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STATE OF MICHIGAN
IN THE SUPREME COURT

Supreme Court Case Nos. 167501, 167503

In re ESTATE OF JENNIFER FOWLER.

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

Appellee.

v

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

Appellant.

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

In re JENNIFER L. FOWLER TRUST.

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

Appellant.

v

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

Appellee.

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

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In re JENNIFER L. FOWLER TRUST.

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

Appellee.

v

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

Appellant.

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF ON BEHALF OF THE PROBATE SECTION OF THE STATE BAR OF MICHIGAN IN SUPPORT OF GRANTING LEAVE TO APPEAL AND REVERSING THE COURT OF APPEALS

NOW COMES *Amicus Curiae*, THE PROBATE SECTION OF THE STATE BAR OF MICHIGAN, by and through the undersigned counsel, and moves in the above-captioned matter to file the attached *Amicus Curiae* Brief, and in support, states as follows:

1. The Probate Section of the State Bar of Michigan ("Probate Section") is a voluntary membership section of the State Bar of Michigan comprising a substantial segment of Michigan's estate planning and probate attorneys, all of which are interested in the questions raised in this appeal. Although the Probate Section is open to all members of the State Bar of Michigan, its focus is centered on the laws, regulations, and procedures relating to estate planning and probate administration. In furtherance of this purpose, the Probate Section participates in cases that are significant to estate planning and probate administration throughout the State of Michigan. The Probate Section has filed numerous Amicus Curiae briefs in state and federal courts. The Probate Section Council, the decision-making body of the Probate Section, has authorized the filing of this

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Amicus Curiae Brief. The position expressed in the attached *Amicus Curiae* Brief is that of the Probate Section only and is not the position of the State Bar of Michigan.

2. Briefly, this appeal concerns whether a Qualified Retirement Plan provided by an employer with 26 USC 401 status with a beneficiary designation to the insured's Revocable Trust is subject to exemption from creditors' claims and whether employer-offered life insurance with a beneficiary designation of the settlor's Revocable Trust retain its MCL 500.2207(2) Exemption from creditor's claims.

3. For the reasons outlined in the attached *Amicus Curiae* Brief, the Probate Section of the State Bar of Michigan, offers unique insight into the important policy considerations of reversing of the decision of the Court of Appeals.

4. The Probate Section of the State Bar of Michigan, as a section of the State Bar of Michigan comprising a substantial segment of Michigan's estate planning and probate attorneys, believes that it can, as a friend of the Court, provide insight regarding the impact that this litigation will have on the landscape of probate litigation. The Probate Section of the State Bar of Michigan therefore respectfully seeks leave to participate in this matter as *Amicus Curiae* so that it may explain why the Court should grant leave to appeal and issue an opinion that reverses the published Court of Appeals opinion at issue.

5. The proposed and attached *Amicus Curiae* Brief of the Probate Section of the State Bar of Michigan (Exhibit 1) seeks to present a unified position on the important issues before this Court in the above-captioned matter that will impact the future of the landscape of probate **litigation.**

6. MCR 7.312(H)(1) provides that "[a]n amicus curiae brief may be filed only on motion granted by the Court except…as directed by the Court[.]"

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7. MCR 7.312(H)(3), "[a]n amicus curiae brief must conform to subrules (A), (B), (C) and (F)."

8. In accordance with MCR 7.312(H), the Probate Section of the State Bar of Michigan respectfully requests that the Court grant its Motion for Leave and accept the attached, proposed *Amicus Curiae* Brief for filing in this case.

WHEREFORE, *Amicus Curiae* the Probate Section of the State Bar of Michigan respectfully requests that this Honorable Court GRANT the present Motion for Leave and that the attached proposed *Amicus Curiae* Brief (Exhibit 1) be accepted for filing at the Court's earliest convenience in advance of a decision on the Application for Leave to Appeal, together with any other relief that is appropriate and just under the circumstances.

