained the following incontestability clause:

> [I]f any beneficiary hereunder asserts any claim whatsoever (except a legally enforceable debt), statutory election, or other right or interest against or in
>
> GRANTOR'S estate, Grantor's Will, or any properties of this trust, other than pursuant to the express terms hereof or of said Will, or directly or indirectly contests, disputes, or call into question, before any tribunal, the validity of this instrument or of said Will or the validity of any provisions of this instrument or of said Will, then:
>
> A. Such beneficiary shall thereby absolutely forfeit any and all beneficial interests of whatsoever kind and nature which such beneficiary might otherwise have under this instrument[.]

While Nancy's trust was subsequently amended, none of the amendments affected this clause.

A. PROBABLE CAUSE FOR CLAIM OF BREACH OF FIDUCIARY DUTY -- NANCY

Kim maintains that she had probable cause to challenge the third amendment to Nancy's trust based on Nancy's breach of her fiduciary duties to Gerald's trust. We have already concluded that Nancy did not breach her fiduciary duty as successor trustee to Gerald's trust. Given that the language of the trust allowed such a transfer, there was not a substantial likelihood that this challenge would succeed when she filed her petition.

B. PROBABLE CAUSE FOR CLAIM OF LACK OF CAPACITY

Kim argues that the trial court erred when it determined that she did not have probable cause to base her challenges to Nancy's second and third trust amendments based on her lack of capacity. Kim does not challenge the trial court's ultimate finding that Nancy did have the capacity to understand her estate planning, but argues, based on what she observed during the time period, that she had probable cause to find that such a claim would likely succeed.

Pursuant to MCL 700.7601, "[t]he capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will." MCL 700.2501 provides as follows:

> (1) An individual 18 years of age or older who has sufficient mental capacity may make a will.
>
> (2) An individual has sufficient mental capacity to make a will if all of the following requirements are met:
>
> (a) The individual has the ability to understand that he or she is providing for the disposition of his or her property after death.
>
> (b) The individual has the ability to know the nature and extent of his or her property.
>
> (c) The individual knows the natural objects of his or her bounty.
>
> (d) The individual has the ability to understand in a reasonable manner the general nature and effect of his or her act in signing the will.

To have testamentary capacity, a testator must " 'be able to comprehend the nature and extent of his property, to recall the natural objects of his bounty, and to determine and understand the disposition of property which he desires to make.' " *Persinger v Holst*, 248 Mich App 499, 504; 639 NW2d 594 (2001) (citations omitted). A testator must know what property is owned and to whom he wishes to give the property, as well as how that will be accomplished. *Id.* It is presumed that a testator has such capacity. *In re Powers Estate*, 375 Mich 150, 158; 134 NW2d 148 (1965). Testamentary capacity is judged at the time the will is executed, unless the testator's condition prior or subsequent to the execution is related to the time of execution. *Id.* "Weakness of mind and forgetfulness are insufficient to invalidate a will if it appears that the mind of the testator was capable of attention and exertion when aroused and he was not imposed upon." *In re Paquin's Estate*, 328 Mich 293, 302; 43 NW2d 858 (1950). Simply put,

> If [the testator] at the time [he] executed the will, had sufficient mental capacity to understand the business in which [he] was engaged, to know and understand the extent and value of [his] property, and how [he] wanted to dispose of it, and to keep these facts in [his] mind long enough to dictate [his] will without prompting from others, [he] had sufficient capacity to make the will. A testator may be suffering physical ills and some degree of mental disease and still execute a valid will, unless provisions thereof are affected thereby. *[In re Ferguson's Estate*, 239 Mich 616, 627; 215 NW 51 (1927) (alterations added).]

As discussed in the trial court's findings, our Supreme Court and this Court have repeatedly upheld the validity of the estate documents of those whose sanity or mental capacity might be regarded as questionable. See, e.g., *Fish v Stilson*, 352 Mich 437, 440-442; 90 NW2d 509 (1958); *In re Nickel's Estate*, 321 Mich 519, 524-525; 32 NW2d 733 (1948). Here, the listed examples cited by *Kim* included general forgetfulness, requiring assistance with banking and other financial needs, and some mild dementia. However, "[w]eakness of mind and forgetfulness are . . . insufficient of themselves to invalidate a will." *In re Sprenger's Estate*, 337 Mich at 521. For example, telling to the trial court was the fact that, while Nancy had trouble filling out checks for Christmas gifts in 2009, she still knew to whom she wanted to give the gifts. We agree with the trial court's analysis.

