

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Supreme Court Case Nos. 167501, 167503

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*In re Estate of Jennifer Fowler*

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SHELLIE SPACIL, Personal Representative of  
the ESTATE OF JENNIFER L. FOWLER,

Appellee,

Court of Appeals Case No. 365600  
St. Clair County Probate Court  
Case No. 19-000085-DE

v

JULIE BROOKS, Personal Representative of  
the ESTATE OF HELEN FOWLER,

Appellant.

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*In re Jennifer L. Fowler Trust*

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SHELLIE SPACIL, Trustee for the JENNIFER L.  
FOWLER TRUST,

Appellant,

Court of Appeals Case No. 365603  
St. Clair County Circuit Court Case  
No. 22-000259-CZ

v

JULIE BROOKS, Personal Representative of  
the ESTATE OF HELEN FOWLER,

Appellee.

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**APPELLEE'S SUPPLEMENTAL BRIEF PURSUANT TO SUPREME COURT'S  
ORDER OF FEBRUARY 13, 2026**

**ORAL ARGUMENT REQUESTED**

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II.THE COURT OF APPEALS CORRECTLY DECIDED THAT THE REVOCABLE JENNIFER FOWLER LIVING TRUST, WHICH RECEIVED A LUMP SUM PAYMENT INTO SAID TRUST, FROM THE DTE SAVINGS AND STOCK OWNERSHIP PLAN AND THE LIFE INSURANCE PROCEEDS FROM THE METROPOLITAN LIFE INSURANCE WAS AT THE TIME OF HER DEATH, THE PROPERTY OF AND CONTINUED TO BE THE PROPERTY OF THE REVOCABLE JENNIFER FOWLER LIVING TRUST

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**STATEMENT OF THE STANDARDS OF REVIEW**

The Appellee incorporates by reference the statement of the Standards of Review filed in the prior Appellee's Response to the Appellant's Application for Leave.

**STATEMENT OF QUESTIONS PRESENTED**

Did the Court of Appeals correctly decide that the Revocable Jennifer Fowler Living Trust, which under the terms of the DTE Savings and Stock Ownership Plan is to pay a lump sum to the designated revocable Jennifer Fowler Living Trust and which received the Metropolitan Life insurance policy proceeds under the insurance policy as the designated beneficiary, are proceeds to be determined property of the revocable Jennifer Fowler Living Trust?

The Court of Appeals Answered: Yes

The Appellee Answered: Yes

The Appellant Answered: No

- A. Did the Court of Appeals correctly decide that the Metropolitan Life Insurance proceeds, which were paid to the Revocable Jennifer Fowler Living Trust, as the designated beneficiary of the life insurance policy, and the proceeds of the DTE Savings and Stock Ownership Plan, required to be paid under the terms of said plan to the designated revocable Jennifer Fowler Living Trust, are available as trust assets of the Revocable Jennifer Fowler Living Trust and are to be administered in accordance with the statutory requirements of MCL 700.7605(1)?

The Court of Appeals Answered: Yes

The Appellee Answered: Yes

The Appellant Answered: No

- B. Did the Court of Appeals decide whether the Metropolitan Life Insurance proceeds, which were paid to the Revocable Jennifer Fowler Living Trust, as the designated beneficiary of the life insurance policy, and the proceeds of the DTE Savings and Stock Ownership Plan, required to be paid under the terms of said plan to the designated revocable Jennifer Fowler Living Trust should be analyzed under provisions related to irrevocable trusts (MCL 700.7506(1)(c)?

The Court of Appeals Answered: Was not raised

The Appellee Answered: Was not raised

The Appellant Answered: Was not raised

## **STATEMENT OF FACTS**

The Appellee incorporates by reference the Counter Statement of Facts filed in the prior Appellee's Response to the Appellant's Application for Leave.

## **INTRODUCTION**

In reviewing the underlying premise of the 3 issues this Court has requested the parties to review, the Appellee respectfully disagrees with the contention that the revocable Jennifer Fowler Living Trust "automatically became irrevocable upon her death".

I realize that such a position is not in the normal course of this appellate attorney's 48-year practice and in particular before the appellate courts. Thus, the undersigned feels it necessary and appropriate to state the Appellee's basis for its disagreement with said premise right from the start of this brief and why the Appellee has a solid basis for its disagreement with that premise.

In 2015, a panel of the Court of Appeals ruled that revocable trusts become irrevocable trust upon the death of the settlor in an unpublished decision. This unpublished decision has not been cited previously. The Michigan Court of Appeals in *Sarhan v Markoul, (In re John Markoul Living Tr)*, No 316892 (Mich Ct App Jan 29, 2015) (unpublished) Appellee Supplemental Appendix pp 19 held as stated in the annotation to section MCL 700.7605 of the Michigan Probate Sourcebook, With Commentary by John H. Martin and Mark Harder, Reporters for the EPIC and MTC Drafting Committees, Probate and & Estate Planning Section (current to 02/06/2026) the following:

"In considering the validity of a claim for exempt property brought with respect to a decedent's revocable, living trust, the court of appeals held that §7605 (1) "*applies only to trusts that remain revocable at death*" and "*the trust in this case became irrevocable upon death*" *Sarhan, supra*. Appellee Supplemental Appendix pp 8

When one considers the Court of Appeals unpublished opinion, is it not saying what is factually and legally impossible. The import of that decision is saying that MCL 700.7605(1) applies only to “trusts that remain revocable at death” but then states that a trust cannot “remain revocable at death” because it “became irrevocable upon death.” Thus, MCL 700.7605(1) has no application to any revocable trust created-- once the Settlor has died, and any assets within that revocable trust are no longer subject to MCL 700.7605(1) or MCL 700.3805(3) despite the statutes specifically referencing a “decedent” and “revocable at the settlor’s death”. Why would the 5-year drafting effort of the Michigan Trust Code Commission create such an illogical result, particularly with the UTC and the long history of Michigan law governing revocable trusts?

Since the Court of Appeals unpublished 2015 decision in *Sarhan, supra*, the Annotation to MCL 700.7605 has continuously published the following:

“The court of appeals interpretation of the trust and statute is highly questionable and, in the Reporter’s opinion, is a flagrant error and misreading the statute. Under the Court’s interpretation, the revocable, living trusts in widespread use as estate planning devices and will substitutes will never be subject to expenses, claims and allowances in clear contravention of long-standing law and the intentions of the drafters of the MTC. Moreover, it appears from the facts of the case that this conclusion may not have been necessary to resolve the case.” See Sup Appx pp8.

The importance of the above stated commentary is grounded in the unique position that the two Reporters for the EPIC and MTC Drafting Committees held during the “five-year drafting effort” prior the enactment of the Michigan Trust Code. (MTC).

In the undersigned’s opinion, based upon his experience in the review of Annotation’s published commentary, there has never been a starker and clearer objection to an appellate court’s opinion, published on non-published that expressed that

such an opinion “is a flagrant error and misreading the statute” and would have the consequence of having resulted in a “clear contravention of long-standing law and the intentions of the drafters of the MTC”.

However, it is hard to believe that there wouldn’t be a more knowledgeable legal scholar to form such an opinion than Mark K. Harder who “chaired the Michigan Trust Code Committee of the SBM Probate and Estate Planning Section and served as a reporter for the Trust Code drafting project.”, particularly since he served in that capacity during the “five-year drafting effort.” *Michigan Bar Journal*, Introducing the Michigan Trust Code, May 2010, pp 24-27. (See Appellee’s Supplemental Appendix pp 11).

In the above stated article, Reporter Harder stated that:

“A guiding principle throughout the drafting process was to preserve longstanding Michigan law absent significant procedural or policy benefits from changing the law.” (pg 25)

“The MTC continues a number of provisions found in current law:

- It retains provisions for claims against a decedent’s revocable trust when the probate estate does not exist or is inadequate to pay claims
- It retains provisions for claims against a decedent’s revocable trust when the probate estate does not exist or is inadequate to pay claims.” (pg 26).

Reporter Harder’s opinion is buttressed by a subsequent opinion of a Michigan Court of Appeals refuting an attempt by an appellant to mischaracterize a “revocable trust” as becoming an “irrevocable trust” at time of death. In the matter of *Sparling v Sparling*, No. 355843 (Mich Ct App June 16, 2022) (Unpublished) the Court of Appeals held:

There is no dispute that the Irrevocable Trust was not revocable at Walter’s death. Moreover, John has offered this Court no authority that this Court should ignore the plain words of the statute when deciding this issue. The Irrevocable Trust simply does not fall within the ambit of MCL 700.7604, and we emphatically reject John’s suggestion that we ignore the words in the

statute. See *Mich Ass'n of Home Builders*, 504 Mich at 212 (“Where the statutory language is clear and unambiguous, the statute must be applied as written.”) (quotation marks and citations omitted) (alteration in original)

Perhaps in anticipation of the issues with the preceding argument, John claims that the reference to revocable trusts applies equally to irrevocable trusts because once a settlor is deceased, **all the settlor’s trusts become irrevocable. This argument, however, again ignores the plain words of the statute, which clearly focuses on the time period immediately preceding the settlor’s death, not after.** To read the statute otherwise would render the term “revocable” surplusage, as the qualifier would be unnecessary under John’s interpretation. See *Ayotte v Dep’t of Health and Human Servs*, 337 Mich App 29, 39; 972 NW2d 282 (2021) (stating this Court will avoid a construction that would render any part of the statute surplusage or nugatory) (quotation marks and citations omitted). In other words, if the **Legislature intended that all trusts—revocable or irrevocable—were subject to MCL 700.7604, it would not have needed to add the phrase “revocable at the settlor’s death.”** Accordingly the trial court did not err when it denied John’s motion for summary disposition on the basis that MCL 700.7604 barred Mary’s claims. See Appellee Sup Appx p 24-33; 29

In this matter, the Court of Appeals recognized the significance of the language in the MTC which defined the revocable Jennifer Fowler Living Trust at the time of her death, not after as well:

“As already noted, MCL 700.7605 (1) allows a creditor of a decedent’s estate to reach assets held by the decedent’s revocable trust when the estate contains insufficient assets to satisfy the claim. Preliminarily, we reject any suggestion by Jennifer’s trust that because the life insurance proceeds did not become property until after Jennifer died, they are not subject to MCL 700.7605(1) in the first instance. Nothing in the language of MCL 700.7605(1) limits its scope in property that only became trust property before a settlor’s death. On the contrary, the statute plainly applies to “the property of a trust,” which goes on to describe as referring to a trust that was revocable during the settlor’s lifetime. It is undisputed that Jennifer’s trust is the type of revocable trust referred to in MCL 700.7605(1). Further, it is undisputed that Jennifer’s life insurance policy named her trust as beneficiary. By virtue of that designation, the life insurance proceeds became “property of a trust”, bringing them within the scope of MCL 700.7605(1).” (page 9 of Court of Appeal decision)

It should be noted that the above stated Reporters included the Court of Appeal decision rendered in this matter to the commentary under MCL 700.7605, with no negative commentary to suggest that it was not in accord with both the historical or current construct of the applicable statutory provisions of the MTC.