Respectfully submitted,

THE PROBATE SECTION OF THE STATE BAR OF MICHIGAN

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Dated: January 13, 2024

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EXHIBIT

1

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STATE OF MICHIGAN
IN THE SUPREME COURT

In re ESTATE OF JENNIFER L. FOWLER

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

Appellant,

v

JULIE BROOKS, Personal Representative of the ESTATE OF HELEN FOWLER

Appellee,

MSC Docket No.
Court of Appeals Docket No. 365600
St. Clair Probate Court Lower Court Case No. 19-000085-DE

In re JENNIFER L. FOWLER TRUST

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

Appellee

v

JULIE BROOKS, Personal Representative of the ESTATE OF HELEN FOWLER

Appellant

Court of Appeals Docket No. 365610
St. Clair Probate Court Lower Case No: 22-000259-CZ

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AMICUS CURIAE BRIEF SUBMITTED BY THE PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR IN SUPPORT OF GRANTING LEAVE TO APPEAL

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STATEMENT OF THE STANDARDS OF REVIEW

The State Bar of Michigan Probate and Estate Planning Section adopts the Appellant's Standards of Review.

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STATEMENT OF THE QUESTIONS PRESENTED[1]

1. WHETHER THE SUPREME COURT SHOULD GRANT LEAVE TO CONSIDER WHETHER A QUALIFIED 401K RETIREMENT PLAN WITH A BENEFICIARY DESIGNATION TO THE EMPLOYEE'S REVOCABLE LIVING TRUST IS SUBJECT TO EXEMPTION FROM CREDITORS' CLAIMS?

   Court of Appeals answered "No."

   Appellant answered "Yes."

   Appellee answered "No."

   Amicus Curiae answers "Yes."

2. WHETHER THE SUPREME COURT SHOULD GRANT LEAVE TO CONSIDER WHETHER AN EMPLOYER-OFFERED LIFE INSURANCE WITH A BNEFICIARY DESIGNATION TO THE EMPLOYEE'S REVOCABLE LIVING TRUST RETAINS IS SUBJECT TO EXEMPTION FROM CREDITORS' CLAIMS

   Court of Appeals answered "No."

   Appellant answered "Yes."

   Appellee answered "No."

   Amicus Curiae answers "Yes."

[1] This is a replacement brief to the submitted brief previously submitted in this matter which was withdrawn on December 18th, 2024. This brief adequately states the public policy of the probate & Estate planning section and if leave is granted the section will adopt a policy position as to how it believes the supreme court should address the substantive issue.

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STATEMENT OF FACTS[2]

The facts as stated in the opinion of the Court of Appeals provide sufficient factual background to the issues before the Court. See In re Estate of Fowler, Mich App _,_NW3d_(2024) no. 365600, 2024 WL 3465374, at *1-2 (Mich Ct App, July 18, 2024). Succinctly, the Estate of Helen Fowler was granted Judgment against the Estate of her daughter, Jennifer Fowler, in excess of $600,000.00. Jennifer's Probate Estate had insufficient assets to satisfy the Judgment, so Helen's Estate brought a claim under MCL 700.7506 to attempt to collect the balance from Jennifer's revocable living trust.

[2] Counsel for a party did not author this brief in whole or in part. Counsel for a party did not make a monetary contribution intended to fund the preparation or submission of this brief. No person made such a monetary contribution pursuant to MCR 7.312 (H)(5).

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Public Policy Position
Amicus Brief in *Jennifer L. Fowler Estate and Trust*
(Appellate Case Numbers 365600 and 365603)

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,457 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On September 13, 2024, the Section adopted its position after a discussion and vote at a scheduled meeting. 20 members voted in favor of the Section's position, 0 members voted against this position, 0 members abstained, 3 members did not vote.

Explanation:
The Probate and Estate Planning Section authorizes the filing of an amicus brief with the Michigan Supreme Court in the matter of the Jennifer L. Fowler Estate and Trust (Appellate Case Numbers 365600 and 365603) in support of the application for leave advocating for the Michigan Supreme Court to grant leave and consider MCL 700.7605(4), MCL 700.7606(1), and MCL 700.3805(3), but not to advocate for affirming or reversing at this stage.

