In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES……..……....ii

JURISDICTIONAL STATEMENT……...…….……...…iii

QUESTIONS PRESENTED……..……....iv

APPENDIX……..…….vii

I. INTRODUCTION……..……1

II. MATERIAL PROCEEDINGS……...……3

III. STATEMENT OF FACTS…….3

IV. ARGUMENT ...…….……6

A. STANDARD OF REVIEW …….6

B. EXLUSIVE PROBATE COURT SUBJECT MATTER JURISDICTION .....……...7

C. A TRUSTEE CAN HOLD AND CONVEY SURVIVORSHIP RIGHTS……..13

D. A TERMIABLE INTEREST IS UNENFORCEABLE AFTER 30 YEARS……..…19

E. NARROWLY INTERPRETING A RECORDING STATUTE SHOULD NOT MAKE A NEW RULE ……..…….22

F. PARTITION IN KIND IS POSSIBLE WHEN ONLY ONE SPLIT IS APPLIED…25

G. TRIAL EVE DOCUMENT DUMPS SHOULD NOT BE ADMISSIBLE ……27

H. ONE JOINT TENANT DOES NOT ALWAYS BIND THE OTHERS ..……..28

V. REQUEST FOR RELIEF..……31

INDEX OF AUTHORITIES

STATUTES **PAGE NO.**

MCL § 554.61 ……19-20
MCL § 554.62 ……20
MCL § 554.65 ……21
MCL § 555.21……..…11
MCL § 565.48 ……22
MCL § 565.49 ……13-14
MCL § 600.3336 ……29
MCL § 700.1302……8

CASES

Albro v Allen, 434 Mich 271; 454 NW2d 85 (1990) ……..…6 & 25
Caldwell v Fox, 394 Mich 401, 417; 231 NW2d 46 (1975) ……..……...30
Strohm v Koepke, 352 Mich 659; 90 NW2d 495 (1958) ……..……30
Tkachik v Mandeville, 487 Mich 38; 790 NW2d 260 (2010) ……..……..30
Silich v Rongers, 302 Mich App 137; 840 NW2d 1 (2013) ……..……29

COURT RULES

MCR 2.401 ……28
MCR 7.303……iii
MCR 7.305……...…6

TREATISES AND OTHER

Restatement (Third) of Trusts § 40 ……...….18

JURISDICTIONAL STATEMENT

This application is taken from a split 2-1 decision of the Court of Appeals released for publication dated July 1, 2021 (COA Docket # 343630).

There was a prior split 2-1 decision from the same panel that was vacated by this Court, by Order dated October 30, 2020, for erroneously reaching the merits before the threshold subject matter jurisdictional issue was resolved.

The prior application to this Court was initiated by the Plaintiff-Appellees herein, as the initial decision held in favor of a trust's power to hold and convey property as a joint tenant with rights of survivorship right.

Upon remand, the former majority opinion became the current dissenting opinion, while the former dissenting opinion became the new majority opinion after one justice in the former majority apparently changed his opinion as to the merits.

On August 11, 2021, Appellant filed this application for leave to appeal within 42 days after the July 1, 2021 Court of Appeals published decision was issued. This Court therefore has jurisdiction pursuant to MCR 7.303(B)(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by concluding that the Circuit Court did not invade the exclusive jurisdiction of the probate court?

Court's Answer:	No, plaintiffs did not ask the Circuit Court to interpret the Mae E. Fitzpatrick Trust or void anything in the chain of title
Appellant's Answer:	Yes, plaintiffs' Count I sought to modify their distribution from trust, and the manner through which they were to receive their distributions arose and was consented to by the plaintiffs during the administration and distribution of the trust
Appellees' Answer:	No, even though we consented to the distribution in the probate proceeding, we want a second bite at the apple of challenging that distribution in Circuit Court

2. Whether the Court of Appeals erred by determining that "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" did not have the power to hold and convey property as a joint tenant with rights of survivorship?

Court's Answer:	No, a trust cannot hold or convey survivorship rights
Appellant's answer:	Yes, any property that can be voluntarily transferred by the owner can be held in trust, and a trustee may hold in trust any interest in any type of property
Appellees' answer:	No, a trust cannot hold or convey survivorship rights

3. Whether the Court of Appeals erred by affirming the Circuit Court's finding that the 60-acre parcel was incapable of partition in kind?

Court's Answer:	No, since a trust cannot hold survivorship rights, then dividing the property into multiple parcels would overburden the easement
Appellant's Answer:	Yes, since the survivorship rights are not invalid, then dividing the property into two parcels would not overburden the easement, and the Circuit Court failed to consider defendant's appurtenant parcel as an additional point of access to avoid overburdening the easement
Appellees' Answer:	No, since a trust cannot hold survivorship rights, then dividing the property into multiple parcels would overburden the easement

4. Whether the Court of Appeals erred by affirming the Circuit Court's conclusion that plaintiffs' document dump of trial exhibits that were admittedly withheld from disclosure until the eve of trial date were admissible?

Court's Answer:	No, defendant had three weeks to look at them
Appellant's Answer:	Yes, the document dump on the eve of the trial date violated the Scheduling Order, and prejudiced defendant's ability to cross examine plaintiffs on them before final briefs were due
Appellee's Answer:	Yes, at their deposition plaintiffs blatantly refused to provide these documents admittedly until a time when it would solely benefit themselves

5. Whether the Court of Appeals erred by affirming the Circuit Court's grant of a joint tenant's claim for contribution when the claimed expenditure did not confer a benefit upon the property or upon the other joint tenants?

Court's Answer:	No, contribution for one joint tenant's undertaking can be imposed upon the other joint tenants even if no benefit is conferred upon the property or the other joint tenants
Appellant's Answer:	Yes, contribution cannot be sought because the prior litigation was not a common burden of ownership that the co-tenants were bound to discharge, and the unsuccessful litigation conferred no benefit upon the other joint tenants
Appellee's Answer:	No, contribution for one joint tenant's undertaking can be imposed upon the other joint tenants even if no benefit is conferred upon the property or the other joint tenants

APPENDIX OF EXHIBITS

1. Court of Appeals decision for publication, July 1, 2021
2. Justice Riordan's dissent
3. Order of the Michigan Supreme Court, October 30, 2020
4. Court of Appeals unpublished decision, August 6, 2019
5. Justice Servitto's dissent
6. Summary disposition hearing transcript, May 15, 2017
7. Order voiding deeds, August 15, 2017
8. Decision and Order Regarding Partition, August 25, 2017
9. Order of Sale, December 11, 2017
10. Decision and Order, April 16, 2018
11. Quit Claim Deeds from Leo Bussa, Trustee of the Leo Bussa Trust AUD (Grantor) to Leo Bussa (Grantee) November 30, 2010 & December 7, 2010
12. Quit Claim Deed from Leo Bussa (Grantor) to Leo Bussa, Cindy Chaff, Colleen M Fryer, & Charlene A Forbes a/k/a Angie Forbes (Grantees) December 7, 2010
13. Quit Claim Deed from Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust (Grantor) to Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust & Gwen Mason (Grantees) February 9, 2011
14. Quit Claim Deed from Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust (Grantor) to Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust, Cindy Schaaf, Colleen M. Fryer, & Charlene Forbes a/k/a Angie Forbes (grantees) February 9, 2011
15. Quit Claim Deeds from Gwen Mason, Successor of the Mae E. Fitzpatrick Trust (Grantor) April 22, 2011
16. Second Amended Civil Scheduling Conference Order, July 21, 2017

I. INTRODUCTION

This case involves a 60-acre parcel of land on Torch Lake with 900 feet of water frontage. The property has been in the family, with capped property taxes, since the 1800s. Two months before he died, Leo Bussa endeavored to transfer the property, upon the advice of counsel, via ladybird deeds with rights of survivorship to keep the property taxes capped. The property had been held in his and his mother's trusts, so Leo sought to transfer the property out of the trusts.

Notably, neither Leo's trust nor his mother's trust contained any language of survivorship rights intending to be conveyed with the property. But, before Leo died, he and all parties to this lawsuit, which collectively totaled all the trust beneficiaries of the 60-acre parcel, consented to and agreed to transfer and receive the 60-acre parcel with survivorship rights to prevent the property taxes from uncapping.