In a case in which the court's analysis seemed to fall short, the court of appeals overturned a probate court determination that 401(k) account proceeds payable to the decedent's trust were exempt from attachment under MCL 700.7605(2). The court of appeals also affirmed the same probate court's determination that life insurance proceeds payable to the decedent's trust were not exempt from claims of creditors. *Spacil v Brooks (In re Estate of Fowler)* Nos 365600,365603,365610, \_\_ Mich App \_\_, \_\_ NW3d \_\_ (July 18, 2024). (See Appellee's Supplemental Appendix pp 7.)

The Appellant's arguments are directly contrary to the drafters of EPIC and MTC as adopted by the legislature's clear intent as set forth in numerous statutory provisions, but most prominently in MCL 700.3805(3) and MCL 700.7605(1). The Appellee's arguments set forth hereafter hopefully will illustrate that the statutory construct of MCL 700.7605(1) and MCL 700.3805(3) along with the entire provisions of EPIC and MTC were clearly intended to provide that the Appellant is entitled to recover her judgment against the deceased Jennifer Fowler estate for her conduct of causing a wrongful death while she was alive and that said process for recovery is clearly spelled out in both EPIC and the MTC.

Finally, if the 401(k) plan proceeds and the Metropolitan Life Insurance policy (an insurance contract) are not to be considered "property" of the only actual created trust under the requirements of MCL 700.7402(1), then at the very least, they should be considered nonprobate transfers under MCL 700.6101 and subject to MCL 700.3805 and in addition as to the insurance contract proceeds MCL 500.2207 is applicable as well.

## ARGUMENT I

**THE COURT OF APPEALS CORRECTLY DECIDED THAT THE REVOCABLE JENNIFER FOWLER LIVING TRUST, WHICH RECEIVED A LUMP SUM PAYMENT INTO SAID TRUST, FROM THE DTE SAVINGS AND STOCK OWNERSHIP PLAN AND THE LIFE INSURANCE PROCEEDS FROM THE METROPOLITAN LIFE INSURANCE WAS AT THE TIME OF HER DEATH, THE PROPERTY OF AND CONTINUED TO BE THE PROPERTY OF THE REVOCABLE JENNIFER FOWLER LIVING TRUST.**

**a. Undisputed facts:**

The following facts are not in dispute:

1. The decedent Jennifer Fowler, during her lifetime never created nor voiced any intention to create an irrevocable trust under Michigan law.
2. The only trust document that the decedent Jennifer Fowler authorized and signed into existence during her lifetime was the revocable Jennifer Fowler Living Trust.
3. In the creation of the revocable Jennifer Fowler Living Trust, the decedent Jennifer Fowler retained the *sole* power to manage and control her property and never relinquished that authority at any time in her lifetime.
4. The revocable Jennifer Fowler Living Trust document gave her the sole authority to revoke said trust at any time up to and at the moment of her death.
5. The revocable Jennifer Fowler Living Trust document contains no provision(s) providing that the Jennifer Fowler Living Trust is to be considered as another type of “trust” and that the provisions within her revocable trust for the handling of her trust and the property of which she had sole control and dominion over were to be handled differently after her death.

6. The beneficiary designation of both the 401(k) plan and the Metropolitan Life Insurance policy did not name or suggest any other trust that might be in existence at the time of the decedent's death, but rather specifically named the **revocable Jennifer Fowler Living Trust** as the recipient of the respective funds to be paid over into said trust upon her death.

**b. The starting point of any analysis as to the ultimate determination of the distribution of the decedent's property is the decedent's intent.**

MCL 700.7506(1)(b) states:

*After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that at the settlor's death was revocable by the settlor, either alone or in conjunction with another person, is subject to expenses, claims and allowances as provided in section 7605.*

MCL 700.7506(1)(b) along with numerous other provisions of EPIC and Michigan case law acknowledge the overriding importance of considering the "intent" of the Settlor/Grantor in making determinations as to the distribution of the decedent's property.

This Supreme Court provided the historical framework for EPIC in *In re Mardigian Estate*, 502 Mich 154 (2018) wherein it held:

One of the underlying purposes and policies of EPIC is to "discover and make effective a decedent's *intent* in distribution of the decedent's property," MCL 700.1201(b) (emphasis added), but this purpose long predates EPIC and is entrenched deeply within the history of this state's probate law. Discovering and giving effect to this intent has been viewed as the foundational standard of probate law for centuries. See, e.g. *In Blodgett's Estate*, 197 Mich 455, 461, 163 N. W. 907 (1917) (citing seventeenth-century jurist Lord Coke for the proposition that a testator's intent constitutes "the **polar star** to guide judges in their determination"). See also *id*, at 461, 163 N. W. 907, quoting 4 Kent, Commentaries on American Law (14<sup>th</sup> ed), p.534 (The intention of the testator is the first and great object of inquiry; and to this object technical rules are to a certain extent, made subservient") *Palms v Palms*, 68 Mich 355, 378, 36 N. W. 419 (1888)

The same principles apply to trust documents *in re Maloney Trust*, 423 Mich 632, 639, (1985) In order to ascertain the decedent's intent, the testamentary document is read as a whole and, when it contains no ambiguity, enforce it as written. *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 693-694 (2015).

The Court of Appeals in *Department of Health & Human Services*, \_\_Mich App \_\_; (for publication, decided November 21, 2024) stated:

The goal when interpreting a statute is to give effect to legislative intent by examining its plain language. *McNeil v Charlevoix Co*, 484 Mich 69, 75; 772 NW2d 18 (2009). "Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed – no further judicial construction is required or permitted, and the statute must be enforced as written." *In re Petition of Attorney General for Investigative Subpoenas*, 282 Mich App 585, 591; 766 NW2d 675 (2009) (quotation marks and citation omitted) "In determining the Legislature's intent, statutory provisions must be read in the context of the whole statute and harmonized with the statute's other provisions." *Walt Disney Co. v Eubanks*, 345 Mich App 213,223; 4 NW3d 797, (2023) (quotation marks and citation omitted). "It is well established that different provisions of a statute that relate to the same subject matter are in *para materia* and must be read together as one law." *TCF Nat'l Bank v Dep't of Treasury*, 330 Mich App 596, 609; 950 NW2d 469 (2019) (quotation marks and citation omitted).

Most recently, the Court of Appeals held that when interpreting a statute courts "use the 'fair reading' standard, where the text, context, and statutory history are consulted to construe a statute as a reasonable reader would do." *Eagen v Detroit*, \_\_Mich App \_\_, \_\_ (2025).

The estate plan that the decedent Jennifer Fowler chose consists of two documents, a will and a revocable trust. Both documents set forth that the valid claims against her estate are to be paid. The Jennifer Fowler Last Will and Testament (Joint Exhibit 1, Article 6, Section 1, Appellant's App'x p 4) states:

I direct my Personal Representative to consult with the Trustee of my Trust to determine whether any expense or tax shall be paid from my trust or from my probate estate. I direct that all my just debts, claims, funeral expenses, expenses of administration of my estate, income taxes, inheritance, taxes, death taxes and succession duties of every kind and nature, that may be assessed or become payable because of my death, shall be paid as soon after my death as may be found convenient.

The Jennifer Fowler Revocable Trust (Joint Exhibit 2- Article 6 Section 2, Appellee's App'x pp 32-33) states:

"My Trustee is authorized, but not directed to pay the following:

\*\*\*

Legally enforceable claims against me or my estate. "

The revocable Jennifer Fowler Living Trust clearly addressed the circumstances which occurred herein, wherein the Estate of Jennifer Fowler has inadequate assets to satisfy a valid claim against her estate.

### **Retirement Plans**

"Despite any conflicting provisions in my trust, no expenses, claims, or death taxes shall be paid out of any retirement plan assets which become trust property as a result of my death, unless my Trustee has first used all other assets available to my Trustee".

(Joint Trial Exhibit 2-Article 6 Section 6(a)-pg 6-4, Appellee's App'x p 35)

The estate plan that the Decedent Jennifer Fowler put in place clearly not only stated the intention that valid claims were to be paid from her assets she held at the time of her death, but the priority in which claims would be paid. A review of the extensive document will also clearly demonstrate that the Drafter of the document was well aware of both the provisions of EPIC and MTC as to the payment of valid claims on behalf of the estate and the provisions that relate to the payment of any insufficiency from funds of a revocable trust.

The revocable Jennifer Fowler Living Trust states:

**Section 2. Upon My Death**

“My Trustee shall make every reasonable effort to collect all sums made payable to my trust or my Trustee under all life insurance policies, annuities, long term care insurance policies, or other non-retirement third-party beneficiary contracts, which provide for death proceeds made payable to or owned by my trust.

\*\*\*\*\*

My Trustee shall have the right, in its sole and absolute discretion, to elect to receive any retirement plan death proceeds either in a lump sum or in any other manner permitted by the terms of the particular retirement plan.