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ARGUMENT

A. THIS COURT SHOULD CONSIDER MCL 700.7605(4),MCL 700.7606(1) AND MCL 700.3805(3) IN DECIDING WHETHER A QUALIFIED 401(K) WITH A BENEFICIARY DESIGNATION OF THE EMPLOYEE'S REVOCABLE LIVING TRUST IS EXEMPT FROM CREDITORS CLAIMS.

The Court of Appeals did not fully and adequately discuss MCL 700.7605 in determining whether the assets in a revocable living trust that passed through a 401k plan enjoy creditor protection. The starting point for this analysis is MCL 700.7506(1)(b), which 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 the 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.

As such, these issues presented in this appeal turn primarily on MCL 700.7605, which states:

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.

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> (2) A trust established as part of, and all payments from, an employee annuity described in section 403 of the internal revenue code, 26 USC 403, an individual retirement account described in section 408 of the internal revenue code, 26 USC 408, a Keogh, or HR-10, plan, or a retirement or other plan that is qualified under section 401 of the internal revenue code, 26 USC 401, shall not be considered to be a trust described in subsection (1).
>
> (3) This section does not impair a right that an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the internal revenue code, 26 USC 414.
>
> (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 other than a trust described in this section, shall not be considered trust property available for the payment of the administration expenses, a claim against the settlor's estate, or an allowance described in subsection (1).

Thus the question in the instant case is whether property exempt from creditor's claims during the settlor's lifetime which are devised at the death of the settlor to a revocable trust retain their status as exempt from creditors. The probate court held that such assets are protected when paid to an employee's revocable living trust, and consequently could not be used to satisfy the claim or judgement,

The Court of Appeals reversed the probate court's ruling, without adequately discussing MCL 700.7605(2) and without any discussion of MCL 700.7605(4). Instead, it relied heavily on the Kansas case of *Commerce Bank N.A* v *Bolander 44 Kansas 2d 1 239 P.3d 83 (2007)* which addressed a similar statute.

The Court in *Bolander* sets forth the following analysis:

> Wanda's power to amend or revoke the trust, or to direct payment from it, obviously died with her, and the remainder beneficiary's interests in the Trust became vested. There is precedent in other jurisdictions holding that when the settlor of a revocable living trust dies, the property is no longer subject to the settlor's debts. See *Schofield v. Cleveland Trust Co.*, 135 Ohio St. 328, 333–34, 21 N.E.2d 119 (1939) (relying on interpretation of statute). We believe that under

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> Kansas statutory law and persuasive authority from other states, the better argument is to the contrary. See *ITT Commercial Finance Corp. v. Stockdale*, 25 Mass.App. 986, 988, 521 N.E.2d 417 (1988) (In view of the settlor's power to amend and revoke the trust and to substitute beneficiaries, a power retained until death, summary judgment could also rest on the creditor's right to reach the trust property as if it had been the debtor's own.); *Johnson v. Commercial Bank*, 284 Or. 675, 680–81, 588 P.2d 1096 (1978).

In The *Bolander* case the court noted part of its rationale for which it formed its opinion by comparison to California law on this subject which is similar to Kansas. California's Probate Code § 19001 (2007) provides:

> (a) Upon the death of a settlor, the property of the deceased settlor that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the deceased settlor's estate and to the expenses of administration of the estate to the extent that the deceased settlor's estate is inadequate to satisfy those claims and expenses.

Further the *Bolander* Court noted:

> Next, the Trust claims that if K.S.A. 58a–505(a)(3) allows Commerce to attach it's assets, it does not allow the attachment of Wanda's IRA accounts which were expressly excluded in the bank note, were exempt under K.S.A. 60–2308(b), and did not come into the Trust until after Wanda's death. *Bolander* at 14

Neither Kansas nor California appears to have a statute that corresponds to the provisions of MCL 700.7605(4). *Amicus Curiae* believes that the analysis of this statute should be considered.

MCL 700.7605 (4) provides:

> (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 other than a trust described in this section, shall not be considered trust property available for the payment of the administration expenses, a claim against the settlor's estate, or an allowance described in subsection (1).

When analyzed this subsection provides for an exemption for a testamentary trust (i.e. a trust created in the settlor's will) and "or **other than to the settlor's estate …".** Accordingly, the meaning of the language " other than the settlor's estate" should be analyzed, which the Court of

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Appeals failed to do. This language must have meaning, and the extent to which it operates to shield assets in a revocable living trust from creditors is an important policy consideration that the Supreme Court should consider and address.