After Leo died, the plaintiffs to this lawsuit regretted their decision to receive their distribution from trust with rights of survivorship. Since the trusts contained no-contest provisions that would have dispossessed plaintiffs of their entire inheritance if they challenged the trust's distribution in probate court, they filed this action in circuit court seeking to void the survivorship rights that were distributed to them from trust in the still pending probate action.

Aside from the first deed, which transferred the property out of Leo's trust to himself personally, the other three deeds he executed all transferred the property "as Joint Tenants with Rights of Survivorship." The third and fourth deeds included a joint tenant grantee identified as "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust." The validity of this grantee's receipt of survivorship rights is the subject of this lawsuit.

After Leo died, the successor trustee of the Mae E. Fitzpatrick Trust, plaintiff Gwen Mason, executed two deeds that disposed of any joint tenancy held by "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust." At the time this action was filed, the property was held by plaintiff Gwen Mason with an undivided 25% tenant in common interest, and an undivided 75% interest with full rights of survivorship held by plaintiffs Cindy Schaaf and Colleen Fryer, and defendant Angie Forbes.

There is no dispute that Leo intended to transfer his half interest in the 60-acre parcel with full rights of survivorship to plaintiffs Cindy Schaaf and Colleen Fryer, and defendant Angie Forbes. Leo accomplished this successfully by first transferring his interest in the property out of the trust and to himself personally before he used a second deed to convey survivorship rights to the intended remaindermen.

His mother Mae Fitzpatrick was deceased, and thus could not do what Leo did. "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" tried to accomplish the same result while retaining an enhanced life estate for "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" (i.e. himself). Since the terms of the trust did not mention anything about granting survivorship rights with the property, Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust did not have the authority to convey survivorship rights to the intended beneficiaries unless all beneficiaries to the 60-acre parcel consented to receive their distribution with survivorship rights despite the terms of the trust. That is exactly what happened – plaintiffs and defendant herein consented to receive their distributions to the 60-acre parcel with survivorship rights. They chose to do so, upon the advice of counsel, to keep the property taxes capped. So, in terms of fulfilling the intent of the testator and acknowledging the consent of the beneficiaries, survivorship rights are what was intended by the testator and consented to by all recipient beneficiaries.

II. MATERIAL PROCEEDINGS

On July 1, 2021, the Court of Appeals released the decision for publication that serves as the basis for appeal in this application.[1] Justice Riordan offered a dissenting opinion.[2] Previously, on October 30, 2020, this Court vacated the Court of Appeals' prior decision on this matter.[3] On August 6, 2019, the Court of Appeals issued its first decision on this matter.[4] Justice Servitto offered a dissenting opinion.[5]

In the Circuit Court, summary disposition oral arguments occurred on May 15, 2017.[6] On August 15, 2017, the Circuit Court issued an Order voiding the deeds.[7] On August 25, 2017, the Circuit Court issued a Decision and Order Regarding Partition finding against partition in kind in favor of selling the property in lieu of partition.[8] On December 11, 2017, the Circuit Court issued an Order of Sale.[9] On April 16, 2018, the Circuit Court issued a Decision and Order on the contribution claim.[10]

III. STATEMENT OF FACTS

In May of 1998, both Mae and Leo created separate trusts. In August of that year, they transferred, to their respective trusts, each of their undivided one-half interests as tenants in common. In 2004, Mae passed away and Leo became Trustee of Mae's Trust. When his mother died, Leo received a life estate in her undivided one-half interest in the 60-acre parcel. When Leo

[1] Exhibit 1 – Court of Appeals decision for publication, July 1, 2021
[2] Exhibit 2 – Justice Riordan's dissent
[3] Exhibit 3 – Order of the Michigan Supreme Court, October 30, 2020
[4] Exhibit 4 – Court of Appeals unpublished decision, August 6, 2019
[5] Exhibit 5 – Justice Servitto's dissent
[6] Exhibit 6 – Summary disposition hearing transcript, May 15, 2017
[7] Exhibit 7 – Order voiding deeds, August 15, 2017
[8] Exhibit 8 – Decision and Order Regarding Partition, August 25, 2017
[9] Exhibit 9 – Order of Sale, December 11, 2017
[10] Exhibit 10 – Decision and Order, April 16, 2018

passed away in 2011, his life estate in his mother's one-half interest terminated, and his own one-half interest vested in the joint tenant remaindermen (subject to divestment if they failed to outlive their co-tenants with rights of survivorship). The parties to this action inherited the entire 60-acre parcel of land on Torch Lake.

Before Leo died, he executed 5 ladybird deeds to the parties to this action. Collectively, those five deeds conveyed 100% of the 60-acre parcel on Torch Lake. Upon the advice of counsel, Leo started with his own undivided one-half interest in the 60-acre parcel, which was held by his trust at that time. So, the first ladybird deed transferred Leo's undivided one-half interest in the 60-acre parcel from his trust to himself personally.[11] Second, Leo conveyed, through ladybird deed number 2, that same undivided one-half interest in the 60-acre parcel to Plaintiffs Cindy Schaaf and Colleen Fryer, and the Defendant Angie Forbes.[12] As the deed states, those three inherited Leo's one-half interest "as Joint Tenants with Rights of Survivorship."[13] Their interests are classified as life estates with vested remainders subject to total divestment if they do not outlive their joint tenants. This is not in dispute.

Leo's third ladybird deed conveyed the property's mineral rights to Angie Forbes. Plaintiffs are not challenging these 3 deeds because the property passed through Leo personally; not through Leo's trust. Consequently, there is no dispute that Cindy Schaaf, Colleen Fryer and Angie Forbes inherited Leo's undivided one-half interest in the 60-acre parcel "as Joint Tenants with Rights of Survivorship."

[11] Exhibit 11 – Quit Claim Deed from Leo Bussa, Trustee of the Leo Bussa Trust AUD (Grantor) to Leo Bussa (Grantee)
[12] Exhibit 12 – Quit Claim Deed (subject to an enhanced life estate) from Leo Bussa (Grantor) to Leo Bussa, Cindy Chaff, Colleen M Fryer, and Charlene A Forbes a/k/a Angie Forbes (Grantees)
[13] See Exhibit 12, ¶ 2

Leo's fourth and fifth ladybird deeds conveyed his mother's undivided one-half interest in the 60-acre parcel. Leo, as trustee of his mother's trust, conveyed ½ of Mae's one-half interest to Plaintiff Gwen Mason,[14] and the other ½ of Mae's one-half interest to Cindy Schaaf, Colleen Fryer, and Angie Forbes "as Joint Tenants with Rights of Survivorship."[15] Plaintiffs are challenging the latter, but not the former because the former did not convey survivorship rights. Thus, upon Leo's death, Gwen Mason received her ½ of Mae's one-half (25% of the whole) without any survivorship rights, which is undisputed.[16] Conversely, the other 3 grantee remaindermen received the other ½ of Mae's one-half interest in the 60-acre parcel (25% of the whole) "as Joint Tenants with Rights of Survivorship."[17] This is the deed being challenged.

It should be noted that if Leo intended for the survivorship rights to restrict Gwen Mason's ¼ share, then Leo would have used only one ladybird deed to convey his mother's ½ interest to the four grantees "as Joint Tenants with Rights of Survivorship." Instead, Leo used two separate deeds to craft this result.[18] Importantly, this is how these parties, as trustees and trust beneficiaries, agreed to receive their title to this property, which arose and was determined during the administration and distribution from trust, both while Leo was still alive and in following through after Leo's death two months later.

[14] Exhibit 13 – Quit Claim Deed (subject to enhanced life estate) from Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust (Grantor) to Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust and Gwen Mason (Grantees)
[15] Exhibit 14 – Quit Claim Deed (subject to enhanced life estate) from Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust (Grantor) to Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust, Cindy Schaaf, Colleen M. Fryer, and Charlene Forbes a/k/a Angie Forbes (grantees)
[16] See exhibit 13
[17] See Exhibit 14
[18] Exhibit 15 – Quit Claim Deed from Gwen Mason, Successor of the Mae E. Fitzpatrick Trust (Grantor) to Gwen Mason (Grantee)

IV. ARGUMENT

A. STANDARD OF REVIEW

This application must show that "the issue involves a legal principle of major significance to the state's jurisprudence,"[19] or "the decision is clearly erroneous and will cause material injustice, or"[20] "the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals."[21]

The exclusivity of the probate court's subject matter litigation, and whether trusts may hold and pass survivorship rights are two legal principles of major significance to the state's civil jurisprudence.