In addition, appellant admits that she wrote a note to Karen and Keith in July 2009, stating that although Nancy's ability to live independently should be questioned in the future, she was not yet at that point. While, by itself, *this* letter cannot prove Nancy's competence or lack thereof, the fact remains that at that point, appellant believed Nancy to have the ability to manage most, if not all, of her own affairs.

To the extent appellant's arguments could be said to apply to the contract she executed between Gerald's and Nancy's trusts, in *In re Erickson Estate*, 202 Mich App 329, 332; 508 NW2d 181 (1993), this Court set forth a substantially similar test for the mental capacity to contract:

> The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand in a reasonable manner the nature and effect of the act in which the person is engaged. To avoid a contract it must appear not only that the person was of unsound mind or insane when it was made, but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract. [Citations omitted.]

In addition, although Nancy was ultimately deemed incapable of managing her own affairs in 2011, the trial court was well within its discretion to find this of little probative value as to Nancy's mental capacity years earlier. *In re Powers Estate*, 375 Mich at 158; see also *In re Nickel's Estate*, 321 Mich at 524 (instructing that because the sole question under consideration is the mental competence of the testator at the time the will was executed, "[t]he admissibility of testimony regarding subsequent events is solely within the discretion of the trial court").[1]

C. PROBABLE CAUSE FOR CLAIM OF UNDUE INFLUENCE

Kim also argues that the trial court erred when it failed to determine that she had probable cause to challenge the trust on the ground that Nancy executed the documents while she was under the undue influence of Keith. As with the lack of capacity challenge, Kim does not challenge the trial court's finding that Nancy was not under Keith's influence. She also does not challenge the trial court's determination that a presumption of undue influence did not attach based on the facts known *after* trial. She instead argues that, from the information she knew at the time she filed her petition, she had probable cause to believe this to be the case. As Kim points out, while the trial court, after its review of the evidence, found that no presumption of undue influence attached, it did not reach the ultimate issue of whether Kim nevertheless had probable cause to challenge the trusts on this ground based on the information she had at the time she filed her petition. We find that the trial court erred in its conclusion concerning the presumption and further find that probable cause to raise the challenge was shown.

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[1] We further note that Kim's arguments here are at odds with her complaint that the trial court should have found that Nancy deliberately abandoned her fiduciary duty to arrive at a plan where she would benefit at the expense of her children, because such would certainly require competence sufficient to execute a valid trust amendment.

> To establish undue influence it must be shown that the granter was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the granter to act against the grantor's inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.
>
> A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the granter and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor 's decision in that transaction. *[In re Erickson Estate*, 202 Mich App at 331 (citations omitted).]

In addition, "[t]he benefit must arise from the specific transaction claimed to have been the subject of undue influence." *Id.* at 332.

The facts in this case support a finding that Keith and Nancy were in a fiduciary relationship, i.e., one "founded on trust and confidence by one person in the integrity and fidelity of another." *In re Leone Estate*, 168 Mich App 321, 325; 423 NW2d 652 (1988), citing *In re Wood Estate*, 374 Mich 278, 282; 132 NW2d 35 (1965). Although the parties agree that Nancy met with her attorney separately and that he took great pains to ensure Nancy was not under Keith's influence, appellees acknowledge that when Kim and Karen asked Nancy what was occurring, Nancy turned to Keith to explain it to them and Keith was also the one upon whom Nancy relied to help her arrange a meeting with an attorney to deal with the settling of Gerald's affairs. And, Nancy and Keith met with Shotwell on July 12, 2007, at which time Nancy retained him to deal with the preparation of the estate tax return and other matters relating to the administration of Gerald's estate. Shotwell testified that Nancy directed him to communicate with her through Keith. In addition, evidence was presented that, although still competent, Nancy was suffering from cognitive difficulties, which could place her in a "relationship of inequality" with Keith. See *In re Karmey Estate*, 468 Mich 68, 74 n 3; 658 NW2d 796 (2003).