For instance, the interpretation of MCL 700.7605(4) in similar circumstances was addressed by the Federal Court in the Eastern District of Michigan in the case of *US v Estate of Chicorel*, 2017 WL 5957197 E.D.MICH 1/17/2017 (attached as Exhibit A). Although not precedent the case certainly provides instruction as to how the Federal District Court believes how this court would interpret the statutes in question.

In *Chicorel* the Court stated that on questions of state law, the following principal: "this court (Federal District Court) is bound by the rulings of the state supreme court. However as set forth in *In re Darvocet, Darvon, & Propoxyphene Prod. Liab. Litig.*, 756 F.3d 917, 937 (6th Cir. 2014) (citing *Bradley v. Gen. Motors Corp.*, 512 F.2d 602, 604-05 (6th Cir. 1975)). "When there is no state law construing a statute, a federal court must predict how the state's highest court would interpret the statute." *Id.* (quoting *United States v. Simpson*, 520 F.3d 531, 535 (6th Cir. 2008)".

In *Chicorel* the court explained:

> When interpreting statutory language, Michigan courts "must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Fradco, Inc. v. Dep't of Treasury*, 495 Mich. 104, 112 (2014) (quoting *Koontz v. Ameritech Servs., Inc.*, 466 Mich. 304, 312 (2002)) (internal quotation marks omitted). This requires courts to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Id.* (quoting *Sun Valley Foods Co. v. Ward*, 4660 Mich. 230, 237 (1999)).
>
> In *Cicorel*, the Court sets forth its analysis as follows:
>
> " Defendant argues that MCL 700.7506(1) and 7605(1) "plainly make the assets of a ***revocable*** trust subject to the claims of creditors under certain circumstances. However, trust funds are only subject to claims of a decedent's creditors to the extent that these funds existed in a ***revocable*** trust at the date of decedent's death." (Dkt. # 14, Pg. ID 102 (double emphasis in original). Because the trust received the death benefit proceeds only after the trust became irrevocable and not otherwise

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part of the estate, Defendant argues those proceeds are unreachable by Decedent's creditors. (*Id.*)

In opposition, the government contends that the language of the statute "does not limit assets of a trust which are subject to creditors' claim[s] to only those that existed at the time of the settlor's death. (Dkt. # 15, Pg. ID 172-73.) The government points to section 7506(1)(b), which states "[a]fter the death of a settlor ... the property of a trust that at the settlor's death was revocable by the settlor ... is subject to expenses, claims, and allowances as provided in section 7605." The phrase "at the settlor's death," the government argues, refers to the time in determining whether a trust is revocable, not what property was held by the trust. (Dkt. # 15, Pg. ID 172-73.) Thus, by the government's logic, property held by a trust made irrevocable by the death of the settlor is always reachable by creditors under Michigan law.

The government's construction ignores the most salient statutory provision, which provides:

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 other than a trust described in this section, shall not be considered trust property available for the payment of the administration expenses, a claim against the settlor's estate, or an allowance described in subsection (1).

Had Decedent used a testamentary trust instead of a revocable living trust, sections 7605(1) and 7506(1) unambiguously would not apply and the death benefit proceeds would not be subject to claims of the estate's creditors. In effect, Defendant's assertion that the statute does not apply to property held outside of a revocable trust at the time of Decedent's death is correct. The government cannot reach the death benefit proceeds held by Decedent's now-irrevocable trust. As a result, the government's proposed amendment would be futile with respect to its claims against the trustee. *Chicorel* at *3

The Court of Appeals issued a published decision but failed to even discuss MCL 700.7605(4). While not binding precedent, the *Chicorel* opinion provides one possible interpretation of this statutory language that may govern this issue, which should be considered by this Court. This is an important policy to govern estate planning and probate attorneys, and their clients, throughout the State of Michigan. If 401k beneficiary designations to revocable living trusts and other assets do or do not enjoy creditor protection will be an important factor in how

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attorneys counsel clients in the future to use such trusts and beneficiary designations. A binding, published decision on this point that fails to discuss the critical language of the statute does not adequately provide guidance to practitioners or their clients.