(Joint Trial Exhibit 2-Article 5 Section 2-pg 5-2, Appellee’s App’x p 26)

The DTE 401(k) plan only provided for a lump sum payment upon the plan holder’s death. If the 401(k) plan assets are not found to be owed to the revocable Jennifer Fowler Living Trust, then exactly who owns that asset after her death. She never designated any entity other than her revocable Jennifer Fowler Living Trust. The same is true of the Metropolitan Life Insurance policy for which she never designated any other entity for the recipient of her insurance proceeds than her revocable Jennifer Fowler Living Trust. If ultimately, the “property” is not the revocable Jennifer Fowler Living Trust at the time of her death, then, it does not transfer by virtue of a trust document but rather a non-probate transfer to her estate. Does it not seem highly incongruent on behalf of the Appellant, to argue that the Trustee has all the powers allocated by the revocable Jennifer Fowler Living Trust, (including who are to be the residual beneficiaries after all expenses and claims are paid) but is no longer bound to follow the Settlor’s stated intent to pay the

claims of the estate as well as the statutory provisions of EPIC and the MTC that specifically require the transfer of trust funds for the payments of valid claims from a trust for decedent's estate for which there are insufficient assets.

**c. The actual effect of the Settlor's (Jennifer Fowler) death upon the revocable Jennifer Fowler Living Trust.**

At the time of Jennifer Fowler's death, the only trust she had created was the revocable Jennifer Fowler Living Trust. MCL 700.7402 (which is verbatim from the Uniform Trust Code (UTC) section 402) states:

(1) A trust is created ***only*** if all of the following apply:

(a) The settlor has capacity to create the trust.

Again, it must be reiterated that the only trust that the decedent created was the revocable Jennifer Fowler Living Trust and it is undisputed that trust is a revocable trust as defined pursuant to the Michigan Trust Code (MTC).

"Revocable" is specifically defined in MCL 700.7103 as follows:

(h) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. *A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation*, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

Obviously, when the settlor (Jennifer Fowler) died, she now has achieved the ultimate "settlor's lack of capacity to exercise the power of revocation" but as the above stated proposition states "A trust's characterization as revocable is not affected by the settlor's lack of capacity". Appellant alleges that the revocable Jennifer Fowler Living Trust somehow is transformed into an irrevocable trust. That simply is not true. Rather, the revocable Jennifer Fowler Living Trust retains its

legal status of a revocable trust as defined within the MTC and the trust continues to be administered as the document was created and in accordance with the stated intent of the Settlor. The only provision that can no longer be exercised is that of the exclusive right of the Settlor to revoke or amend the revocable trust, as that authority was reserved to the Settlor up until the time of her death. The revocable trust does not lose its characterization as a revocable trust now that the power to revoke or amend is lost due to the incapacity (death) of the settlor Jennifer Fowler.

The only avenue for the creation of an “irrevocable trust” which would dictate the property disposition of Jennifer Fowler would have been during her lifetime when she had the “capacity to create the trust” per MCL 700.7402(1). Prior to her death, she would have had to revoke the Jennifer Fowler Living Trust and willingly and deliberately consented to placing her property into an irrevocable trust for which she would no longer have control or the ability to revoke or amend said trust. Again, upon her death, she would no longer have the capacity to create a trust under the MTC.

An accurate characterization of the revocable Jennifer Fowler Living Trust, after her death, is that the trust would be administered in accordance with the terms of the only existing trust that the settlor Jennifer Fowler created and in accordance with her stated intent. Obviously, under the terms of the revocable Jennifer Fowler Living Trust, the successor Trustee would have no authority to revoke, change or amend the terms of the trust as that was reserved solely to the settlor Jennifer

Fowler, while she had the capacity to do so.

Thus, the nature of the revocable Jennifer Fowler Living Trust is not changed by her death, rather during the administration of the Trust, the Trustee would be bound by the terms of the Trust as it existed at the time of her death and any attempt to deviate would be prevented by the proper application of both the terms of the revocable Jennifer Fowler Living Trust and those EPIC and MTC provisions applicable to the proper distribution of the decedent's property associated with the Trust.

**d. In order to arrive at the correct interpretation of the provisions of the MTC, the Court is required to review the “text, context and statutory history” --Eagen v Detroit, supra.**

Not cited previously, the Michigan Court of Appeals in *Sarhan v Markoul*, (*In re John Markoul Living Tr*), No 316892 (Mich Ct App Jan 29, 2015) (unpublished) Appelle Supp Appx pp 19 held as stated in the annotation to section MCL 700.7605 of the Michigan Probate Sourcebook, With Commentary by John H. Martin and Mark Harder, Reporters for the EPIC and MTC Drafting Committees, Probate and & Estate Planning Section( current to 02/06/2026) the following:

“In considering the validity of a claim for exempt property brought with respect to a decedent's revocable, living trust, the court of appeals held that §7605 (1) “applies only to trusts that remain revocable at death” and “the trust in this case became irrevocable upon death” *Sarhan, supra*.

Since the Court of Appeals unpublished 2015 decision in *Sarhan, supra*, the Annotation has continuously published the following:

“The court of appeals interpretation of the trust and statute is highly questionable and, in the Reporter’s opinion, is a flagrant error and misreading the statute. Under the Court’s interpretation, the revocable, living trusts in widespread use as estate planning devices and will substitutes will never be subject to expenses, claims and allowances in clear contravention of long-standing law and the intentions of the drafters of the MTC. Moreover, it appears from the facts of the case that this conclusion may not have been necessary to resolve the case.” Sup Appx pp 8.

The importance of the above stated commentary is grounded in the unique position that the two Reporters for the EPIC and MTC Drafting Committees held during the “five-year drafting effort” prior the enactment of the Michigan Trust Code. (MTC).

Mark K. Harder “chaired the Michigan Trust Code Committee of the SBM Probate and Estate Planning Section and served as a reporter for the Trust Code drafting project.” *Michigan Bar Journal*, Introducing the Michigan Trust Code, May 2010, pp 24-27. See Appellee’s Supplemental Appendix pp 10-13.

In the above stated article (Appellee’s Supplemental Appendix pp 10-13), Reporter Harder stated that:

“A guiding principle throughout the drafting process was to preserve longstanding Michigan law absent significant procedural or policy benefits from changing the law.” (pg 25)

“The MTC continues a number of provisions found in current law:

- It retains provisions for claims against a decedent’s revocable trust when the probate estate does not exist or is inadequate to pay claims.
- It retains provisions for claims against a decedent’s revocable trust when the probate estate does not exist or is inadequate to pay claims.” (pg 26)

John H. Martin, “served as the reporter for the Drafting Committee of the Estates and Protected Individuals Code and is the author of the commentary to that code published annually by ICLE.” (See Appellee’s Supplemental Appendix pp 15).

It should be noted that the above stated Reporters included the Court of Appeal decision rendered in this matter to the commentary under MCL 700.7605, with no negative commentary to suggest that it was not in accord with both the historical or current construct of the applicable statutory provisions of the MTC.

In a case in which the court’s analysis seemed to fall short, the court of appeals overturned a probate court determination that 401(k) account proceeds payable to the decedent’s trust were exempt from attachment under MCL 700.7605(2). The court of appeals also affirmed the same probate court’s determination that life insurance proceeds payable to the decedent’s trust were not exempt from claims of creditors. *Spacil v Brooks (In re Estate of Fowler)* Nos 365600,365603,365610, \_\_ Mich App \_\_, \_\_NW3d \_\_ (July 18, 2024). See Appellee’s Supplemental Appendix pp 7.

e. **Historical context of a revocable trust being subject to creditor’s claims.**

The Michigan Trust Code (MTC), Reporter’s Comment states:

“The MTC relies upon the structure and provisions of the Uniform Trust Code (UTC) for many of its provisions. However, the **MTC is a uniquely Michigan document that draws from both the UTC and prior Michigan law to preserve long-established procedures, practices and principles concerning trusts in Michigan while also filling the numerous gaps that existed in the law. On balance the MTC tends to preserve long-standing Michigan law absent significant procedural or policy benefits from changing the law.**”

The Michigan Trust Code (MTC), Reporter’s Comment as to MCL 700.7605 states:

Under Michigan law, assets in a revocable trust have long been subject to claims of the settlor’s creditors, both during lifetime and at death. See MCL 556.128,.131. This section does not alter those provisions. Beginning with §7605, the remaining parts of Part 6 articulate a mechanism for determining and settling those claims at death ....

Subsection 760-5(1) provides that the assets of a revocable trust are liable for the payment of administration expenses; claims against the settlor; and homestead, family and exempt property allowance. However, that liability exists only to the extent that the probate estate is insufficient to satisfy those items.

If, at death, the settlor of a trust held a power of revocation over the trust, *the assets of that trust* (except as provided in subsections (2), (3) and (4)) are exposed to debts, expenses, and allowances. “

The Legislature clearly encapsulated the “existing law” as it applied to revocable trusts and creditors in MCL 700.7506 (Part 6 – referenced above) as set forth below:

700.7506 Creditor’s claim against settlor; “settlor” explained

- (1) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:
  - (a) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor’s creditors.
  - (b) After the death of a settlor, and subject to the settlor’s right to direct the source from which liabilities will be paid, **the property of a trust that at the settlor’s death was revocable by the settlor**, either alone or in conjunction with another person, is subject to expenses, claims, and allowances as provided in section 7605.

The Commentary to the *Michigan Probate Sourcebook*, Martin/Harder (current to 02/06/2026); on MCL 700.7606, further highlights the statutory construct which was intended to provide creditors with relief involving revocable trusts.

Subsection (1) provides a series of rules dealing with revocable trusts, claims following death, and irrevocable trusts. A spendthrift provision cannot be used to override these rules. §7506(1). Subsection (2) describes the amount that can be reached when more than one settlor contributes to a trust. Subsections (3) and (4) address issues that arise in the context of more sophisticated planning techniques.

**Paragraph (1)(a) codifies the common-law rule that a creditor of the settlor can reach the assets of the settlor's revocable trust. See Restatement (Second) of Trusts §156; *Colman v Department of Mental Health (In re Hertsberg Inter Vivos Tr)*, 457 Mich 430, 578 NW2d 289 (1998).**

From its enactment, EPIC contained a means by which the assets of a decedent's revocable trust are made available to satisfy the claims against the decedent's probate estate if there is no estate or the resources of the probate estate are insufficient to satisfy all of the claims. The MTC retains these rules, which are found in MCL 700.7605-.7615. Paragraph 7506(1)(b) confirms that the settlor's revocable trust remains subject to expenses, claims, and allowances after the settlor's death.