Appellees point to *Hanson v McNamara*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2011 (Docket No. 293012),[2] to claim that "it is the law in Michigan that a person's mere involvement in meetings where a decedent's planning is discussed does not establish undue influence." However, appellees completely ignore the fact that the *Hanson* panel found that the respondents had established the *presumption* of undue influence where the petitioner had initially contacted an elder law clinic on the testators behalf, participated in many of the clinic's meetings, and drove the testator to the clinic's office the day the testator executed his will. *Id.*, unpub op p 4. We thus find that sufficient evidence was presented of this prerequisite to find a presumption of undue influence at least sufficient to meet the standard of probable cause to challenge the trusts.

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[2] "An unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1).

As to the second requirement, "the fiduciary, or an interest represented by the fiduciary, benefits from a transaction" (*In re Estate of Erickson*, 202 Mich App at 331), Kim pointed out that not only did Keith become the co-trustee of Nancy's Trust with Nancy and sole successor trustee, allowing him much more freedom in administering the Trust, he could take "total control of the distribution process." Part of this taking control was that he was now able to have his pick of lakefront lots. While the trial court did not find this to be a benefit because Nancy's estate plan called for an equalization of any monetary difference between the various lots distributed to her children via cash payment, real property is unique. See *In re Smith Trust*, 480 Mich 19, 27; 745 NW2d 754 (2008). In this case, one lot is a two-acre lot with a home and a pole barn while the other lots are one acre in size, one of which contains a cottage. It could be said, then, that Keith gained a benefit here, and Kim presented a colorable claim that she had probable cause to argue that this prerequisite had been met.

As to the third requirement, that "the fiduciary had an opportunity to influence the grantor's decision in that transaction" (*In re Estate of Erickson*, 202 Mich App at 331), the evidence presented led the trial court to find that this had not occurred, due to Shotwell's involvement and his steps to ensure that Keith did not have an opportunity to influence her. Kim, however, maintained that she had probable cause to believe that this element was satisfied because through her correspondence with her brother, she knew that Keith had multiple conversations with Nancy about her estate plans. While Kim also acknowledges that she knew that Shotwell had been retained as Nancy's attorney, she claims she could not have known that Keith was separated from Nancy at the time she signed the real estate documents when appellant filed her petition. This is a reasonable claim.

Evidence was presented to support the fact that Keith was at least involved in the decisions as an advisor to Nancy. And, appellees do not really contest that Keith assisted Nancy in carrying out her plan. Rather, they rely on the trial court's findings that the trial court properly found, *after* reviewing all of the evidence, that Keith did not have an opportunity to influence Nancy's decision. However, even the trial court found that Keith had acted in a "ministerial" role. Given the evidence presented, Kim possessed sufficient facts at the time of filing her petition to allow a reasonable person to find that there was a substantial likelihood that the undue influence challenge would be successful because Kim could present evidence to support a presumption of undue influence. At the time of her petition, Kim would not have been able to know whether such a presumption could be rebutted. We thus find that the presumption of undue influence attached and that there was sufficient evidence that Kim (and any reasonable person), at the time she filed her petition, could find that there was a substantial likelihood that the undue influence challenge would be successful.

While Kim has not shown that she had probable cause to challenge Nancy's trust amendments on the grounds of lack of capacity or breach of fiduciary duty, she raises a colorable claim that she had probable cause to challenge the amendments due to undue influence. MCL 700.7113 provides:

> A provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust.

Under the plain language of the above statute, the use of a no-contest provision is foreclosed if an interested person raises a single reasonable objection to the trust or proceedings as a whole. Thus, as long as Kim had probable cause to raise even one of her challenges, the *in terrorem* clause in Nancy Mahoney's trust is inapplicable. Because of our conclusion that Kim had probable cause to challenge the amendments due to undue influence, the *in terrorem* clause in Nancy Mahoney's trust was unenforceable as to Kim.

Affirmed in part, reversed in part, and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Deborah A. Servitto