The majority's decision is clearly erroneous because it conflicts with the comprehensive statutory framework of EPIC. The majority's decision will cause material injustice because the resulting outcome is not what Leo, the lawyers, or these beneficiaries intended at the time this issue arose during the administration and distribution of the deeds from trust.

The majority's decision conflicts with *Albro v Allen* because it allows a life estate's partition to harm the interests of the remaindermen.[22] The majority's decision also conflicts with another decision of the Court of Appeals, which was this same panel's unpublished split decision dated August 6, 2019.

For these reasons and those that follow herein, this application should be granted.

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[19] MCR 7.305(B)(3)
[20] MCR 7.305(5)(a)
[21] MCR 7.305(5)(b)
[22] *Albro v Allen*, 434 Mich 271, 454 NW2d 85 (1990)

B. EXCLUSIVE PROBATE COURT SUBJECT MATTER JURISDICTION

At the time this action was filed in circuit court, these parties were still parties / trustees / beneficiaries in the then pending probate court proceeding concerning the settlement and distribution of Mae's & Leo's trusts, which primarily involved this parcel. Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust conveyed, upon the consent of the beneficiaries, survivorship rights to "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust," and the beneficiaries. After Leo died, Plaintiff Gwen Mason became the successor trustee of the Mae E. Fitzpatrick trust. In that capacity, Ms. Mason executed the deeds that removed any interest that "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" had in the 60-acre parcel; thereby granting exclusively it to these parties as joint tenants with rights of survivorship.

During the parcel's distribution from trust, none of the trust distributees contested that "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust"[23] could hold survivorship rights, nor did they contest the method through which the transfer was being accomplished. In fact, trustee Leo and successor trustee Ms. Mason had to believe their action was legal and effective, or else they would have been knowingly violating their fiduciary duties as trustees. Obviously, defendant Ms. Forbes believes that "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" could hold survivorship rights. And, the probate court did not see a problem as it approved the conveyance. If any beneficiary believed that the trustees did not have the power to convey distribution of survivorship rights to "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust," then compulsory joinder and exclusive jurisdiction required them to raise it as an issue at that time.

[23] Exhibit 1 – Court of Appeals decision for publication dated July 1, 2021

Exclusive jurisdiction is vested in the probate court to "determine a question that arises in the administration or distribution of a trust" and "determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right."[24] During the administration of Mae's trust, a question arose as to how the 60-acre parcel would be conveyed to the beneficiaries. When survivorship rights were agreed upon, even though Mae's trust did not mention them, these parties' probate lawyers determined the trustee's power to convey survivorship rights required the consent of all beneficiaries to receive their distribution in a manner that differed from the terms of the trust. So, the parties here, as trust beneficiaries in the probate action, all consented to their receipt of survivorship rights.

The next question that arose was how to distribute the parcel from trust without uncapping the property taxes. These parties' probate lawyers settled on ladybird deeds (a/k/a enhanced life estates). While Leo was alive, his lawyer had him transfer his property rights out of his trust and to himself personally. Since Mae was deceased, the lawyers concluded that the grantor of an enhanced life estate from Mae's Trust had to be "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" since any other grantee in the chain of title would constitute a transfer of ownership and uncap the taxes. Because it was an enhanced life estate, "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" reserved for itself a life estate (essentially for Leo to continue living on the property) coupled with the "unrestricted power to convey the premises during ***his*** lifetime."

Two months later Leo died and his successor trustee, plaintiff Mason, executed new ladybird deeds removing "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" as a joint tenant (because ***his*** lifetime had ended). This procedure to distribute these parties' property interests from

[24] MCL 700.1302(b)(v) & (vi)

the trust was intentionally and strategically employed to prevent a transfer of ownership event that would uncap the property taxes. So, obviously, the question of how "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" could have, should have, and did distribute the 60-acre parcel to these parties was a very important issue that arose at the time of distribution. In fact, the issue arose twice: once before Leo died when he executed the deeds during the administration of Mae's trust, and again two months later after Leo died when his successor trustee executed the deeds removing the joint tenant known as "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust."

The distinction in this case, as one of exclusive jurisdiction of the probate court rather than concurrent jurisdiction in circuit court, is not about the issue of whether a trust can hold and convey survivorship rights as the Appellate decision overbroadly considered. Exclusive jurisdiction applies because the challenge being raised in circuit court by these plaintiffs, that "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" could not hold and pass survivorship rights, (1) arose during the administration and distribution of the trust, (2) only related to all of the parties here [i.e. it did not require the presence of any parties who were not parties to the probate action], (3) which parties constituted all of the beneficiaries of that distribution, (4) which beneficiaries consented to their receipt of survivorship rights with the joint tenant "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust," (5) which beneficiaries intentionally and strategically employed this manner of distribution from trust to prevent the uncapping of taxes, and (6) during a probate court action that was still pending when the plaintiff beneficiaries filed this challenge in circuit court.

There are circumstances in which circuit court would have concurrent jurisdiction over the issue of whether a trust can hold and convey survivorship rights. For example, by a litigant further down the chain of title who was not a party to the probate court action, whose interest in the title did not arise before the trust was settled or before the probate court action was concluded, etc. But,

in this case, these beneficiaries consented to their receipt of survivorship rights and the manner of distribution of those rights from trust those through enhanced ladybird deeds that contained the joint tenant "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust."

Even though this issue was considered, and this manner of trust distribution was consented to in the probate matter that was still pending, the trust beneficiaries filed this challenge in circuit court trying to modify their own distribution from trust. Notably, had they returned to the probate court for modification of the deed so as to effectuate the testator's intent and comply with their own prior consent, then survivorship rights would still have been passed to them (albeit through a court order rather than an enhanced life estate deed). Through this circuit court action, the beneficiaries are backdooring the testator's intent, retracting the consent they gave at the time of their trust distribution, and seeking to change the trust distribution into something that was never intended i.e. a tenancy in common to force the sale of the property.

These plaintiffs did not come into circuit court seeking a partition based upon the deed they held. These plaintiffs presented Count I to a different judge because they wanted to backdoor the existing deed that they themselves created in the pending probate court action. Only after getting their trust distribution modified by Count I, could they actually move onto Count II to partition the property without survivorship rights. That is why Count I as alleged in the complaint was within the exclusive jurisdiction of the probate court wherein the question about how to use the trust to convey survivorship rights to these parties arose and was determined with what should have been finality as to these parties. The majority's finding of concurrent jurisdiction opens the circuit court up to challenges from probate beneficiaries who want a second bite of the apple to challenge their distributions from trust.

The majority's decision held that exclusive jurisdiction does not apply because "plaintiffs did not ask the circuit court to construe, invalidate, or modify the Fitzpatrick Trust, or any other testamentary instrument, involved in the chain of title in the subject property."[25] This is patently false – that is exactly what plaintiffs asked for in Count I. The request for relief in Plaintiffs' Second Amended Complaint asks the circuit court to hold that the deeds transferring survivorship rights be deemed defective.[26] The deeds transferring survivorship rights were their distribution from trust. The question of how to distribute survivorship rights to them from trust was deliberated, strategized, and consented to. If plaintiffs were not asking the circuit court to void a deed in the chain of title, then why did the court say at the summary disposition hearing that "A conveyance attempting to transfer property to a trust as joint tenant with rights of survivorship is therefore voidable."[27] The conveyance that the judge held to be voidable was the deed that these parties crafted to distribute their interest from the trust in a manner that they believed would keep their taxes capped.

If, as the majority's decision states, plaintiffs were not asking the circuit court to construe the Fitzpatrick Trust, then why was her trust plaintiffs' primary exhibit attached to the complaint? Paragraph C of their request for relief effectively seeks modification of the distribution of the 60-acre parcel from trust but without survivorship rights this time. Relief related to a partition action is not requested until Paragraph D.