Additionally, *Amicus Curiae* would like this Court to consider the impact of the issues presented in the instant matter raised in the following statutes

> **700.7606 Payment of expenses and obligations of settlor's estate; duty of trustee.**
> Sec. 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 a creditor of the settlor, including a claim for the settlor's funeral and burial expenses; and homestead, family, and exempt property allowances. The trustee may rely on the certificate of the personal representative without liability to a trust beneficiary or another party. If a personal representative is not appointed for the settlor's estate, the trustee shall pay directly to the creditor an enforceable and timely served claim of a creditor of the settlor, including a claim for the settlor's funeral and burial expenses. If a personal representative is not appointed for the settlor's estate within 4 months after the date of the publication of notice to creditors, a trust described in section 7605(1) is not liable for payment of homestead, family, or exempt property allowances. A payment made by a trustee is subject to this section, but the payment shall be made exclusively out of property, or the proceeds of property, that is includable in the settlor's gross estate for federal estate tax purposes, other than assets described in section 7605(2) to (4).

As is apparent the holding in the instant case will have significant impact for trustees of revocable trusts Without clear determination the trustee is faced with potential breach of duty actions if they incorrectly determine creditor exemption status. Currently if presented with the instant situation the trustee will not know whether to honor a claim or deny a claim and is subject to a breach of fiduciary petition if he/she decides incorrectly. The trustee will be forced to go to court to have a determination made leading to extensive litigation. Without a clarifying ruling

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from this Court as to the specific language presented in MCL 700.7605(4), which governs trustees under MCL 700.7606, trustees and their counsel are left in a difficult position as to creditor claims such as the ones presented in this case.

Additionally, *Amicus Curiae* requests this court to consider the provisions of MCL 700.3805(3) in making its decision to grant leave to appeal. In its analysis the Court of Appeals never considered the provisions of MCL 700.3805 (3) which provides:

> (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 non-probate 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 non-probate transfer, including those made under a trust described in section 7605(1), bears a proportionate share or equitable share of the total burden.

Like the trustees concerned with MCL 700.7606(1), both trustees and personal representatives will be presented with a conundrum in trying to determine whether the trust should bear a proportionate share of a deficiency burden if there is a deficiency, without guidance from this Court as to the meaning of 7605(4). If the asset is treated as retaining its exempt status, then is it exempt from sharing a *pro rata* share. Again, trustees and personal representatives and their counsel need guidance as to how to proceed without continual litigation of this issue, they also need assurance of unanimity to alleviate risks of liability for the wrong decision.

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B. THIS COURT SHOULD CONSIDER MCL 700.7605(4),MCL 700.7606(1) AND MCL 700.3805(3) IN DECIDING WHETHER LIFE INSURANCE POLICY WITH A BENEFICIARY DESIGNATION OF THE EMPLOYEE'S REVOCABLE LIVING TRUST IS EXEMPT FROM CREDITORS CLAIMS

Both the probate Court and Court of Appeals held that an employer provided insurance Policy with a beneficiary designation of the employee's revocable living trust was not exempt from creditor's claims. The Court of Appeals relied upon the provisions of the insurance code MCL500.2207, and the exemptions provided therein to determine that the proceeds of the policy are not protected from creditor's claims when paid to a revocable living trust. *Amicus Curiae* believes that the provisions of MCL 700.7605(4) should be considered in making this decision. Like the 401(K) the proceeds are paid other than to the estate. Consequently, its seems like the same issues and confusion will arise for trustees and personal representative as those discussed relative to the 401(k) creditor exemption. Additionally, since life insurance proceeds are a non-probate assets the same administration difficulties under MCL 700.7606 and MCL700.3805 arise. A definitive ruling based on the statutes discussed would allow the fiduciary administering the estate an answer on how to proceed.

