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STATE OF MICHIGAN

IN THE SUPREME COURT

JENNIFER L. FOWLER TRUST,
under Agreement dated
August 17, 2002

Plaintiff/Appellant

vs.

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

Defendant/Appellee

Supreme Court Case No:

Court of Appeals No: 365603
Consolidated with 365600
and 365610

Lower Court No: 22-2059-CZ
St. Clair County Probate Ct

_____/

APPELLANT JENNIFER FOWLER TRUST'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF FACTS IN SUPPORT OF REPLY BRIEF

The underlying facts of the case were set forth in the trial exhibits and will not be repeated.

Unfortunately, Appellee goes to great lengths to malign Shellie Spacil, the Personal Representative of the Estate of Jennifer Fowler. As the facts are not in dispute and the issues are matters of law regarding the interpretation of MCL 700.7605 and MCL 500.2207, the actions of Shellie Spacil are irrelevant to the issues before the Court.

Despite that fact, as Appellee has chosen to muddy the waters and attack Ms. Spacil to somehow gain a perceived advantage, Appellant does briefly response.

It is noteworthy that the trial court denied Appellee's Petition to Removal Ms. Spacil as Personal Representative of the Estate of Jennifer Fowler, and that Appellee did not seek appellate of review of the trial court's Opinion. See Appellant's Appendix 11, pp. 479-488. In fact, the trial court specifically found:

> "Because the court finds that Special had the authority to seek a resolution of the questions which were presented in her petition, it does not find that Spacil has failed to perform a duty of her office. Similarly, the court cannot find that Spacil is incapable of discharging her duties as personal representative or that her removal is

> in the best interest of Jennifer's Estate, as she has acted within the permissible bounds of her position. Accordingly, the request for her removal as personal representative of Jennifer's Estate is denied."

The issues regarding Ms. Spacil and her defense of the Estate of Jennifer Fowler are irrelevant to this Applicant for Leave to Appeal and nothing further needs to be said.

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ARGUMENT

I. WHETHER THE DTE SAVINGS AND STOCK 401k PLAN PROCEEDS ARE EXEMPT FROM THE CLAIMS OF CREDITORS OF THE ESTATE OF JENNIFER FOWLER PURSUANT TO MCL 700.7605

Appellee argues, and the Michigan Court of Appeals so found, that as the DTE 401k Plan proceeds, upon liquidation, will not be protected by the protections afforded by Employee Retirement Income Security Act of 1974, Pub. L No. 93-406, 88 Stat. 829 (codified at *29 U.S.C.A. §§ 1001, et seq.,* hereinafter referred to as ERISA, that the trial court erred in finding the proceeds exempt from the claims against the Estate of Jennifer Fowler under MCL 700.7605.

While it is true that in its present form the DTE 401k is protected from claims pursuant to the protections under ERISA, it is equally clear that the funds will be liquidated, and it is for that reason that the trial court addressed the events upon liquidation, and that it correctly found that the 401k proceeds are excluded as assets available under MCL 700.7605 to satisfy the claims against the Estate of Jennifer Fowler. [Appellant's Appendix 11, pps. 7-8.]

MCL 700.7605 provides in part:

> (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

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> 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:
>
> * * *
>
> (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).** [Emphasis added]

MCL 700.7605(2) created a class of assets which shall not be considered assets subject to the provisions of MCL 700.7605(1). See also MC: 700.7605(4). MCL 700.7605(2) clearly exempts these assets from being included as assets of a Trust which can be used to satisfy the claims against the deceased. In holding that the trial court erred in its ruling, the Michigan Court of Appeals held:

> "However, the Savings & Stock Plan provides that, after Jennifer's death, any remaining funds are to be paid to the fund beneficiary's estate in a lump sum if there is no surviving beneficiary. Therefore, under the Savings & Stock Plan, any 401(k) account funds remaining after Jennifer's death converted to a lump-sum cash payment. **This asset no longer involved a retirement account administered by DTE. Upon the lump-sum conversion, the funds were no longer**

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> **part of the Savings & Stock Plan subject to federal regulations for retirement accounts.** For this reason, the probate court erred by ruling that MCL 700.7605(2) applied to prohibit Helen's estate from reaching the lump-sum payment of the remaining 401(k) account funds." [emphasis added] Appellant Appendix 12.