To make matters worse, the circuit court judge was clearly concerned with the propriety of the distribution of survivorship rights from the Mae E. Fitzpatrick Trust. At summary disposition, the circuit court judge cited MCL 555.21 for the proposition that "every sale, conveyance or other

[25] Exhibit 1 – Court of Appeals decision for publication dated July 1, 2021
[26] Plaintiffs' Second Amended Complaint, pg. 8, ¶ A & B
[27] Exhibit 6 – Summary disposition hearing transcript, May 15, 2017, pg. 23, lines 21-23

acts of the trustees in contravention of the trust shall be absolutely void."[28] The judge said this because he was led to believe that survivorship rights were conveyed by the trustee in contravention of the trust's terms because the Mae E. Fitzpatrick Trust did not mention them.

If the circuit court was not construing the Fitzpatrick Trust, as the majority's decision claims, then why did the judge say:

> The language of Mae's trust indicates that she wanted her 50 percent to be conveyed to the grantees as tenants in common, she does not include any power in the trust to grant a joint tenancy or to grant survivorship language and the court believes that language is necessary under Michigan law. The trust is very clear, 50 percent shall be distributed to Gwen Mason…[29]

Here, the judge clearly believed that the deed with survivorship rights, issued from the probate court upon the consent of these parties, was an improper distribution from a trust because the trust does not mention survivorship rights which he (erroneously) believes Michigan law requires before a deed from trust can convey survivorship rights. Clearly, the judge based his decision on his opinion that the probate court's distribution of survivorship rights from trust was erroneous. The circuit court judge effectively took it upon himself to modify these parties' distribution from trust by invalidating the survivorship rights that he thought should not have been distributed. This is where the circuit court invaded the exclusive jurisdiction of the probate court.

The majority's decision misstates defendant's argument by claiming "Defendant does not suggest that plaintiffs' claims for determining interests in real property, for sale of the property, and contribution were not actionable in circuit court. Indeed, she could not validly make such a suggestion."[30] On the contrary, defendant has been aggressively arguing that plaintiffs' Count I is

[28] Exhibit 6 – Summary disposition hearing transcript, May 15, 2017, pg. 21, lines 21-22
[29] Exhibit 6 – Summary disposition hearing transcript, May 15, 2017, pg. 24, lines 9-15
[30] Exhibit 1 – Court of Appeals decision for publication dated July 1, 2021

not actionable in circuit court. An action to determine interests in real property is actionable in circuit court, but that is not what plaintiffs are doing in their Count I. They already determined their interests in the property in the probate court action when these beneficiaries crafted these deeds to be their distribution from trust. They cannot leave probate court, walk into circuit court, and challenge the very distribution from trust that they just approved of. That is what their couched action to determine interests in land really was, and that is exactly how the judge heard them arguing it when he based his opinion on the Mae E. Fitzpatrick Trust's lack of language therein granting survivorship rights.

C. A TRUSTEE CAN HOLD & CONVEY SURVIVORSHIP RIGHTS

The majority's decision notes that defendant "leans heavily upon the fact that the language used to convey the property interest to the trust specifically stated that the trust was to hold its property rights in that manner."[31] Of course, defendant leans heavily upon the deed's specified grant of survivorship rights because that is the only way to create survivorship rights – by clearly and unequivocally using language in the deed that specifies that survivorship rights are intended. "Conveyances expressing an intent to create a joint tenancy or tenancy by the entireties in the grantor or grantors together with the grantee or grantees shall be effective to create the type of ownership indicated by the terms of the conveyance."[32]

The deeds that are the subject of this litigation all use the language "as Joint Tenants with Rights of Survivorship." The express language of joint tenancy with survivorship rights clearly indicates the that the terms of the conveyance shall be a joint tenancy with rights of survivorship. If the language was not specifically in the deed, then we would not even be talking about

[31] Exhibit 1 – Court of Appeals decision for publication dated July 1, 2021
[32] MCL 565.49

survivorship rights because there is a general presumption in favor of tenancies in common. Importantly, survivorship language is clearly specified in our deeds because while the trustee, the beneficiaries, and their lawyers were all worried that if the deeds distributed from the trust were not done correctly, then a transfer of ownership might have uncapped the taxes.

The published decision's mockery that "simply saying something is intended or shall be does not necessarily make the intended act permissible or lawful" directly contradicts MCL § 565.49. As it relates to the creation of joint tenancies, when a deed expresses "an intent to create a joint tenancy or tenancy by the entireties in the grantor or grantors together with the grantee or grantees it shall be effective to create the type of ownership indicated by the terms of the conveyance."[33]

The very purpose of testamentary instruments is to articulate a clear expression of an intention in hopes of making it so. Testators are not on a game show saying the car is behind door number two in hopes of making it so. Testators do not just willy-nilly say something. They express their final wishes and expect them to be fulfilled. Leo and Mae took greater efforts than most to plan their estate succession. While Leo was alive, plaintiffs herein led him to believe that survivorship rights would keep the property in the family and the taxes capped to an affordable level. After he died, the three trust beneficiaries walked into a new court with a new judge and told a different story.

It is unsettling to see precedential value assigned to a decision that cites to logic and common sense, in a de novo review of statutory construction, rather than citing to the statutory framework. If it is so logical and such common sense that a trust may not pass survivorship rights,

[33] MCL 565.49

then why was there a split panel on both appellate decisions? Did one judge on the panel not have common sense and logic when he was with the first majority, and then he developed common sense and logic before the second time around when he was with the new majority? Is the current dissenting appellate judge without logic or common sense because he still believes a trust can pass survivorship rights? A published decision should not cite to undefinable and subjective terms that imply the majority's higher intellect. As the dissent shows, a de novo review of statutory construction should cite to the statutory framework.

From a decision with precedential value, we as practitioners have to explain to our clients that the new law is based on common sense because any logical practitioner should know that a trust cannot hold survivorship rights. As the dissent highlights:

> The majority does not cite any authority providing that a trust may not hold title as a joint tenant under common law. Rather, the majority offers 'common sense' arguments to reach its conclusion. In my view, the common law and statutory framework provide to the contrary, and that is what we should follow to resolve the matter before us.[34]

From a practitioner's standpoint, the dissent is much easier to explain to the client as a reasoned, historically accurate approach to explaining why the court held as it did. Contrarily, the published decision taunts that just because your probate lawyers do their best to express your intent in a conveyance that alone does not mean your final wishes will be followed by erudite judges with superior logic.

The majority's decision, despite the language in the deed, critically mistakes the trust as the joint tenant. But, the grantee in the deed is "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust." The grantee was not "The Mae E. Fitzpatrick Trust." Moreover, the enhanced life estate

[34] Exhibit 2 – Justice Riordan's dissent, pg. 2, ¶ 2

created an "unrestricted power to convey the premises during ***his*** lifetime." The deed clearly referenced the grantee as a male person, a life in being, a natural person upon whose life the survivorship rights of his joint tenancy could be measured. There was nothing in the record to support that the Fitzpatrick Trust was a male (or a female). The "his lifetime" used in the deed was Leo's lifetime; not the "lifetime" of the trust.

At the time the language was chosen, the probate lawyers knew the successor trustee was a female, plaintiff Mason, but they did not include in the deed "his or her" lifetimes. The language used did not seek to retain a life estate during the successor trustee's lifetime. The language used did not say the lifetime of "The Mae E. Fitzpatrick Trust." The language in the deed of "his lifetime" meant Leo in his official capacity as trustee. Leo the individual, not the trustee, had no authority to grant any distribution from the trust. The grantor on the deed could only be Leo, the trustee.

Enhanced life estates require the reservation of an unrestricted right to convey, so the reservation related back to the same grantee that is the grantor. In doing so, the lawyers used Leo the trustee's lifetime as the measure upon which Leo, the trustee, could be a joint tenant. To be sure, when Leo died, the successor trustee issued new deeds removing "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" as a joint tenant because ***his*** lifetime had ended. At the time, the trusts had not yet been settled or terminated. The 60-acre parcel was released from probate before the remainder of the probate estate had been settled. Mae's & Leo's trusts, and the probate court dispute over them, continued on long after issuance of the deed that removed "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" as a joint tenant. Thus, the successor trustee, the trust beneficiaries, and the probate court all acted as if Leo's death triggered the survivorship rights clause justifying removal of "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" as a joint tenant.