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CONCLUSION

The Probate and Estate Planning Section of the State Bar takes the position that leave should be granted and asks the Court to consider and construe MCL 700.7605(4), and to a lesser extent, MCL 700.7606(1) and MCL 700.3805(3), so that estate planners and probate attorneys, and their clients, have guidance about what assets that pass through revocable living trusts are or are not subject to creditor protection. The Section takes no position at this time as to whether the statutes do or do not offer creditor protection and recognizes that there are important, competing policy considerations both ways. If leave is granted by this Court, then the Section would like to further discuss the issues internally, adopt a new public policy position, and submit further briefing to this Court. As this point, the primary purpose of this Brief is to highlight the wisdom in granting leave so that the important language in 7605(4) can be considered and construed, rather than letting a published decision from the Court of Appeals stand that did not adequately discuss this statute.

Proof of Service

I certify that the foregoing document was served on all parties in this case to each of the attorneys of record at their respective addresses as disclosed on the pleadings in this case on January 13, 2025 by:

[ ] U.S. Mail
[ ] Hand Delivery
[ ] Email
[ ] Other
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Respectfully submitted,
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Dated: January 13, 2025

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CERTIFICATE OF COMPLIANCE

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Date: January 13, 2025

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EXHIBIT A

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2017 WL 5957197
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

UNITED STATES of America, Plaintiff,

v.

ESTATE OF Albert CHICOREL, et al., Defendants.

Case No. 16-10894
|
Signed 01/17/2017

Attorneys and Law Firms

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Steven G. Cohen, Farmington Hills, MI, for Defendants.

OPINION AND ORDER DENYING LEAVE TO FILE AMENDED COMPLAINT

ROBERT H. CLELAND, UNITED STATES DISTRICT JUDGE

***1** In this action Plaintiff United States seeks to recover back taxes allegedly owed by Defendant Estate of Albert Chicorel. Before the court is the government's Motion for Leave to File Proposed Second Amended Complaint filed December 6, 2016. (Dkt. # 13.) The government seeks the court's leave to add claims against two new parties: Chicorel Lyons, LLC and Ralph Chicorel, as trustee for the Albert Chicorel Revocable Trust. Defendant opposes the motion, arguing that the government has unduly delayed in bringing the claims and that the new claims would be futile. (Dkt. # 14.) The motion has been fully briefed and a hearing is unnecessary. *See* E.D. Mich. LR 7.1(f)(2). For the reasons that follow, the court will deny the government's motion.

I. BACKGROUND

The following facts are undisputed unless otherwise noted. Decedent Albert Chicorel died on October 26, 2006. (Dkt. # 14, Pg. ID 93.) In the year prior to his death, Decedent was placed into a conservatorship under the supervision of the Oakland County Probate Court. (*Id.*) The court-appointed conservator prepared Decedent's 2002, 2003, and 2004 federal income tax returns. (*Id.*) The tax returns reflected income of over $2 million, which Defendant avers was "stolen from the Decedent by his business associates." (*Id.*) The estate currently owns assets consisting of approximately $130,000 in cash and a fifty percent membership interest in Chicorel Lyons, LLC. (Dkt. # 13-1, Pg. ID 78.) The government avers that the total balance due is approximately $712,000. (Dkt. # 14, Pg. ID 96.)

Decedent formed the LLC in 2004, after executing a General Durable Power of Attorney, naming C. Gregory Williams as attorney-in-fact. (Dkt. # 13-1, Pg. ID 79.) Decedent and three family members transferred their ownership interests in two parcels of real property to the LLC. (Dkt. # 14, Pg. ID 95.) In exchange, each received a membership share of the LLC in proportion to their interest in the real property: Decedent received a fifty percent share and the other three members split the remaining fifty percent equally. (Dkt. # 13-1, Pg. ID 82.) Defendant avers that "more than a dozen" Chicorel family members transferred their ownership interest in oil wells on the property to the LLC and received a contractual promise of distributions of oil royalties from the LLC. (Dkt. # 14, 95.) Decedent made what appears to be the only capital contribution—at least $30,000 in cash. (Dkt. # 13-1, Pg. ID 82.) According to Defendant, Decedent's fifty percent share is valued at $637,480.