Paragraph (1)I is derived from UTC §505I. It describes the maximum amount that can be reached by a creditor from an irrevocable trust. It is consistent with Michigan common law. See *Vander Weele v Commissioner*, 27 TC 340 (1956), *aff'd*, 254 F2d 895 (6<sup>th</sup> Cir 1958).

The Jennifer Fowler Living Trust is a revocable trust and is also subject to the statutory provisions of MCL 700.7605(1), which is also consistent with long standing Michigan case law that a revocable trust is subject to creditors. The terms of MCL 700.7605(1) provide:

**700.7605 Liability of trust for expenses, claims, and allowances.**

Sec. 7605.

- (1) **The property of a trust** over which the settlor has the right without regard to the settlor's mental capacity, ***at his or her death***, either alone or in conjunction with another person, **to revoke the trust** and revest principal in himself or herself is subject to all of the following, but only to the extent that the settlor's property subject to probate administration is insufficient to satisfy the following expenses, claims, and allowances:
- (a) The administration expenses of the settlor's estate.
  - (b) An enforceable and timely presented claim of a creditor of the settlor, including a claim for the settlor's funeral and burial expenses.
  - (c) Homestead, family, and exempt property allowances.

The key phrases in both MCL 700.7506 of “**the property of a trust that at the settlor’s death was revocable by the settlor**” and MCL 700.7605 of “**The property of a trust ... at his or her death, either alone or in conjunction with another person, to revoke the trust**” are critical to understanding and appreciating the clear import of the both the substantive and intent of both EPIC and the MTC in maintaining the long honored determination in both legislation and court holdings that creditors can reach the assets of the settlor’s revocable trust.

A prior attempt by an appellant to mischaracterize a “revocable trust” as becoming an “irrevocable trust” at time of death has already been argued and decided in the matter of *Sparling v Sparling*, No. 355843 (Mich Ct App June 16, 2022) (Unpublished). See Appellee Supplemental Appendix pp 24 The Court of Appeals held:

There is no dispute that the Irrevocable Trust was not revocable at Walter’s death. Moreover, John has offered this Court no authority that this Court should ignore the plain words of the statute when deciding this issue. The Irrevocable Trust simply does not fall within the ambit of MCL 700.7604, and we emphatically reject John’s suggestion that we ignore the words in the statute. See *Mich Ass’n of Home Builders*, 504 Mich at 212 (“Where the statutory language is clear and unambiguous, the statute must be applied as written.”) (quotation marks and citations omitted) (alteration in original)

Perhaps in anticipation of the issues with the preceding argument, John claims that the reference to revocable trusts applies equally to irrevocable trusts because once a settlor is deceased, all the settlor’s trusts become irrevocable. This argument, however, again ignores the plain words of the statute, **which clearly focuses on the time period immediately preceding the settlor’s death, not after.** To read the statute otherwise would render the term “revocable” surplusage, as the qualifier would be unnecessary under John’s interpretation. See *Ayotte v Dep’t of Health and Human Servs*, 337 Mich App 29, 39; 972 NW2d 282 (2021) (stating **this Court will avoid a construction that would render any part of the statute surplusage or nugatory**) (quotation marks and citations omitted). In other

words, if the **Legislature intended that all trusts—revocable or irrevocable—were subject to MCL 700.7604, it would not have needed to add the phrase “revocable at the settlor’s death.”** Accordingly the trial court did not err when it denied John’s motion for summary disposition on the basis that MCL 700.7604 barred Mary’s claims.

The death of a settlor of a revocable trust does not convert or transform a revocable trust into an irrevocable trust which is defined by the MTC as when the Settlor consciously and intentionally gave up their control and ownership of their property to another entity while they had the capacity (alive) to do so.

Rather, the death of a settlor of a revocable trust forever determines the nature of that particular trust as a revocable trust as it exists at the time of the settlor’s death.

The question would have to be asked why the following phrases would be utilized in the MTC if in fact the MTC intended that all settlors’ revocable trusts were transformed into irrevocable trusts upon their death.

MCL 700.7506(1)(b):

*After the death of a settlor, and subject to the settlor’s right to direct the source from which liabilities will be paid, the property of a trust that at the settlor’s death was revocable by the settlor, either alone or in conjunction with another person, is subject to expenses, claims and allowances as provided in section 7605.*

Sec. 7605.

- (2) The property of a trust over which the settlor has the right without regard to the settlor’s mental capacity, **at his or her death**, either alone or in conjunction with another person, **to revoke the trust** and re-vest principal in himself or herself is subject to all of the following, but only to the extent that the settlor’s property subject to probate administration is insufficient to satisfy the following expenses, claims, and allowances:
- (d) The administration expenses of the settlor’s estate.
  - (e) An enforceable and timely presented claim of a creditor of the settlor, including a claim for the settlor’s funeral and burial expenses.

(f) Homestead, family, and exempt property allowances.

MCL 700.7606:

(1) A trustee of a trust described in section 7605(1) shall pay to the personal representative of the settlor's estate the amount that the personal representative certifies in writing to the trustee is required to pay the administration expenses of the settlor's estate; an enforceable and timely presented claim of the settlor, .....

In MCL 700.7607 the MTC set forth rules regarding the priority of payment of expenses and obligations and in particular in section (4) the following:

(a) If the decedent was the settlor of more than 1 trust described in section 7605(1), the charges described in that section are payable pro rata from those trusts based on the gross values of the respective trusts on the date of the decedent's death. Each trustee is entitled to right of contribution as necessary to effect the pro rata liability. The allocation and contribution, however, are subject to provisions in the trust regarding the allocation and burden of the charges. If there is a conflict between the terms of the trusts regarding the allocation and burden of the charges, the decedent's will controls.

Obviously, the drafters of EPIC and MTC consciously addressed a circumstance wherein the "*decedent was the settlor*" ...of a "trust described in section 7605(1)". An argument, that a revocable trust, which is what is described in section 7605(1), automatically is no longer considered a "revocable trust" upon the death of the settlor, but rather becomes an "irrevocable trust" no longer reachable to pay valid claims of the estate, would completely abrogate MCL 700.7506; MCL 700.7605; MCL 700.7606; MCL 700.3805; MCL 556.123 and MCL 700.6101.

It is clear why the Reporter's commentary stated that the unpublished ruling of *Sarhan, supra*, that a revocable trust becomes irrevocable upon death "is flagrant error and misreading of the statute" and a "clear contravention of long-standing law and the intentions of the MTC". If in fact the MTC intended all revocable trusts become irrevocable trusts at the time of the decedent's death it would not have included such terms as "the decedent was the settlor" of a "trust described in section 7605(1)." or "after the death of a settlor, *and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that at the settlor's death was revocable by the settlor*" as the those terms are clearly referencing revocable trusts that existed at the time of the settlor's death will be administered as a definitively named revocable trust and as a direct consequence of the settlor's death as enunciated repeatedly within the MTC.

## ARGUMENT II

**THE COURT OF APPEALS CORRECTLY DECIDED THAT THE REVOCABLE JENNIFER FOWLER LIVING TRUST, WHICH RECEIVED A LUMP SUM PAYMENT INTO SAID TRUST, FROM THE DTE SAVINGS AND STOCK OWNERSHIP PLAN AND THE LIFE INSURANCE PROCEEDS FROM THE METROPOLITAN LIFE INSURANCE WAS AT THE TIME OF HER DEATH, THE PROPERTY OF AND CONTINUED TO BE THE PROPERTY OF THE REVOCABLE JENNIFER FOWLER LIVING TRUST**

Property for which the Settlor Jennifer Fowler had an interest in at time of her death which is designated by her to paid into her revocable trust are trust assets available to satisfy the debts, claims and expenses if her estate assets are insufficient to satisfy those debts, claims and expenses.

The Court of Appeals directly addressed the issue as to whether MCL 700.7605(1) applied to property paid to the revocable Jennifer Fowler Living Trust after her death.

“As already noted, MCL 700.7605 (1) allows a creditor of a decedent’s estate to reach assets held by the decedent’s revocable trust when the estate contains insufficient assets to satisfy the claim. Preliminarily, we reject any suggestion by Jennifer’s trust that because the life insurance proceeds did not become property until after Jennifer died, they are not subject to MCL 700.7605(1) in the first instance. Nothing in the language of MCL 700.7605(1) limits its scope in property that only became trust property before a settlor’s death. On the contrary, the statute plainly applies to “the property of a trust,” which goes on to describe as referring to a trust that was revocable during the settlor’s lifetime. It is undisputed that Jennifer’s trust is the type of revocable trust referred to in MCL 700.7605(1). Further, it is undisputed that Jennifer’s life insurance policy named her trust as beneficiary. By virtue of that designation, the life insurance proceeds became “property of a trust”, bringing them within the scope of MCL 700.7605(1).” (page 9 of Court of Appeal decision)

The Court of Appeals also held in its opinion that:

“After Jennifer’s death, the required lump-sum payment of the 401(k) account funds becomes an asset subject to a creditor’s claim to the extent that the assets in Jennifer’s estate were insufficient to satisfy her debts.” (page 9 of Court of Appeals opinion).

The significance of the Settlor Jennifer Fowler specifically naming the revocable Jennifer Fowler Living Trust as the beneficiary of both her 401(k) plan and Metropolitan Insurance policy proceeds created those proceeds as an asset of the revocable Jennifer Fowler Living Trust as she never revoked or amended those designations prior to her death. Those designations, by the decedent Jennifer Fowler, were obligations that the 401(k) plan and the Metropolitan Life insurance policy were contractually bound to adhere to and such proceeds could not be paid to any other entity or person.

The Jennifer L. Fowler Living Trust specifically provided that:

“I hereby transfer, assign and convey all of my right, title, and interest in and to all my property

“In addition to the above descriptions, any description for referring to my trust shall be effective to transfer title to my trust or to designate my trust as a beneficiary so long as the format indicates that the assets are to be held in a fiduciary capacity.”

(Joint Trial Exhibit 2-Article 3 Section 1-pg 3-1, Appellee’s App’x p 14)

At no time has the Appellant provided any law or statutory construct that would refute the Court of Appeals opinion that “Nothing in the language of MCL 700.7605(1) limits its scope in property that only became trust property before a settlor’s death”.