The majority, in a footnote, recognizes that a trustee is different from a trust itself, but the decision never addresses why "The Mae E. Fitzpatrick Trust" is considered the joint tenant in this case when the deed clearly identifies the grantee as "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust." From the language employed in the deed, how the grantor/grantee was named, the reference to "his lifetime," and the subsequent actions of the trustees and distributees, the intent of the testator was clear and followed and the survivorship rights were conveyed to the best of the probate attorneys' abilities. Appreciatively, the dissent recognizes that the published decision's application of the new 'logical and common sensical' rule against a trust holding survivorship rights forces the sale of the 60-acre parcel outside of the family, which is a result that was completely unforeseeable by Leo, the beneficiaries (at the time of their consent to the receipt of survivorship rights in their distribution from trust), and the probate attorneys.[35]

The majority concludes that "a trust holding property as a joint tenant with rights of survivorship thus potentially renders any such right of survivorship illusory."[36] First, why is the majority's decision speaking in potentials and hypotheticals as if this is a law school exam question rather than an actual case with real facts? These plaintiffs / grantees' survivorship rights were not, in fact, rendered illusory. At the time this action as filed, there was no potential that these plaintiffs would never receive their survivorship rights. The threat of a trust holding these Plaintiff's survivorship rights in perpetuity was impossible because the joint tenant being complained had already been dispossessed of any interest in the property.

The joint tenant known as "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" was no longer a joint tenant when this action was filed. It had not been on the deed for about six years.

[35] Exhibit 2 – Justice Riordan's dissent, pg. 4
[36] Exhibit 1 – Court of Appeals decision for publication, July 1, 2021

The joint tenant known as "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" appeared on a deed with these grantees as of February 9, 2011. After Leo's death, new deeds were issued just two months later, on April 22, 2011, through which the joint tenant known as "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" was removed as a joint tenant. Thus, as of April 2011, after the successor trustee issued new deeds removing "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" as a joint tenant, it was no longer possible for these grantees' survivorship rights to be rendered illusory because of a trust as their joint tenant. Nonetheless, the majority leans heavily on this impossibility as a potential.

The majority states that "a trust, not being a natural person, has no actual residential needs, cannot occupy real property, and does not die."[37] In doing so, the majority ignores the fact that a trust is a vehicle for a natural person to hold the person's property and convey it upon their death. The majority does nothing to respond to the dissent's citation to Restatement (Third) of Trusts § 40, which explains that "a trustee may hold in trust any interest in any type of property," including contingent remainders.[38] In this case, "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" should have been allowed to hold in trust any interest in any type of property, including a contingent remainder. A trustee is a natural person, but limited to an official capacity. Leo still had residential needs at the time, which is why a life estate was reserved for "***his*** lifetime." Leo still did in fact occupy the real property until his lifetime ended. When Leo died, his death resulted in the successor trustee removing the joint tenant grantee known as "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust." Thereafter, there was no longer any potential for these plaintiffs' survivorship rights to be rendered illusory.

[37] Exhibit 1 – Court of Appeals decision for publication, July 1, 2021
[38] Exhibit 2 – Justice Riordan's dissent

While the majority acknowledges that a trust cannot exist in perpetuity, it goes on the claim, without any citation to authority, that a trust can exist far beyond the lifespan of a natural person. Once again, that is not what factually happened in this case. The trust did not exist beyond these grantees' lifetimes. These grantees temporarily shared a joint tenancy with "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" for just over two months during the distribution and administration of the trust estate. The joint tenant known as "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" held title only so long as necessary to distribute survivorship rights to the trust beneficiaries through a method strategically employed to administer the estate with the best property tax consequences inuring for the benefit of the beneficiaries.

D. A TERMINABLE INTEREST IS UNENFORCEABLE AFTER 30 YEARS

Even though certain types of trusts could exist beyond the lifetime of a natural person, that does not render survivorship rights illusory because no trust can hold survivorship rights beyond 30 years without recording a preservation notice from every other joint tenant. Our statutory framework provides that a terminable interest may not exist beyond 30 years without being actively preserved, regardless of whether the terminable interest is held by a trust, trustee, or natural person.[39]

A terminable interest is a possessory interest in real property which is subject to termination by a provision in a conveyance that creates a right of reversion to a grantor, his heirs, successors, or assigns on the occurrence of a specified contingency.[40] A life estate is a possessory interest in real property. The contingent remainder subjects the life estate to termination by a provision in the conveyance. A specified contingency is the event described in the conveyance that created the

[39] MCL 554.61 through 554.66
[40] MCL 554.61(a)

terminable interest, the occurrence of which divests the terminable interest.[41] In this case, the specified contingency is surviving beyond the duration of the other life estates with contingent remainders. Thus, a life estate with a contingent remainder, joint tenants with rights of survivorship, is a terminable interest with a specified contingency of survivorship.

Pursuant to statute, "[i]f the specified contingency does not occur within 30 years after the terminable interest is created, the right of termination by reason of the specified contingency shall be unenforceable."[42] In the matter of joint tenants with rights of survivorship, if the specified contingency of surviving beyond the duration of the other life estates with contingent remainders does not occur within 30 years after the conveyance wherein survivorship rights were created, then the right of termination by reason of survivorship is unenforceable. Thus, even if a trust is a joint tenant with rights of survivorship, after 30 years of there being no last man standing then the survivorship rights are unenforceable. Therefore, while certain trusts can exist beyond the life of a natural person, any terminable interest the trust possesses is unenforceable after 30 years of the specified contingency's nonoccurrence. Consequently, even if this trust was the joint tenant rather than the trustee, the trust could not have held its survivorship rights beyond 30 years (unless preserved).

The only way a trust, or any other person or entity, can possess survivorship rights that are enforceable after 30 years of the specified contingency's nonoccurrence is upon recordation of a preservation notice reaffirming the consent of each and every joint tenant.

> A right of termination may be preserved by the recording, within a period of not less than 25 nor more than 30 years after creation of the terminable interest or within 1 year after the effective date of this act, whichever is later, of a written notice that the owner of such right of termination

[41] MCL 554.61(b)
[42] MCL 554.62

> desires to preserve the same, such notice to be recorded in the register of deeds office of the county where the real property subject to such right of termination is located. Such notice shall be verified by oath, shall describe the land involved and the nature of such right of termination, including the specified contingency, and shall state the name and address of the owner of such right of termination. The recording of such notice shall operate to preserve such right of termination from the operation of this act for a period of 30 years from the date of recording of such notice.[43]

As the dissent expressed, "[t]he Michigan Trust Code, is a comprehensive scheme with dozens of provisions addressing virtually every aspect of trust law."[44] Applying these provisions, instead of relying upon subjective logic or common sense, shows that survivorship rights are not rendered illusory even if a trust can exist for longer than natural person.

The majority erred by basing the measure of how long a trust could hold survivorship rights on the duration of the trust's existence, rather than on how long EPIC limited the perpetuation of a terminable interest. EPIC's preservation statute provides a 5-year window of opportunity to preserve the survivorship rights beyond 30 years, or else the enforceability of those survivorship rights lapses automatically. If joint tenants that hold survivorship rights want to preserve the specified contingency of surviving each other, then within 25-30 years from the date of the conveyance wherein their survivorship rights were granted, each survivorship right holder must take an oath and record notice reaffirming the survivorship rights for another 30 years.

So, even if the trust was the joint tenant with rights of survivorship, rather than the trustee, and even if these grantees were still joint tenants with that trust, which they are not and were not when this case was filed, then the specified contingency's nonoccurrence by February 9, 2041 would have caused the survivorship rights to be unenforceable unless all joint tenants reaffirmed

[43] MCL 554.65
[44] Exhibit 2 – Justice Riordan's dissent

its enforceability. Therefore, it was not possible for the trust to hold survivorship rights beyond that date without further reaffirmation. Since the majority's decision leaned heavily on the duration of a trust's existence instead of EPIC's limitation on terminable interests, the majority erred by analyzing the wrong criteria. In doing so, the majority wrongfully concluded that survivorship rights were rendered illusory because of a trust's potential for existing longer than the life of a natural person. That is the problem that arises from citing to non-precedential, subjective logic and common sense rather than the statutory code.