At the time of his death, Decedent also held an annuity with Transamerica Life Insurance Company that payed approximately $6,000 per month. (Dkt. # 14, Pg. ID 94.) The annuity also contained a $250,000 death benefit payable to the trust. (*Id.*) Because the benefit was payable to a named beneficiary, the proceeds are not part of the estate. (*Id.* at 94-95.)

After Decedent's death, probate proceedings were commenced in the Oakland County Probate court and Richard Behar, Decedent's nephew, was appointed personal representative on April 27, 2007. (*Id.* at Pg. ID 95.) Decedent's will devises his entire probate estate to his trust, which was unfunded at the time of his death. (*Id.* at 94.) The government filed a proof of claim in probate court on January 9, 2009, to which the personal representative did not object. (*Id.* at Pg. ID 97.) The probate proceeding is ongoing.

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***2** On March 11, 2016, the government filed the instant action seeking to reduce Decedent's liability to judgment and enforce its tax liens. (Dkt. # 1.) The government subsequently amended its complaint as a matter of course on May 26, 2016. (Dkt. # 4.) The government now seeks to submit a second amended complaint to add claims against the LLC and the trust. (Dkt. # 13-1.) Against the LLC, the government's new claims would seek to set aside Decedent's transfer of his real estate property interest to the LLC. Against the trust, the government would seek to reach the trust assets—specifically the annuity death benefit—to satisfy Decedent's outstanding tax debts.

II. STANDARD

Except for amendments allowed as a matter of course under Federal Rule of Civil Procedure 15(a)(1), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Factors that may affect the determination include undue delay in filing, bad faith or dilatory motive, undue prejudice, repeated failure to cure deficiencies by previous amendment or futility of amendment by the moving party. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (citation omitted).

III. DISCUSSION

Defendant argues that the government unduly delayed in offering its amendment that, in any event, the proposed new claims would be futile. The court will examine Defendant's argument with respect to each proposed new party.

A. Trust

The government seeks to add Ralph Chicorel as trustee to the decedent's trust and argues that the property of the trust is subject to its claim under Michigan statute. (Dkt. # 13, Pg. ID 70.) Defendant argues that claims against the trust would be futile because Michigan law does not subject the trust's property to claims by creditors of the estate. (Dkt. # 14, Pg. ID 101-02.) Because the court agrees with this contention by Defendant, it will not address Defendant's other arguments regarding futility.

On questions of state law, this court is bound by the rulings of the state supreme court. *In re Darvocet, Darvon, & Propoxyphene Prod. Liab. Litig.*, 756 F.3d 917, 937 (6th Cir. 2014) (citing *Bradley v. Gen. Motors Corp.*, 512 F.2d 602, 604-05 (6th Cir. 1975)). "When there is no state law construing a statute, a federal court must predict how the state's highest court would interpret the statute." *Id.* (quoting *United States v. Simpson*, 520 F.3d 531, 535 (6th Cir. 2008)). Neither party points to any prior cases interpreting the statutes at issue. (*But see* Dkt. # 15, Pg. ID 173 n.3 (citing *Commerce Bank, N.A. v. Bolander*, 44 Kan. App.2d 1(2007) (Kansas state court interpreting a similarly worded Kansas statute)).) Accordingly, the court must endeavor to predict how the Michigan Supreme Court would interpret the statutes.

Central to the futility question is whether Michigan law authorizes creditors to collect on a revocable trust made irrevocable by the death of the settlor. On this point, the parties dispute the proper interpretation of Michigan statute. First, MCL 700.7506(1)(b) provides:

> 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.

In turn, MCL 700.7605(1) states:

> The property of a trust over which the settlor has the right ... 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.... (b) An enforceable and timely presented claim of a creditor of the settlor[.]

***3** When interpreting statutory language, Michigan courts "must ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute." *Fradco, Inc. v. Dep't of Treasury*, 495 Mich. 104, 112 (2014) (quoting *Koontz v. Ameritech Servs., Inc.*, 466 Mich. 304, 312 (2002)) (internal quotation marks omitted). This requires courts to consider "the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Id.* (quoting *Sun Valley Foods Co. v. Ward*, 4660 Mich. 230, 237 (1999)).