*Leslie and Stark’s Trust and Estates* treatise at page 123 states:

“To create a valid trust, the settlor must transfer property (or title to property) to the trustee. The definition of ‘property’ for the purpose is broad. *Any current and identifiable interest in property can be trust property. (italicized original)* .... All matters of contingent interests can be trust property.”

Leslie, Melanie, and Stewart E. Stark, *Leslie and Stark’s Trust and Estates*, Available from West Academic (4<sup>th</sup> Edition) West Academic Publishing, 2021

The term “property” is defined in 2 sections of EPIC and one section of POA.

MCL 700.2901(i)

“Property” means **anything** that may be the subject of ownership. Property includes both real and personal property and an interest in property, including a present interest; a future interest; a legal interest; and equitable interest; and interest acquired by testate succession; by intestate or other statutory succession, by succession to a disclaimed interest, or by lapse or release of power of appointment; or an interest that may be acquired under a governing instrument.

MCL 700.1106(x)

“Property” means **anything** that may be subject of ownership, and includes both real and personal property or in interest in real or personal property.

MCL 556.112(a)

“Property” means **any** legal or equitable interest in real or personal property, including choses in action.

At the time of Jennifer Fowler’s death, no one else had any authority as to determine what would become of her property, or her interest in her property, other than herself. Up until then she had the only and absolute authority to determine what would happen to her property upon her death. Up until then, she could have changed the designation of not only the beneficiary of her 401k plan (which was clearly her’s alone interest in the 401k plan) but also the designation of the beneficiary of her Metropolitan insurance policy (contract). At the time of death, the decedent Jennifer Fowler’s determination, (the intent of the Grantor/Settlor), are to be followed by the successor trustee, the Appellee Sherry Spacil, irrespective of what Ms. Spacil may have wanted to happen. If in fact, the decedent Jennifer Fowler had wished to give up her right to make those determinations at an earlier stage than right up to the time of her death, she could

have created an irrevocable trust. The decedent, at any time in her life, did not create an irrevocable trust. What she did was create a revocable Jennifer Fowler Living Trust, that does not become an “irrevocable trust” as a trust instrument has to be created by the Settlor/Grantor. In fact, the revocable Jennifer Fowler Living Trust is still in existence and according to its terms, and the Decedent Jennifer Fowler’s intent is to be followed in the disposition of her property after her death.

The two biggest personal property items the decedent Jennifer Fowler owned or had an ownership interest in were her 401k plan and her Metropolitan insurance contract at the time of her death. Thus, the importance of both MCL 700.7506 and MCL 700.7605 both utilizing the terms as to the Settlor/Grantor’s “the property of a trust that a settlor’s death was revocable by the settlor” language.

In *Lee v Smith*, 310 Mich App 507 (2015) the Court of Appeals held:

The interpretation of a statute is reviewed de novo, as a question of law. *Driver v Naini*, 490 Mich 239, 246; 802 NW2d 311 (2011). A court’s primary goal when interpreting a statute is to discern legislative intent first by examining the plain language of the statute. *Id.* at 246- 247. **Courts construe the words in a statute in light of their ordinary meaning and their context within the statute as a whole.** *Johnson v Recca*, 492 Mich 169,177; 821 NW2d 520 (2012). A court must give effect to every word, phrase, and clause, and avoid an interpretation that renders any part of a statute nugatory or surplusage. *Id.* **Statutory provisions must also be read in the context of the entire act.** *Driver*, 490 Mich at 247. **It is presumed that the Legislature was aware of judicial interpretations of the existing law when passing legislation.** *People v Likine*, 492 Mich 367, 398 n 61; 823 NW2d 50 (2012). When statutory language is clear and unambiguous, courts enforce the language as written. *Lafarge Midwest, Inc v eDetroit*, 2QO Mich App 240. 246-247; 801 NW2d 629 (2010). A statutory provision is ambiguous only when it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *Id.* at 247.

**(B) Revocable Trust v Irrevocable Trust**

A revocable trust is created during a person's lifetime and allows the Settlor/Grantor (the decedent Jennifer Fowler) the power to change, modify or terminate the revocable trust while she is legally competent to do so. It is often, as it is in this case, the legal instrument that, as part of the Settlor/Grantor's estate plan, serves as the vehicle through which the settlor/grantor's assets flow at death. Thus, the revocable trust allows the grantor to manage and control their assets while also designating how those assets should be handled after death.

"Revocable" is specifically defined in MCL 700.7103 as follows:

- (i) "Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a durable power of attorney, a conservator of the settlor, or a plenary guardian of the settlor is serving.

The definition of an "irrevocable trust" is found in MCL 556.112(p), the Powers of Appointment Act of 1967 (POA) which states:

- (p) "Irrevocable trust" means a trust over which no person holds a power of revocation. A power holder's lack of capacity to exercise a power of revocation negates the power of revocation unless an agent of the power holder under a durable power of attorney, a conservator of the power holder, or a plenary guardian of the power holder is serving and the agent, conservator, or guardian is authorized to exercise the power of revocation.

The distinction between a “revocable trust” and an “irrevocable trust” is determined at the time of the creation of the trust wherein the Settlor/Grantor determines if he or she wished to completely give up assets and their entitlement to manage their assets during their lifetime

At no time did the Settlor/Grantor decedent ever revoke her revocable Jennifer Fowler Living Trust. At the time of her death, decedent Jennifer Fowler had not exercised any action described above to revoke her revocable trust.

The three major reasons that “irrevocable trusts” are recommended by probate attorneys and financial counselors are as follows:

1. A desire to minimize estate taxes
2. Maintaining status as eligible for government programs (Medicare/Medicaid)
3. Protection of assets from creditors.

The Jennifer Fowler Living Trust was unqualifiedly a revocable trust that was entered into by the decedent Jennifer Fowler to manage and control her assets while living and allowing her to determine how her assets should be handled after her death. The successor trustee is obligated to fulfill the decedent Settlor/Grantor’s intent, as expressed in the revocable Jennifer Fowler Living Trust terms, established by the trust.

Up to and at the time of her death, the decedent Jennifer Fowler never created an “irrevocable trust” and the revocable Jennifer Fowler Living Trust clearly does not have any of the alleged “advantages” upon her death that an “irrevocable trust” would afford her.

**(C) (MCL 700.7605(4) has no application to the facts and law herein.**

MCL 700.7605(4) reads:

- (4) For purposes of this section, property held or received by a trust to the extent that the property would not have been subject to a claim against the settlor's estate if it had been paid directly to a trust created under the settlor's will **or other than to the settlor's estate**, or property received from a trust described in this section, shall not be considered trust property available for the payment of administration expenses, a claim against a settlor's estate, or an allowance described in subsection (1).

The above statutory provision applies only to "property held or received by a trust"

if the following exists:

**a. Paid directly to a trust created under a settlor's will**

The trust described above is a "testamentary trust" often utilized in wills to set up a trust for the benefit of minor children or other dependents for which the testator of the will had provided that assets of the testator's estate are set aside for a period of time to provide for support and care for said minors or dependents.

**b. Paid directly to a trust "other than to a settlor's estate"**

This would require that the payments would be paid directly to a trust that would not entail the "settlor's estate". The Estates and Protected Individuals Code (EPIC) define an "Estate" as follows in MCL 700.1104(b):

- (b) 'Estate' **includes** the **property** of the decedent, **trust**, or other person whose **affairs are subject to this act as the property is originally constituted and as it exists throughout administration**. Estate also includes the rights described in sections **3805**,**3922** and **7606** to collect from others amounts necessary to pay claims, allowances and taxes.

These proceeds are not being paid to an entity described above as “other than to the settlor’s estate.” A trust of that nature would be a “special needs trust” or another vehicle wherein the Settlor gives up its right to the use of the property, and places it in a trust that provides for ownership by someone or something other than the ‘settlor’s estate.’”

Isn’t it a fair statement that the decedent’s naming of the 401(k) plan proceeds to be paid to the revocable Jennifer Fowler Living Trust and the decedent naming of the Metropolitan insurance proceeds are to be paid to the revocable Jennifer Fowler Living Trust demonstrate what is to be “originally constituted” in evaluating what properly belongs as the property of the decedent’s estate.

The proceeds of both the 401(k) plan and the Metropolitan insurance policy are both directly payable to the revocable Jennifer Fowler Trust as “originally constituted and as it exists throughout administration.” The original constituted trust is the revocable Jennifer Fowler Trust and that is the only trust that can and is being utilized throughout the administration of Jennifer Folwer’s estate.

Despite the clear fact that Section 1 of MCL 700.7605 clearly and unambiguously provides that a revocable trust is subject to the valid claims of creditors, by clear definition in EPIC, both the 401k funds and the proceeds of the Metropolitan insurance contract were in fact paid to the Settlor/Grantor Jennifer Fowler’s estate as defined in MCL 700.1104(b)

The Estates and Protected Individuals Code (EPIC) define an “Estate” as follows in MCL 700.1104(b):

- (c) ‘Estate’ **includes** the **property** of the decedent, **trust**, or other person whose **affairs are subject to this act as the property is originally constituted and as it exists throughout administration.** Estate also includes the rights described in sections **3805,3922** and **7606** to collect from others amounts necessary to pay claims, allowances and taxes.

MCL 700.7606 specifically requires:

- (2) **A trustee of a trust described in section 7605(1) shall pay to the personal representative of the settlor's estate the amount that the personal representative certifies in writing to the trustee is required to pay the administration expenses of the settlor's estate; an enforceable and timely presented claim of the settlor, .....**

In MCL 700.7607 EPIC and the MTC set forth rules regarding the priority of payment of expenses and obligations and in particular in section (4) the following:

- (b) If the **decedent was the settlor of more than 1 trust described in section 7605(1)**, the charges described in that section are payable pro rata from those trusts based on the gross values of the respective trusts on the date of the decedent's death. Each trustee is entitled to right of contribution as necessary to effect the pro rata liability. The allocation and contribution, however, are subject to provisions in the trust regarding the allocation and burden of the charges. If there is a conflict between the terms of the trusts regarding the allocation and burden of the charges, the **decedent's will controls**.