E. NARROWLY INTERPRETING A RECORDING STATUTE SHOULD NOT MAKE A NEW RULE

The majority held the lack of a death certificate to record, pursuant to MCL 565.48, after a joint tenant trust's interest in the property terminates left "no room to conflate the definition of death beyond its practical meaning." But, in the same sentence through which this statute requires recordation of a death certificate, the legislature added more language to allow the register to accept something other than a death certificate. Essentially, the legislature created leeway for something akin a death certificate. So, when the majority said there is "no room to conflate the definition of death," the majority ignores that the legislature did in fact articulate "room" for interpretation. This additional language provides feasibility by opening the door for "other proof of death that is permitted by the laws of this state to be received for record by the register."

A termination of trust or other trust document terminating property rights, which are receivable by the register, could be recorded contemporaneously, in a separate document, with the new deed that removes the trust as a joint tenant. Is the contemporaneous recordation of a termination of trust, or other trust document, with the deed removing that trust as a joint tenant realistically conflating the definition of death beyond its practical meaning?

In 2011, the Antrim County Register had no objection to receiving conveyances with "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" as a joint tenant with rights of survivorship, and as both grantor and grantee on an enhanced life estate deed. What we do not know is whether the register would have accepted a termination of trust, or other trust document, contemporaneously with the new deeds removing the trust as a joint tenant, or whether the register would have demanded a certified death certificate.[45] According to the majority, common sense would have left no room for a logical register to conflate the definition of death beyond a certified death certificate – despite the additional statutory language in that same sentence that allows for "other proof of death that is permitted by the laws of this state to be received for record by the register."

While terminations of trust are receivable by the register, in practical application they are rarely recorded. The purpose of a trust is to hold, transfer, and distribute assets. Its termination comes when there are no more assets to distribute. Any land in the trust must be transferred and distributed before the trust can terminate. If a trust terminates properly, it no longer possesses any real property. When a trust terminates without any property, there is no chain of title within which to record the termination of trust. But, in this case, the register could receive it in the chain of title of the real property that the trust was terminating its interest in as "other proof of death that is permitted by the laws of this state to be received for record by the register."

The other question we do not know is whether, under the statute, the register would accept Leo's death certificate as sufficient to record the new deeds without the former joint tenant known as "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust." Perhaps the register might have requested another document, filed contemporaneously as well, from the successor trustee of the Mae E.

[45] The deeds removing "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" were never recorded because (1) deeds do not have to be recorded to be valid, and (2) out of an abundance of caution aimed at preventing an event sufficient to constitute a transfer of ownership whereby the taxes would be uncapped

Fitzpatrick Trust that acknowledged termination of any joint tenancy? Either way, this process, considering the leeway afforded by the recording statute, does not seem to conflate the definition of death beyond its practical meaning. Trusts are attendant to death. Nearly all trusts are administered as a direct result of someone's death.

Starting the slippery slope of drawing a line at where a trust can no longer hold the same interests in property that an individual can hold should not arise from an overly restrictive interpretation of a permissive recording statute. Significantly, title deeds are not even required to be recorded. So, it is not as if this permissive recording statute is preventing a trust from holding survivorship rights. At most, the restrictive interpretation offered by the majority's decision could only result in an obstinate register refusing to receive a deed that seeks to remove a trust as a joint tenant. However, recordation or non-recordation does not change the deed's validity. Even though the register does not accept it, the conveyance is still valid. Therefore, the permissive recording statute, even under the majority's narrow interpretation, does not prevent a trust from holding and passing survivorship rights. Troublingly, the majority cites this statute and provides a narrow interpretation of proof of death, while ignoring the additional language, in an effort to claim the legislature intended to exclude trusts from possessing survivorship rights (even though the entire framework of EPIC demonstrates an alternative legislative intent supporting liberal use of trusts). As the dissent recognizes, the Appellate decision's new rule, that creates the first limitation on a trust's ability to hold any interest in property that a person can hold, "results in a division of interests that, in all likelihood, was completely unforeseeable by both the grantor and the grantees at the time of the trust's creation."[46] To me, it seems most logical and makes good common sense to try to fulfill the intent of the testator and force the beneficiaries to accept their intended

[46] Exhibit 2 – Justice Riordan's dissent

distribution from trust. Legislating from the bench should not bail them out of their buyer's remorse (actually it's more like trust distributee's remorse).

F. PARTITION IN KIND IS POSSIBLE WHEN ONLY ONE SPLIT IS APPLIED

Based on *Albro v Allen*, it is clear that unique circumstances can result in the ability to partition some current possessory rights, regardless of whether those possessory right holders also hold reversionary or remainder rights.[47] But, the largest caveat from *Albro* was that partition of the joint life estates can only be granted as long as it does not affect the contingent remainders. So, if these plaintiffs complained that their enjoyment of the waterfront during peak summer weeks (their life estate) was being infringed upon by the other life estates' enjoyment of the waterfront, then a court could partition their current possessory interests by assigning each life estate certain use weeks for each of them to exclusively enjoy the waterfront during the peak summer season. That is a workable partition of current possessory interests that would not do any harm to each of their contingent remainders.

On the other hand, someone holding a contingent remainder of survivorship rights is most certainly prejudiced by a life estate's attempt to partition that forces the sale of the property. That type of partition of current possessory interests grants the life estate more rights than it came to the table with. That life estate is taking an action that causes a result that extends beyond the life estate. That type of partition of current possessory interests prejudices the remaindermen's interest because the remaindermen never get to await the happening of the specified contingency because the property will have been sold before the contingency had an opportunity to occur (or not occur within 30 years). For this reason, the published decision directly conflicts with *Albro* because it

[47] *Albro v Allen*, 434 Mich 271, 454 NW2d 85 (1990) (We further hold that the joint life estate may be partitioned without affecting the contingent remainders)

grants a current possessory owner partition even though doing so will harm the survivorship rights of the contingent remaindermen.

The Circuit Court erred in concluding that partition in kind was not possible because the court tried to divide the property into more than two parcels. Since the court first concluded that a trust could not hold survivorship rights, it then assigned the party's interests into multiple parcels. From there, the court extended that to say multiple parcels would overburden the easement. However, if the survivorship interests were properly applied, then partition in kind would have considered only two parcels: (1) an undivided 75% interest in the property with survivorship rights, and thus non-partitionable, and (2) plaintiff Mason's undivided 25% interest as a tenant in common. Thus, partition in kind analysis should have only considered one divide and two parcels; not multiple parcels.

There was no evidence presented that one divide of the 60-acre parcel would overburden the easement. The 60-acres would still have only had four tenants. Three tenants on 75% of the 60-acre parcel, and one tenant on 25% of the 60-acre parcel. In fact, since the easement starts at the southern part of the property, and the parcel's house is on the northern end of the easement, then there would have been less usage across the easement the more northerly you drove onto the property (notably the dominant tenement owners are north of the property). If the three joint tenants received the southern 75% of the property, then there would have been three less owners traversing the northern portion of the easement to get to the house. If the three joint tenants got the northerly half, then there would have been one less owner traversing to the northern portion of the easement. Furthermore, the record showed that defendant owns a separate appurtenant parcel that she offered upon partitioning in kind to provide another access to the 60-acres so as to not overburden the Bussa Lane easement. Neither of these options were given proper consideration because the circuit

court first invalidated the survivorship rights and then considered partition in kind based upon the creation of multiple parcels.

G. TRIAL EVE DOCUMENT DUMPS SHOULD NOT BE ADMISSIBLE

On the eve of the trial date, Plaintiffs filed 305 pages of proposed trial exhibits, which should have been precluded from admission at trial. The only documents that Plaintiffs ever exchanged during the entire course of this case were attached as exhibits to pleadings. Since Appellees never provided any discovery that was not attached to a pleading, these 305 pages of proposed exhibits were never disclosed.