As correctly recognized by the Court of Appeals, once the beneficiary has received the pension payment, and the Plan has obviously disbursed the asset(s), attachment of those funds by a creditor does not involve alienation of the benefits and the payment has been made and the monies are not longer in the Plan. DaimlerChrysler Corp v Cox, 447 F3d 967, 974 (CA 6, 2006). See also State Treasurer v Abbott, 468 Mich 143 (2003) which recognizes that while ERISA protects Plan funds held by the Plan, account, that protection is lost once the beneficiary receives the funds. However, nothing in Abbott says that Plan funds cannot be otherwise protected by a non-ERISA law. Unfortunately, the Court of Appeals never analyzed MCL 700.7605(2), and rather, the Court merely held that once the 401k proceeds were disbursed, that lose their protection under ERISA and are subject to judgment execution. Appellant Appendix 12. The trial court noted that fact, however, the trial court, unlike the Court of Appeals, correctly applied MCL 700.7605(2).

In addressing the issues to be determined, the trial court correctly concluded:

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> "401k:
>
> "As set forth above, MCL 700.7605(2) excludes from the operation of MCL 700.7605(1) '"a trust established as part of; and all payments from ... a retirement or other plan that is qualified under section 401 of the internal revenue code, 26 USC 401.'" MCL 700.7605(2). The payment to be received from Jennifer's 401(k) to Jennifer's Trust is clearly a payment '"from ... a retirement or either plan that is qualified under section 401 of the internal revenue code, 26 USC 401,"' and accordingly is excluded from application of MCL 700.7605(1).
>
> Helen's Estate's reliance on *Abbott* and its progeny does not change the statutory scheme. In *Abbott,* there was no statutory provision that gave specific direction as to whether the proceeds could be used to satisfy the claims of creditors. Here, MCL 700.7605(2) specifically excludes "payments from ... a retirement or other plan that is qualified under section 401 of the internal revenue code, 26 USC 401." This specific direction, that payments from a 401(k) are not subject to satisfying claims from an Estate under these circumstances, resolves this issue.
>
> Monies paid from Jennifer's 401(k) are not subject to satisfying the claims of Helen's Estate." [Appellant's Appendix 11, pps. 7-8

The trial court was correct in its analysis and holding that the clear language of MCL 700.7605(2) excludes the 401k proceeds from the creditors of the Estate of Jennifer Fowler.

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Oddly enough, rather than apply or even analyze MCL 700.7605(2), the Court of Appeals, relied solely upon Commerce Bank, N.A. v Bolander, 239 P.3d 83 (2007), holding:

> "We agree that the analysis in *Bolander* applies with equal force to the construction and application of MCL 700.7605. After Jennifer's death, the required lump-sum payment of the 401(k) account funds became an asset subject to a creditor's claim to the extent that the assets in Jennifer's estate were insufficient to satisfy her debts. Accordingly, we reverse in part the probate court's order to the extent that it holds that the 401(k) account funds could not be used to satisfy the judgment debt owed by Jennifer's estate to Helen's estate." Appellant Appendix 12.

Not only did the Court of Appeals err in failing to address and apply MCL 700.7605(2) to the facts of this case, the Court misapplied the Kansas Court of Appeals Bolander holding.

The Kansas statutory authority, K.S.A. 58a-505, does not include a provision similar to MCL 700.7605(2). Thus, the holding on Bolander, based upon the Kansas statute, while correct, has no application in the case at bar. MCL 700.7605(2) contains an exclusion. In fact, while K.S.A. 58a-505 does not include exemptions, Bolander itself noted that exemptions may apply stating:

> "When a trust is created for the settlor's own benefit, **the settlor's creditors can reach any trust assets and, for purpose of the present case, *those nonexempt assets***

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> ***available to the settlor.***" [Emphasis added]. Bolander, 239 P.3d at 92.

Ironically, in Redmond v Kester, 159 P3d 1004, 1019 (2007) the Kansas Supreme Court addressed K.S.A. 58a-505 and any exemptions available under the statutes noted:

> **"We note, however, that *K.S.A. 58a-505* contains no language excluding the property held by the *trust* from the application of the *exemptions* found in *K.S.A. 60-2301*. Thus, the property held by a self-settled, *revocable trust* is available to satisfy the settlor's *creditors* unless the property is specifically *exempted* from levy, attachment, or execution by another statutory provision."** [Emphasis added]. Redmond v Kester, 159 P3d at 1019.

In concluding that the DTE funds are subject to the claims against the Estate of Jennifer Fowler, the Court of Appeals erroneously concluded:

> "While *Abbott [State Treasurer v Abbott,* 468 Mich 143 (2003)] involves a prisoner account, the rationale of *Abbott* applies equally to this case. After Jennifer's death, the funds from the Savings & Stock Plan no longer are to be used to fund retirement benefits, but are payable in a lump sum. Jennifer named her trust the beneficiary of those funds instead of naming any individual beneficiary. BRISA is intended to protect retirement assets, but the lump-sum payment due to Jennifer's trust can no longer be considered a retirement account." Appellant's Appendix 12.