Obviously, the drafters of EPIC and MTC consciously addressed a circumstance wherein the "decedent was the settlor" ...of a "trust described in section 7605(1)". An argument, that a revocable trust which is what is described in section 7605(1), automatically is no longer considered a "revocable trust" upon the death of the settlor, but rather becomes an "irrevocable trust" no longer reachable to pay valid claims of the estate, would completely abrogate MCL 700.7607 and for that matter MCL 700.7606.

The 401k funds and Metropolitan insurance proceeds are assets of the revocable trust and are only payable to the revocable Jennifer Fowler Living Trust, which upon her death becomes a part of the decedent Jennifer Fowler's estate. Those funds and proceeds are not being paid to some person or entity that would qualify as "other than the settlor's estate".

The “other than the settlor’s estate” is intended to cover circumstances wherein the recipient is not the Settlor/Grantor’s trust which is part and parcel of the decedent’s estate. Having a revocable trust is often marketed as a way of avoiding having to have your estate probated, but a revocable trust obviously can obviously be a source of satisfaction of a deficient valid claim of a creditor in a decedent’s estate as clearly recognized by several statutory provisions including MCL 700.3805 and MCL 700.7606 as identified in MCL 700.1104(b) above.

**(D) EPIC also provides the clear and proper framework for the resolution of this matter.**

In addition to the pertinent sections of the MTC which have been set forth above, the Plaintiff Estate of Helen Fowler Estate’s claim against the Estate of Jennifer Fowler is also governed by MCL 700.3805(3).

MCL 700.3805(3) deals specifically with the circumstance wherein an estate has insufficient funds, including the decedent’s revocable trust to pay the valid claims.

- (3) If there are insufficient assets to pay all claims in full or to satisfy homestead allowance, family allowance, and exempt property, the personal representative shall certify the amount and nature of the deficiency to the trustee of a trust described in section 7605(1) for payment by the trustee in accordance with section 7606. **If the personal representative is aware of other nonprobate transfers that may be liable for claims and allowances, then, unless the will provides otherwise, the personal representative *shall* proceed to collect the deficiency in a manner reasonable under the circumstances so that each nonprobate transfer, including those made under a trust described in section 7605(1) bears a proportionate share or equitable share of the total burden.**

As the commentary to MCL 700.3805(3) states:

Subsection (3) is new. It states that the personal representative is to certify to the trustee of the **decedent's revocable trust** the amount needed to pay claims, exemptions, and allowances that is not available in the probate estate. This provision should be read in conjunction with MCL700.7606 (formerly 7502). Subsection (3) also directs the personal representative to apportion the burden of that deficiency among all transferees of nonprobate assets (if the nonprobate property is liable for claims, e.g., assets subject to a general power of appointment), not just a revocable trust. This section entitles a personal representative to look to assets passing as a result of death or other than by means of probate for contribution toward the payment of claims and allowances, unless the will provides otherwise.

Again, EPIC is quite clear in MCL 700.3805(3) that “a trust described in section 7605(1)” (revocable trust) is definitively and without question a source of satisfying “claims and allowances”, along with any other source of nonprobate transfers.

MCL 700.3805(3) also provides that if the assets of the revocable trust are insufficient, then the personal representative should look to nonprobate transfers which are defined in MCL 700.6101(1) to include:

- (1) A provision for an nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument that is intended to result in 1 or more of the following:
  - (a) Money or another benefit due to, controlled by, or owned by the decedent before death is paid after the descendant's death to a person, including a trustee of a trust created by will, whom the decedent designates either in a separate instrument or in a separate writing, including a will, executed either before, at the same time as, or after the instrument.

Another applicable statutory provision that has direct application to the circumstances is the Power of Appointment Act (POAA) herein is MCL 556.123 of which the first three sections are applicable:

Sec 13.

- (1) If a donee has a general power of appointment, any interest that the donee has power to appoint or has appointed is to be treated as property of the donee for the purposes of satisfying claims of the donee's creditors, as provided in this section.
- (2) If a donee has an unexercised general power of appointment and the donee can presently exercise such a power, any creditor of the donee may by appropriate proceedings reach any interest that the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. If the donee has exercised the power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances the creditor could reach property that the donee has owned and transferred.
- (3) If a donee has at the time of his or her death a general power of appointment, whether or not he or she exercises the power, the personal representative or other legal representative of the donee may reach on behalf of creditors any interest that the donee could have appointed to the extent that the claim of a creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

The Commentary is again illustrative of the application of the above statutory provisions in conjunction with the previously cited provisions of EPIC and the MTC.

A settlor's power of revocation may be presently exercisable general power of appointment within the meaning of the POAA. See MCL 556.112(c). (defining *power of appointment* to include *power of revocation*), (h) (defining *general power*), (l) (specifying when power is *presently exercisable*) POAA Section 13(2), MCL 556.123(2), provides that the creditor of a donee of an unexercised presently exercisable general power of appointment can reach any property subject to the power to the extent of the value of the property owned by the donee is insufficient to satisfy the creditor's claim. Thus Section 13(2) may yield the same result as MTC 7506(1)(a), MCL 700.7506(1)(a), for the creditor of a living settlor if the settlor retained a power of revocation that effectively allows the settlor to appoint the trust

assets to the settlor: “During the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor’s creditors.” **MCL700.7506(1)(a). Section 13 (3), MCL 556.123(3), likewise may yield the same result as MTC section 7506(1)(b), MCL 700.7506(1)(b) as to the assets of a trust that was revocable by its settlor at the time of the settlor’s death.**

### ARGUMENT III

EVEN IF IT IS DEEMED THAT MCL 700.7605(1) DOES NOT APPLY TO THE PROPERTY AT ISSUE (401(k) AND LIFE INSURANCE), THAN THOSE PROCEEDS PAID TO THE NAMED BENEIFICIARY THE REVOCABLE JENNIFER FOWLER LIVING TRUST, AS THE DESIGNATED BENEFICIARY OF 401(k) PLAN AND THE LIFE INSURANCE POLICY, ARE AVAILABLE AS TRUST ASSETS WHICH WERE NON-PROBATE TRANSFERS IN ACCORDANCE WITH THE STATUTORY REQUIREMENTS OF MCL 500.2207(2) , MCL 700.3805(3), MCL 556.123 AND MCL 700.6101 AND ARE SUBJECT TO THE PAYMENT OF A VAILID CLAIM OF A CREDITOR IN ACCORDANCE WITH THE ABOVE STATED STAUTORY PROVISIONS OF EPIC AND THE MTC AND IN PARTICULAR MCL 700.7506(1)(c).

If the decedent Jennifer Fowler's 401(k) plan proceeds and life insurance policy proceeds are determined not to be "property" of the revocable trust as the time of her death, despite her revocable trust having been named specifically as the beneficiary, then the subsequent transfer of those funds must be deemed a non-probate transfer upon death.

MCL 700.3805(3) deals specifically with the circumstance wherein an estate has insufficient funds, particularly if there are non-probate transfers involving the decedent to pay the valid claims.

- (3) If there are insufficient assets to pay *all claims in full* or to satisfy homestead allowance, family allowance, and exempt property, the personal representative shall certify the amount and nature of the deficiency to the trustee of a trust described in section 7605(1) for payment by the trustee in accordance with section 7606. **If the personal representative is aware of other nonprobate transfers that may be liable for claims and allowances, then, unless the will provides otherwise, the personal representative shall proceed to collect the deficiency in a manner reasonable under the circumstances so that each nonprobate transfer, including those made under a trust described in section 7605(1) bears a proportionate share or equitable share of the total burden.**

As the commentary to MCL 700.3805(3) states:

Subsection (3) is new. It states that the personal representative is to certify to the trustee of the **decedent's revocable trust** the amount needed to pay claims, exemptions, and allowances that is not available in the probate estate. This provision should be read in conjunction with MCL700.7606 (formerly 7502). Subsection (3) also directs the personal representative to apportion the burden of that deficiency among all transferees of nonprobate assets (if the nonprobate property is liable for claims, e.g., assets subject to a general power of appointment), *not just a revocable trust*. **This section entitles a personal representative to look to assets passing as a result of death** or other than by means of probate for contribution toward the payment of claims and allowances, unless the will provides otherwise.

Again, EPIC is quite clear in MCL 700.3805(3) that “assets passing as a result of death” along with any other source of non-probate transfers are means for the payment of claims and allowances.

Non-probate transfers on death are defined in MCL 700.6101(1) to include:

Sec.6101.

(1) **A provision for an nonprobate transfer on death in an insurance policy**, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, **pension plan, individual retirement plan, employee benefit plan, trust**, conveyance, deed of gift, marital property agreement, or other written instrument that is intended to result in 1 or more of the following:

(a) Money or another benefit due to, controlled by, or owned by the decedent before death is paid after the descendant's death to a person, including a trustee of a trust created by will, whom the decedent designates either in a separate instrument or in a separate writing, including a will, executed either before, at the same time as, or after the instrument.

In this matter, the only person able to receive the 401(k) plan proceeds and the Metropolitan Life Insurance proceeds is the Trustee of the revocable Jennifer Fowler Living Trust as it is the only designated entity provided for payment in both the 401(k) plan documents and the life insurance contract. Again, it must be reiterated that the revocable Jennifer Fowler Living Trust states:

**Section 2. Upon My Death**

“My Trustee shall make every reasonable effort to collect all sums made payable to my trust or my Trustee under all life insurance policies, annuities, long term care insurance policies, or other non-retirement third-party beneficiary contracts, which provide for death proceeds made payable to or owned by my trust.

\*\*\*\*\*

My Trustee shall have the right, in its sole and absolute discretion, to elect to receive any retirement plan death proceeds either in a lump sum or in any other manner permitted by the terms of the particular retirement plan.

(Joint Trial Exhibit 2-Article 5 Section 2(a) &2(b)-pg 5-2, Appellee’s App’x p 26)

This Court has directed the parties to address the significance of MCL 700.7506(1)(c) as it relates to irrevocable trusts. MCL 700.7506(1)(c) states:

With respect to an irrevocable trust, a creditor or assignee of the settlor may reach no more than the lessor of the following:

- (i)The claim of the creditor or assignee.
- (ii) The maximum amount that can be distributed to or for the settlor’s benefit exclusive of sums to pay the settlor’s taxes during the seller’s lifetime.