Plaintiffs appear to have obtained documents from the various prior court proceedings between or amongst these parties, and then introduced them into this matter for the first time as voluminous trial exhibits filed on the eve of trial. Obviously, this surprise disclosure was not prompt, and it clearly prejudiced the Defendant as she never got the opportunity to depose Plaintiffs on any of their documentary support for the contribution claim.

Frustratingly, both Plaintiffs Mason and Fryer testified that neither of them had any documents to provide and they pointed to Plaintiff Schaff, who, while testifying, flat out refused to produce any such proofs as she hinted at producing them in a way that would only benefit her. Such tactics should not be rewarded with admissibility. Because of this conduct, the 305 pages of exhibits should have been deemed inadmissible.

Exhibits that were not identified as trial exhibits in compliance with the Scheduling Order should have been precluded. The 2nd Amended Scheduling Order ("Scheduling Order") mandated that "counsel shall electronically file… **COMPLETE** copies of PRE-MARKED TRIAL

EXHIBITS" "PRIOR TO the Final Pre-Trial/Settlement Conference."[48] As per the terms of the Scheduling Order, "[f]ailure to comply with every requirement of this conference paragraph may result in a default or a dismissal as may be appropriate against the offending party or attorney and an award of sanction to each non-offending party."[49] Pursuant to MCR 2.401(G):

> The court shall excuse a failure to… participate as directed by the court, and shall enter a just order other than one of default or dismissal, if the court finds that (a) entry of an order of default or dismissal would cause manifest injustice, or (b) the failure was not due to the culpable negligence of the party or the party's attorney.
>
> The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).[50]

The Scheduling Order required:

> Counsel shall… exchange copies of exhibits no later than February 5, 2017.
>
> Witnesses or exhibits not under the control of party and which become known or made available to a party through the discovery process may be later added so long as the disclosure is prompt and no prejudice is shown.
>
> Failure to comply with this paragraph will bar the introduction of the evidence or testimony at trial.[51]

H. ONE JOINT TENANT DOES NOT ALWAYS BIND THE OTHERS

Plaintiffs' contribution award from the Circuit Court included "fees associated with the previous litigation concerning the property (Antrim County Circuit Court Case No 11-8633-CH)."[52] This lawsuit ended in 2012, with the decision from Judge Rodgers that prevented the easement on this 60-acre parcel, known as Bussa Lane, from being utilized to provide access to

[48] Exhibit 16 - Second Amended Civil Scheduling Conference Order, July 21, 2017, pg. 4, ¶ 4
[49] Exhibit 16, pg. 5, ¶ 2, citing MCR 2.401(G)
[50] MCR 2.401(G) – Failure to Attend or to Participate
[51] Exhibit 16, pg. 2, ¶¶ 1-3, citing MCR 2.401(I).
[52] Exhibit 10 – Decision and Order, April 16, 2018

the 80-acre neighboring parcel, which Ms. Schaaf owned. This lawsuit was initiated by Leo Bussa the day before he died (at the time he held a life estate on the 80-acres). Shortly thereafter, all four parties to this action amended the Complaint to replace Mr. Bussa's name with their names as they were now the joint tenants with rights of survivorship. That lawsuit sought a ruling that would allow development of the 60-acre parcel (and Ms. Schaaf's 80-acre parcel[53]). That litigation was unsuccessful.

Plaintiffs should not have been able to maintain a claim pursuant to MCL § 600.3336(2) for fees associated with the previous litigation because those fees did not confer a benefit upon the premises. This statute permits the Court to consider "the benefits which a party has conferred upon the premises."[54] Even though no benefit was conferred on the property or inured to the benefit of Defendant as a joint tenant, Plaintiffs were awarded contribution from Mrs. Forbes. Nowhere in the statute does it empower the Court to consider a failed attempt to increase the property's value. That unsuccessful litigation cannot be said to have conferred a "benefit" upon the premises. Quite the contrary, the resulting decision further encumbered the premises by adding a Court Order to the property's chain of title. Suing their neighbors certainly did not confer a "benefit" upon these premises in terms of neighborly relations. "[A] party should not be charged for costs that did not benefit that party."[55] Thus, Plaintiffs' claim for contribution should have failed as a matter of law due to the absence of a benefit being conferred upon the premises by the unsuccessful litigation.

[53] Importantly, Ms. Schaaf solely owned the neighboring 80-acre parcel, in addition to her co-tenant ownership interest in the 60-acre parcel. So, if the legal bills were going to be shared pro rata – wouldn't one-half of the legal bills be the sole responsibility of Ms. Schaaf (for her 80-acres), and only the other half would be attributable to the co-tenants (for their 60-acres)? Tellingly, Plaintiffs' claim for contribution sought to give Ms. Schaaf a free ride for her 80-acres while making her 60-acre co-tenants bear more of her burden. Similarly, Plaintiffs double dipped in probate court by receiving CDs from Leo's Estate to pay for these legal fees

[54] MCL 600.3336(2)

[55] *Silich v Rongers*, 302 Mich App 137, 144; 840 NW2d 1 (2013)

Litigating for development potential is not a common burden or obligation which one joint tenant should be able to bind the other joint tenants to. In 2010, the Michigan Supreme Court explained:

> The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares.[56]

"It is not, however, enforced unless reason and justice require that each of the cotenants contribute his proportionate share of the common burden."[57]

The voluntary decision for one joint tenant to commence a lawsuit against the neighbors is not a common burden or obligation of ownership. One joint tenant should not be able to bind another joint tenant to the costs of that lawsuit that joint tenants are not bound to discharge. Taxes are a common burden of ownership that several persons may be equally liable and are bound to discharge. The same cannot be said for voluntary litigation – especially when the litigation ends with a burdensome impact upon the premises. To hold otherwise will result in joint tenants with rights of survivorship trying to destroy their survivorship rights by overspending and seeking contribution just to compel the other joint tenants to agree to sell – thus destroying the survivorship rights with unnecessary financial burdens.

In no way can it be said that reason and justice require that Mrs. Forbes contribute one quarter for legal fees when there was a greater pro rata benefit to Ms. Schaaf because her neighboring 80-acre parcel was involved as well. If one of the co-tenants had single-handedly paid

[56] *Tkachik v Mandeville*, 487 Mich 38, 47; 790 NW2d 260 (2010) quoting *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975)
[57] *Strohm v Koepke*, 352 Mich 659, 662; 90 NW2d 495 (1958)

for the litigation, won, and increased the property's sale price due to its developability, then yes (assuming the property's value increased by more than the cost of the endeavor) the out-of-pocket co-tenant could seek contribution of their aliquot share from the other co-tenants who benefited from the successful endeavor. That is what the statute allows. But, an unsuccessful and voluntary litigation is not a common obligation of ownership that a co-tenant is bound to discharge. As such, Plaintiffs' claim for contribution should have been dismissed.

REQUEST FOR RELIEF

WHEREFORE, Defendant-Appellant respectfully requests and Order reversing the Court of Appeals' decision in its entirety and hold: (1) the Circuit Court invaded exclusive probate jurisdiction, (2) "Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust" properly held and conveyed property as a joint tenant with rights of survivorship, (3) due to the improper invalidation of survivorship rights, partition in kind was not properly considered requiring remand, (4) plaintiffs intentional withholding of discovery until the eve of the trial date rendered those documents inadmissible, and (5) joint tenants cannot claim contribution for non-common burdens of ownership unless a benefit is conferred upon the property or the other joint tenants, and for such other and further relief as this court deems just and proper.

Respectfully submitted,

BEK Law, PLC

Dated: August 11, 2021

By: */s/ Brace Kern*

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In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 1

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August 11, 2021

STATE OF MICHIGAN

COURT OF APPEALS

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON, Plaintiffs/Counterdefendants-Appellees, v CHARLENE FORBES, also known as ANGIE FORBES, Defendant/Counterplaintiff-Appellant.	FOR PUBLICATION July 1, 2021 9:00 a.m. No. 343630 Antrim Circuit Court LC No. 2016-009008-CH

ON REMAND

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

SERVITTO, J.