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While it is true that ERISA pension Plan payments once disbursed to the beneficiary are not protected under ERISA, MCL 700.7605(2) exempts "all payments from ...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)."

Unfortunately, upon holding that the proceeds lose their protection under ERISA upon receipt, the Court stopped its analysis of the issue and never addressed MCL 700.7605(2). The trial court correctly found that MCL 700.7605(2) "specifically excludes 'payments from ... a retirement or other plan that is qualified under section 401 of the internal revenue code, 26 USC 401."

II. WHETHER THE LIFE INSURANCE PROCEEDS PAYABLE TO THE JENNIFER FOWLER TRUST ARE EXEMPT FROM THE CLAIMS OF CREDITORS OF THE ESTATE OF JENNIFER FOWLER PURSUANT TO MCL 500.2207(2)

In rejecting Appellant's claim that the proceeds of a life insurance policy, where a Trust is the beneficiary, are exempt from the claims of Jennifer Fowler's decedent Estate creditors the Court of Appeals held:

> "MCL 500.2207(2) plainly provides that the lawful beneficiary or assignee shall be entitled to the proceeds of a properly assigned insurance policy or insurance policy made payable to another.

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> 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…[.]**" Appellant Appendix 12 [Emphasis added]

Trusts are a legally distinct entity, "distinguishing between the trustee personally or as an individual and the trustee in a fiduciary or representative capacity." 1 Restatement Trusts, 3d, § 2, comment a, p 17. Michigan has a long history of recognizing this distinction. Bankers' Trust Co of Muskegon v Forsyth, 266 Mich 517, 519-521 (1934); Hein v Hein, 214 Mich App 356, 358 (1995).

Michigan courts honor the separate existence of an "artificial entities" unless a court sitting in equity has pierced the corporate veil and disregarded the entity's separate existence. See Green, Hendrickson, Esper, and Libwag, LLC v

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Ziegelman, 310 Mich App 436, 450-451 (2015). In the case at bar, there are no claims that the Jennifer Fowler Trust is not a separate legal entity. Further, at no time was there a claim that the "corporate veil" of the Trust should be pierced and the trial court did not do so.

While Michigan does not have a case on point where a Trust is the beneficiary of a life insurance death benefit, the Arizona Court of Appeals addressed such an issue in Difilippo v Reed (In re Estate of King), 269 P3d 1189 (2012). In Difilippo, the Court addressed the issue of whether life insurance benefits payable to a Trust as beneficiary, was protected from the insured's estate's creditors.[1]

Contrary to the claim of the Court of Appeals, the holding in Difilippo and the statutory provisions clearly apply in the instant case and support the claim that the insurance proceeds are exempt.

The Arizona statute in question, A.R.S 20-1131, provided:

> "A. If a policy of life insurance is effected by any person on the person's own life or on another life in favor of another person having an insurable interest in the policy, or made payable by assignment, change of beneficiary or other means to a third person, the lawful beneficiary or such third person, other than the person effecting the

[1] The insured and settlor of the Trust, Kathryn L. King was dead. Her Trust was the beneficiary of her life insurance policy. Ms. King's Estate was financially "upside down" and had insufficient funds to pay the claims pf its creditors. 269 P3d at 1191.

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> insurance or the person's legal representatives, is entitled to its proceeds against the creditors and representatives of the person effecting the insurance."

In addressing whether the Trust as beneficiary of the life insurance proceeds would receive the proceeds over the claims of Ms. King's creditors, the Court held:

> "We hold that the language of § 20-1131 is broad enough to also protect such proceeds when they are paid to a trust created by the insured in which the beneficiary is a third party." 269 P3d @ 1192.
>
> * * *
>
> We disagree with Creditors' argument that A.R.S. § 20-1131(A) does not protect the life insurance proceeds because King was the trustee of the Trust at the time she effected the policy, the Trust was the owner and beneficiary of the policy, and the policy was an asset of the Trust."

RELIEF REQUESTED

WHEREFORE, Appellant requests this Court Reverse the decision of the Michigan Court of Appeal, affirm and reinstate the decision of the trial court regarding the 401k and reverse the trial court regarding the life insurance benefits.

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_____/

CERTIFICATE OF COMPLIANCE WITH MCR 7.305(A)(1)

In compliance with MCR 7.305(A)(1), I hereby certify that Appellant's Reply Brief in Support of Application for Leave to Appeal contains 2,576 countable words as determined by Microsoft Word "Wordcount"; the typeface used is NewCourier set at a 12-point font except for footnotes.

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October 20, 2024