The Commentary to the above stated provision states:

Paragraph (1)(c) is derived from UTC §505(c). It describes the maximum amount that can be reached by a creditor from an irrevocable trust. It is consistent with Michigan common law. See *Vander Weele v Commissioner*, 27 TC 340 (1956), *aff’d*, 254 F2d 895 (6<sup>th</sup> Cir 1958).

The above stated provision under Michigan law provides that creditors of a settlor can generally reach assets in a self-settled irrevocable trust to the extent the settlor retained beneficial interest or the maximum amount that can be distributed to or for the grantor's benefit. In *Vander Weele v Commissioner*, 27 TC 340 (1956), *aff'd*, 254 F2d 895 (6<sup>th</sup> Cir)

“Under controlling Michigan law, the donor's creditors could reach her distributable income. *Gilkey v Gilkey*, 162 Mich 664, 666, 127 N.W. 715; *Hackley v Littell*, 150 Mich.106, 113 N.W. 787 and cases cited; Michigan Statutes Annotated, section 26.921, Comp.Laws 1948, §5666.131. The trustees were granted almost unrestricted power to invade the corpus of the trust for the fund to her. “

The Michigan Court of Appeals *In re Johannes Trust*, 191 Mich App 514 (1991) held:

“Under 1 Restatement Trusts, 2d, Sec. 156, where the settlor is a beneficiary of the trust, the creditors can reach the maximum amount that the trustee could pay to beneficiary under the terms of the trust:

- (1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.
- (2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

Respondent does not cite any Michigan authority that has affirmatively adopted the rule set forth in Sec. 156 of Restatement, and our own research has failed to discover a case that either accepts or rejects this rule. However, the Supreme Court, in *Miller*, *supra*, did cite with approval the Restatement on a number of occasions.

**Furthermore, the rule stated in the Restatement promotes a valid public policy. A person ought not to be able of shelter his assets from his creditors in a discretionary trust of which he is the beneficiary and thus be able to enjoy all the benefits of ownership of the property without any of the burdens. Accordingly, we find the Restatement to be persuasive in this regard and conclude that the rule should be applied.** Thus, if Martha can be considered to be the settlor of the trust her creditors may compel payment from the trust to the maximum amount that is within the trustee's discretion to pay. "

The decedent Jennifer Fowler created for her own benefit the revocable Jennifer Fowler Living Trust. In Article One titled "Creation of My Trust" Section 1 the decedent declares she is the "Trust maker" which she defines as "When the term is used in my trust, it shall have the same legal meaning as 'Grantor', 'Settlor', 'Trustor,' or any other term referring to the maker of a trust." Thus, there is no question she is the Settlor for the revocable Jennifer Fowler Living Trust. (Joint Trial Exhibit 2-Article 1 Section 1-pg 1-1, Appellee's App'x p 11)

The decedent, Jennifer Fowler names herself as the initial Trustee and states that "My trust is a revocable living trust that contains my instructions for my own well-being and that of my loved ones." (Joint Trial Exhibit 2-Article 1 Section 1-pg 1-1, Appellee's App'x p 11)

Thus, the decedent Jennifer Fowler created a self-settled trust.

The decedent Jennifer Fowler is the only one who contributed any property to her revocable Jennifer Fowler Trust and she funded the trust in Article Three as follows:

I hereby transfer, assign and convey all of my right, title and interest in and to all of my property that is permitted by law to be held in trust, wherever situated, whether personal or real, tangible or intangible, separate or community, to my Trustee (herself) to hold and administer for my benefit and for the benefit of my beneficiaries. (Joint Trial Exhibit 2-Article 3 Section 1-pg 3-1, Appellee's App'x p 14)

Her sole ownership is manifested in her statement “I am treated as the owner of my trust for tax reporting purposes because I have retained control of the assets transferred to my trust”. (Joint Trial Exhibit 2-Article 1 Section 4-pg 1-2, Appellee’s App’x p 12)

Article 4 of the revocable Jennifer Fowler Living Trust states “During my life, I shall have the express and total power to control and direct payments, make investment decisions, add or remove trust property, and amend or revoke this trust.” (Joint Trial Exhibit 2-Article 4 Section 1-pg 4-1, Appellee’s App’x p 16)

Prior to the decedent’s death, and while she had “express and total power” over all of her trust property, (a self-settled trust) she committed a tortious wrong death act that resulted in a wrongful death claim against her personally before her death.

**a. The Power of Appointment Act (POAA) MCL 556.123.**

Another applicable statutory provision that has direct application to the circumstances is the Power of Appointment Act (POAA) herein is MCL 556.123 of which the first three sections are applicable:

Sec 13.

- (1) If a donee has a general power of appointment, any interest that the donee has power to appoint or has appointed is to be treated as property of the donee for the purposes of satisfying claims of the donee’s creditors, as provided in this section.
- (2) If a donee has an unexercised general power of appointment and the donee can presently exercise such a power, any creditor of the donee may by appropriate proceedings reach any interest that the donee could appoint, to the extent that the donee’s individual assets are insufficient to satisfy the creditor’s claim. If the donee has exercised the power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances the creditor could reach property that the donee has owned and transferred.

- (3) If a donee has at the time of his or her death a general power of appointment, whether or not he or she exercises the power, the personal representative or other legal representative of the donee may reach on behalf of creditors any interest that the donee could have appointed to the extent that the claim of the creditor has been filed and allowed in the donee's estate but not paid because the assets of the estate are insufficient.

The Commentary is again illustrative of the application of the above statutory provisions in conjunction with the previously cited provisions of EPIC and the MTC.

A settlor's power of revocation may be presently exercisable general power of appointment within the meaning of the POAA. See MCL 556.112(c). (defining *power of appointment* to include *power of revocation*), (h) (defining *general power*), (l) (specifying when power is *presently exercisable*) POAA Section 13(2), MCL 556.123(2), provides that the creditor of a donee of an unexercised presently exercisable general power of appointment can reach any property subject to the power to the extent of the value of the property owned by the donee is insufficient to satisfy the creditor's claim. Thus Section 13(2) may yield the same result as MTC 7506(1)(a), MCL 700.7506(1)(a), for the creditor of a living settlor if the settlor retained a power of revocation that effectively allows the settlor to appoint the trust assets to the settlor: "During the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors." **MCL700.7506(1)(a). Section 13 (3), MCL 556.123(3), likewise may yield the same result as MTC section 7506(1)(b), MCL 700.7506(1)(b) as to the assets of a trust that was revocable by its settlor at the time of the settlor's death.**

The settlor/decedent Jennifer Fowler had both the power of revocation and appointment as to who would be the beneficiary of her insurance contract proceeds from Metropolitan Insurance Company. By choosing her revocable trust as the recipient of the proceeds, she made those proceeds subject to the provisions of MCL 700.3805(3), MCL 556.123.

**b. The application of MCL 500.2207**

The life insurance contract between the Metropolitan Insurance Company is governed by the terms of the contract and Jennifer Fowler had her insurable interest in the contract and the power to transfer said interest to the Jennifer Fowler Revocable Trust as occurred under Article Three of said Trust and the Trust is the recipient of the proceeds as the named beneficiary of that insurable interest. (See Evidentiary hearing exhibit 3 & 4, Appellant's App'x p 108, p 145)

The contract of life insurance was with decedent Jennifer Fowler, as she had the insurable interest, and she not only transferred the insurable interest and contract to the revocable Jennifer Fowler Living Trust, she also designated the Jennifer Fowler Revocable Trust as the beneficiary of the proceeds of said insurance contract. (See Evidentiary hearing exhibit 3 & 4, Appellant's App'x p 108, p 145)

The Metropolitan Insurance Company provided under a Group Life insurance policy to DTE employees, and Jennifer Fowler participation in said life insurance benefit consisted of Basic Life in the amount of \$175,000.00 and Optional Life in the amount of \$263,000.00 which was paid after Jennifer Fowler's death per the life insurance contract between the Metropolitan Insurance Company and the decedent Jennifer Fowler. The provision of providing life insurance is considered part of a welfare benefit plan under ERISA and not an employee pension benefit plan. (See Evidentiary hearing exhibit 3 & 4, Appellant's App'x p 108, p 145)

The life insurance contract between the Metropolitan Insurance Company is governed by the terms of the contract and Jennifer Fowler had her insurable interest in the contract and the power to transfer said interest to the Jennifer Fowler Revocable Trust as occurred under Article Three of said Trust and the Trust is the recipient of the proceeds as the named beneficiary of that insurable interest. (See Evidentiary hearing exhibit 3 & 4, Appellant's App'x p 108, p 145)

The contract of life insurance was with decedent Jennifer Fowler, as she had the insurable interest, and she not only transferred the insurable interest and contract to the revocable Jennifer Fowler Living Trust, she also designated the revocable Jennifer Fowler Living Trust as the beneficiary of the proceeds of said insurance contract. (See Evidentiary hearing exhibit 3 & 4, Appellant's App'x p 108, p 145)

. The Settlor Jennifer Fowler chose Shellie Spacil as her Trustee to administer that portion of her estate planning- the revocable Jennifer Fowler Living Trust. The Trial Court recognized that designation in determining that "The trustee of Jennifer's Trust is someone designated by Jennifer to handle its affairs, a position akin to an executor or administrator." (page 7 of the Trial Court's Opinion and Order, Appellant's App'x p 485)

ERISA Section 514(b)(2)(A), 29U.S.C. Section 1444(b)(2)(A) provides that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

Michigan has enacted a comprehensive law titled the Insurance Code of 1956, Act 218 of 1956 which regulates life insurance in the State of Michigan.

MCL 500.2207(1) which is part of the Insurance Code of 1956, only provides that life insurance proceeds payable directly to a spouse or children of the deceased cannot be reached by the creditors of the deceased insured. Neither of those circumstances existed herein.