Defendant argues that MCL 700.7506(1) and 7605(1) "plainly make the assets of a ***revocable*** trust subject to the claims of creditors under certain circumstances. However, trust funds are only subject to claims of a decedent's creditors

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to the extent that these funds existed in a ***revocable*** trust at the date of decedent's death." (Dkt. # 14, Pg. ID 102 (double emphasis in original). Because the trust received the death benefit proceeds only after the trust became irrevocable and not otherwise part of the estate, Defendant argues those proceeds are unreachable by Decedent's creditors. (*Id.*)

In opposition, the government contends that the language of the statute "does not limit assets of a trust which are subject to creditors' claim[s] to only those that existed at the time of the settlor's death. (Dkt. # 15, Pg. ID 172-73.) The government points to section 7506(1)(b), which states "[a]fter the death of a settlor ... the property of a trust that at the settlor's death was revocable by the settlor ... is subject to expenses, claims, and allowances as provided in section 7605." The phrase "at the settlor's death," the government argues, refers to the time in determining whether a trust is revocable, not what property was held by the trust. (Dkt. # 15, Pg. ID 172-73.) Thus, by the government's logic, property held by a trust made irrevocable by the death of the settlor is always reachable by creditors under Michigan law.

The government's construction ignores the most salient statutory provision, which provides:

> 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 other than a trust described in this section, shall not be considered trust property available for the payment of the administration expenses, a claim against the settlor's estate, or an allowance described in subsection (1).

MCL 700.7605(4).

Had Decedent used a testamentary trust instead of a revocable living trust, sections 7605(1) and 7506(1) unambiguously would not apply and the death benefit proceeds would not be subject to claims of the estate's creditors. In effect, Defendant's assertion that the statute does not apply to property held outside of a revocable trust at the time of Decedent's death is correct. The government cannot reach the death benefit proceeds held by Decedent's now-irrevocable trust. As a result, the government's proposed amendment would be futile with respect to its claims against the trustee.

B. Chicorel Lyons LLC

The government also seeks to set aside the transfer of Decedent's real property interest to the LLC, (Dkt. # 13-1, Pg. ID 87), arguing that Decedent "lacked the mental capacity to understand the nature and effect of his acts, including agreeing to a contribution disproportionately larger than those of other LLC members[.]" (*Id.*) In its brief in support and its proposed complaint, the government points to Decedent's grant of a durable power of attorney, Decedent's brother's petitions to appoint an adult guardian and conservator—which were granted, and Decedent's dementia diagnosis in the approximately thirty months between the creation of the LLC and the Decedent's death. (Dkt. # 13-1.)

***4** The court finds that the proposed amendment is unduly delayed. Officials tasked with collecting on Decedent's tax liability have been aware of the LLC, Decedent's issues with dementia, and claims that Decedent had been "taken advantage of by unscrupulous people" since at least August of 2006. (Dkt. # 14, Pg. ID 130-31.) The government has known of the conservatorship and how to access the conservatorship file since at least April of 2004. (*Id.* at 132.) Yet the government apparently did not raise this concern in the state probate proceeding. Neither did the government include the claim in its first complaint, filed March 11, 2016, (Dkt. # 1), nor in its first amended complaint, filed as a matter of course on May 26, 2016 (Dkt. # 4). While the court does not doubt that the government gained access to some additional documents through discovery, Plaintiff's proposed amended complaint primarily cites the petitions for guardianship and conservatorship, which were presumably part of the public record. (Dkt. # 13-1, Pg. ID 80.) Nothing suggests that the claim could not have been brought in the initial filing.

Further, it is not clear to the court that a competency determination in this case, some twelve years after the transaction in question took place, and over a decade after the death of the individual in question, is likely to be a reliable or just determination. The court has little desire to wade into such murky water, and even less when it appears the government knew or should have known the evidence giving rise to its concerns regarding Decedent's competency years ago.

While the court is mindful of its duty to "freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). However, justice does not require leave here, as the court finds that the

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government's proposed amended complaint is unduly delayed and, in some respects, likely to be futile.

IV. CONCLUSION

IT IS ORDERED that the government's Motion for Leave to File Proposed Second Amended Complaint (Dkt. # 13) is DENIED.

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