MCL 500.2207(2) only exempts life insurance benefits that are directly named in the insurance policy other than the person who procured the insurance or his/her personal representative or administrator. Jennifer Fowler established the beneficiary of the life insurance policy, her own estate planning vehicle, the revocable Jennifer Fowler Living Trust as the named beneficiary and thus the recipient of the insurance proceeds.

Both the Trial Court and the Court of Appeals recognized the distinction. The Court of Appeals held at page 10 the following:

The purpose behind MCL 500.2207(1) is to shield from creditors insurance policies procured to protect an insured's dependents MCL 500.2207(2) extends the exemption to other policies obtained under legitimate circumstances. However, MCL 500.2207(2) plainly provides that an exemption from creditors is not available when "a policy of insurance...is effected by any person on his own life" and is payable to the insured. Thus, MCL 500.2207(2) does not allow an insured to obtain coverage on his or her own life and shield the policy proceeds from the insured's creditors. Jennifer obtained the insurance coverage through her employment with DTE and named her revocable trust as the beneficiary of the policy. Jennifer's trust cannot avoid the requirements of MCL 500.2207(2) by arguing that Jennifer's trust is a separate entity. As the probate court noted, MCL 500.2207(2) provides that policy proceeds paid to an insured's executors or administrators are not exempt from creditors. Given that provision the probate court correctly held that the proceeds from Jennifer's life insurance policy, which were payable to Jennifer's trust and were to be administered by a trustee, are not protected from creditors, and therefore, can be reached by Helen's estate to satisfy the wrongful-death judgment. Jennifer could have named the individual beneficiaries of her trust as direct beneficiaries of the life insurance policy to avoid this asset from being

subject to her creditor's claims, but she did not do so. See, *e.g. Ionia Co Savings Bank v McLean*, 84 Mich 625, 629-630, 48 NW 159 (1891).

(Appellant's App'x p 498)

The statutory provisions of MCL 500.2207 et seq. which govern the payment of insurance proceeds and any applicable exemptions from creditors does not base any determination upon revocable v irrevocable status. Rather, it sets forth the circumstances wherein said proceeds could be exempted from creditors and when they are not. The facts of this case cannot be misconstrued to determine that the proceeds paid to the revocable Jennifer Fowler Living Trust are exempted by the application of MCL 700.7605(4).

### **CONCLUSION**

MCR 7.305(B) sets forth the grounds upon which this Court will consider whether to grant the Appellant's Application for Leave. The provisions of MCR 7.305(B) that is most applicable to the appeal herein are:

Grounds. The application must show that

(5) in appeal of a decision of the Court of Appeals,

(a) the decision is clearly erroneous and will cause material injustice, or

(b) the decision conflicts with a Supreme Court decision or another

decision of the Court of Appeals,

The Michigan Trust Code (MTC), Reporter's Comment states:

"The MTC relies upon the structure and provisions of the Uniform Trust Code (UTC) for many of its provisions. However, the MTC is a uniquely Michigan document that draws from both the UTC and prior Michigan law to preserve long-established procedures, practices and principles concerning trusts in Michigan while also filling the numerous gaps that existed in the law. On balance the MTC tends to preserve long-standing Michigan law absent significant procedural or policy benefits from changing the law."

A review of the Court of Appeals decision is consistent with the guidance afforded by the MTC and EPIC, and prior case law. The Court of Appeals made an informed and correct decision, under the facts of this case, that the revocable Jennifer L. Fowler Living Trust is obligated to transfer assets to the Estate of Jennifer Fowler to cover any deficiency of valid claims against the estate. It is also clear that this panel of the Court of Appeals also followed prior case law and statutory provisions in making its determination that the Metropolitan Life Insurance proceeds held in the revocable Jennifer L. Fowler Living Trust are also available to cover any deficiency of valid claims against the estate.

The Appellant has not argued or presented any evidence that the decision of the Court of Appeals conflicts with a Supreme Court decision or another decision of the Court of Appeals.

The remaining ground for granting of an application for leave states "(a) the decision is clearly erroneous and will cause material injustice" strikes a chord with the undersigned counsel. If in fact, the Court of Appeals had ruled contrary to its decision, it would have resulted in a gross material injustice. The facts that support this assertion by Appellee are as follows:

1. The decedent Jennifer Fowler, developed an estate plan which provided for a Trust and a Will, that both had specific provisions that provided that if there were valid claims against her Estate, and if the funds in her Estate would be insufficient to satisfy the claims, that the assets held in her revocable trust would be available to satisfy said claims. Those provisions were not only agreed to by the decedent Jennifer Fowler, but were consistent with the provisions of both EPIC and MTC that the assets of revocable Trust would be available to cover any deficiency.
2. The decedent Jennifer Fowler, a single woman, whose only child, died in 2015, chose not to name any individual or individuals as beneficiaries of her workplace Metropolitan Insurance policy, but rather named upon her death, the revocable Jennifer L. Fowler Living Trust as the beneficiary.
3. The decedent Jennifer Fowler, also chose upon her passing, that the funds held in her workplace 401(k) DTE Savings and Stock Plan, would be paid to the revocable Jennifer L. Fowler Living Trust.
4. That the decedent, Jennifer Fowler, killed her mother Helen Fowler, prior to her death, which resulted in a valid Wrongful Death Claim against her Estate which was brought by a surviving daughter Julie Brooks and surviving son, Thomas Fowler on behalf of the Estate of Helen Fowler.
5. Those decisions by the decedent Jennifer Fowler, and the circumstances of which she did not have a spouse and or a child/dependent at the time of her death, removed any exemptions that could be claimed against valid claims against her estate as alleged by the Appellant.

6. The Appellant, who is the Personal Representative of the Estate of Jennifer L. Fowler and the Trustee of the revocable Jennifer L. Fowler Living Trust are one and the same—Sherry Spacil.
7. Sherry Spacil is also a residual beneficiary of the revocable Jennifer L. Fowler Living Trust.
8. Sherry Spacil has repeatedly and consistently testified, that as opposed to seeing that the Wrongful Death Judgment awarded in favor of Julie Brooks and Thomas Fowler, the son and daughter of Helen Fowler, who was killed by the decedent Jennifer Fowler, is paid from the assets of the Estate of Jennifer Fowler, has vowed to spend every last “dime” of the Estate and Trust, as opposed to paying the valid claim of the Appellee.
9. That the actions of Shelly Spacil, are contrary to the terms of both the Jennifer Fowler Will and revocable Trust, and her fiduciary duties as both the Personal Representative and Trustee to pay the valid wrongful Death Judgment, and instead is pursuing her own personal agenda, in order to maximize her own residual distribution from the Trust.

Justice would hardly be served by disavowing the estate plan of Jennifer Fowler and instead allowing Shelly Spacil, as PR and Trustee to subvert not only the testator Jennifer Fowler’s Will and Trust provisions, but the provisions under Michigan law that dictate the circumstances when a revocable Trust is to transfer funds to an Estate to satisfy any deficiency of a valid claim against an estate.

In making any judicial determination as to whether a material injustice would result by a decision of the Court of Appeals, one must look to the outcome that would result if this Court were to overturn the Court of Appeals decision. That analysis would have to conclude that:

1. That the daughter Julie Brooks and son Thomas Fowler, the persons who suffered the loss of their mother, Helen Fowler, would be denied the recovery of a valid Wrongful Death judgment that has been determined by a jury and then affirmed by another panel of this Court of Appeals.
2. That the long standing and guiding principle of both the Michigan statutory scheme set forth in both EPIC and MTC and Michigan jurisprudence, that the assets of a **revocable trust** are subject to be utilized to satisfy a deficiency of a decedent's estate, unless said funds are intended to serve a surviving spouse or children/dependents, will now be upended to reward a residual beneficiary of a trust who is given greater priority than persons who suffered losses validly determined by a jury.
3. That a Personal Representative and Trustee, Shelly Spacil, who is a residual beneficiary of the revocable Jennifer L. Fowler Living Trust, will be rewarded, for her own self-determined intent to spend every last dime, to prevent the recovery of the valid losses of Julie Brooks and Thomas Fowler, despite the fact that the Trust has more than enough funds to satisfy said losses and provide significant funds to the residual beneficiaries.
4. Personal Representative and Trustee, Shelly Spacil's stated intent, is contrary to the Testator Jennifer L. Fowler's written intent, memorialized in

5. both her Will and revocable Trust, to provide said funds to pay any deficiency out of her Trust, if her Estate did not have sufficient funds to accomplish same.

As opposed to the absolute “material injustice” of the wrongful death claimants (daughter and son of the deceased mother Helen Fowler) receiving nothing that would occur should the Court of Appeals decision be overturned, the affirmation of the Court of Appeals decision would result in justice being served as follows:

1. The Metropolitan Life Insurance proceeds paid into the revocable Jennifer Fowler Living Trust amounted to \$438,385.20 (Appellants Appendix 2, Exhibit 4, page 145)
2. The 401(k) plan assets as of August 31, 2025 were valued at \$1,087,868.72 (See Appellee’s Supplemental Appendix pp 17-18)
3. After the payment of the valid wrongful death claim, the non-dependent residual beneficiaries of the revocable Jennifer Fowler Living Trust will have approximately \$800,000 to distribute to said residual beneficiaries.

The decision of the Court of Appeals is not erroneous and is consistent with the valid public policy which was passed into legislation after a 5-year draft commission which formalized in EPIC and MTC the long-standing rulings that revocable trusts are subject to valid claims of creditors. A denial of recovery to the Appellee would not only be contrary to the tenants of probate and trust law contained in EPIC and MTC, but would deny true justice to the Appellees.

**RELIEF REQUESTED**

The Appellee, the Estate of Helen Fowler respectfully requests this Honorable Court to deny the Appellant revocable Jennifer Fowler Living Trust's application for leave to appeal and/or affirm the decision of the Court of Appeals

**CERTIFICATE OF COMPLIANCE WITH MCL 7.212**

In compliance with MCL 7.212 and ADM File No. 2019-16, I certify that this brief contains 15,155 countable words and the typeface used in this brief is Arial, set in a 12-point font except for footnotes.

Dated: March 3, 2026

/s/ John B. McNamee  
John B. McNamee

Respectfully submitted,

Dated: March 3, 2026

/s/John B. McNamee  
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