This case is again before us following an order by our Supreme Court which vacated our judgment in *Schaaf v Forbes*, unpublished opinion of the Court of Appeals, issued August, 6, 2019 (Docket No. 343630) (*Schaaf I*), and remanded the case with the directive that we first consider defendant's challenge regarding the circuit court's subject-matter jurisdiction before we consider any remaining legal issues. *Schaaf v Forbes*, ___ Mich ___; 949 NW2d 726 (2020). We now hold that the circuit court had subject-matter jurisdiction to hear and decide this case and, on the merits, we conclude that the circuit court properly held as a matter of law that a trust cannot hold and convey real property as a joint tenant with rights of survivorship. We also reject defendant's arguments that the circuit court abused its discretion in receiving and considering more than 300 pages of documentation that plaintiffs offered regarding the issue of contribution as the case proceeded, and conclude that the trial court properly ordered defendant to contribute to prior easement litigation expenses concerning the property. Accordingly, as we find no error in any of the trial court's rulings, we affirm its judgment.

I. FACTS & PROCEDURAL HISTORY

We previously summarized the pertinent facts as follows:

Mae Fitzpatrick and Leo Bussa, mother and son, jointly owned property on the west shoreline of Torch Lake, located in Milton Township, Michigan, and the associated littoral rights. In the 1980s and 1990s, a portion of the waterfront property was divided into seven separate parcels for residential development. Access to the seven lots was through the subject parcel by an easement on a private road, Bussa Lane. After the division, the remaining Bussa/Fitzpatrick property was an 80-acre northern parcel, which was sold in 2015, and a 60-acre southern parcel. Bussa Lane provided the only means of access to the latter parcel as well.

Fitzpatrick died in 2004, leaving Bussa as the trustee of the Fitzpatrick Trust. Bussa endeavored to restructure ownership of the subject 60-acre parcel by executing five conveyances. First, he, as trustee of the Bussa Trust, conveyed to himself, as an individual, the trust's half interest. He then conveyed that interest to himself, defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while retaining his own enhanced life estate.[1] This left the Fitzpatrick Trust retaining its half interest in the subject parcel as a tenant in common, and the other half, formerly that of the Bussa Trust, shared by Bussa personally, along with defendant and plaintiffs Schaaf and Fryer, as joint tenants with rights of survivorship.

Bussa then, as trustee of the Fitzpatrick Trust, simultaneously conveyed half of the latter trust's interest to himself as trustee of the Fitzpatrick Trust, and to plaintiff Mason, "as Joint Tenants with Rights of Survivorship," while retaining his own personal enhanced life estate, and the other half of that interest to himself, again as trustee of the Fitzpatrick Trust, and to defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while again retaining his own enhanced life estate.

Shortly before he died, Bussa commenced litigation relating to a proposed subdivision of the parcel and use of the Bussa Lane easement. The owners of the seven adjacent parcels objected to any increased burden on that easement, and they contested the litigation. Upon Bussa's death, the instant parties were substituted as plaintiffs in the case, who continued the litigation. That case ended in a ruling that acknowledged that the 60-acre parcel had the right to use the easement, but prohibited the further burdening of the easement by allowing additional owners or newly created parcels to use it.

Plaintiff Mason, as successor trustee of the Fitzpatrick Trust, drew up and filed deeds confirming the transfers from Bussa to the remaindermen. Plaintiffs contested the validity of the conveyances that purport to have the Fitzpatrick Trust as a joint tenant with rights of survivorship. The circuit court agreed that "a Trust cannot hold Property as a joint tenant with rights of survivorship," and thus that the Fitzpatrick Trust "had no authority to convey the Property as joint tenants with

[1] An enhanced life estate is "a life estate reserved in the grantor and enhanced by the grantor's reserved power to convey." Frank, *Ladybird Deeds*, Mich BJ 30, 30 (June, 2016).

rights of survivorship." The court voided the attendant conveyances, which left the interests in the Fitzpatrick Trust's half of the subject parcel to pass in accord with the terms of the trust itself. The circuit court recognized the resulting interests in the subject property as follows:

Gwen Mason (Plaintiff)	An undivided one-half interest in a one-half undivided interest in the entire Parcel as a tenant in common with the other parties;
Cindy Schaaf (Plaintiff)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided $^{1}/_{3}$ interest in a one-half undivided interest in the entire Parcel as a joint tenant with right of survivorship as to the other interests in that one-half;
Colleen Fryer (Plaintiff)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided $^{1}/_{3}$ interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half;
Charlene Forbes (Defendant)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided $^{1}/_{3}$ interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half.

The court summarized the ownership situation as "an undivided one-half of the Parcel . . . held by the Parties as tenants in common" and "[t]he other undivided half . . . owned by Plaintiff Schaaf, Plaintiff Fryer and Defendant Forbes as joint tenants with full rights of survivorship." The parties do not dispute that the circuit court correctly identified the interests of the parties if indeed Bussa's and Mason's conveyances of the Fitzpatrick Trust's real property are set aside.

The circuit court concluded that given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust, and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in

> kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved." Accordingly, the court ordered that the property be sold intact.
>
> The circuit court further held that the parties, "[a]s cotenants and beneficiaries of Leo Bussa," were "jointly and equally responsible for the costs and attorney fees" associated with the earlier litigation concerning the easement, and also "for the real estate taxes and expenses associated with maintenance of the Property." The court set forth detailed findings and calculations, and concluded that plaintiffs were "entitled to $30,000.86 of Defendant's share from the sales proceeds of the Property." [*Schaaf I*, unpub op at 1-3.]

Defendant appealed as of right to this Court.

In a split, unpublished opinion this Court rejected defendant's claims of error related to the more than 300 pages of documentation but held that the trial court committed error requiring reversal when it concluded, as a matter of law, that a trust may not hold land as a joint tenant with rights of survivorship. Regarding defendant's jurisdictional challenge, we concluded that it was appropriate for the circuit court to make the initial determination on remand. Accordingly, we reversed in part, vacated in part, affirmed in part, and remanded the case to the circuit court for further proceedings. *Schaaf I*, unpub op at 3-7.

Plaintiffs sought leave to appeal in the Michigan Supreme Court, raising the sole question of whether a trust can own property as joint tenants with rights of survivorship. In lieu of granting leave, the Supreme Court vacated our judgment in *Schaaf I*, and remanded the case to this Court to consider in the first instance plaintiff's jurisdictional challenge before reaching the merits of the remaining legal issues. *Schaaf II*, ___ Mich at ___.

II. JURISDICTION

Defendant contends on appeal that the circuit court exceeded its jurisdiction, and encroached on the exclusive jurisdiction of the probate court, when it voided the deeds executed by the Fitzgerald Trust's trustee and reallocated trust distributions in accord with its own interpretation of the terms of the trust. We disagree.

The existence of jurisdiction is a question of law that may be raised at any time and that this Court reviews de novo. *Adams v Adams*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). Because the jurisdiction of the probate court is entirely a matter of statute, the question of the scope of the probate court's exclusive jurisdiction is an issue of statutory interpretation, calling for review de novo. See *Thompson v Thompson*, 261 Mich App 353, 358; 683 NW2d 250 (2004).

"Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void." *Fox v Bd of Regents*, 375 Mich 238, 242; 134 NW2d 146 (1965).

The circuit court is a court of general jurisdiction, which jurisdiction extends to "all civil claims and remedies except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. See also Const. 1963, art. 6, § 1. The Legislature exercised its prerogative to limit the jurisdiction of the circuit court when, in MCL 700.1302, it vested the probate court with "exclusive legal and equitable jurisdiction" over the following relevant matters:

> (a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the county to be administered, including, but not limited to, all of the following proceedings:
>
> (i) The internal affairs of the estate.
>
> (ii) Estate administration, settlement, and distribution.
>
> (iii) Declaration of rights that involve an estate, devisee, heir, or fiduciary.
>
> (iv) Construction of a will.
>
> (v) Determination of heirs.
>
> (vi) Determination of death of an accident or disaster victim under section 1208.
>
> (b) A proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do all of the following:
>
> (i) Appoint or remove a trustee.
>
> (ii) Review the fees of a trustee.
>
> (iii) Require, hear, and settle interim or final accounts.
>
> (iv) Ascertain beneficiaries.
>
> (v) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust.
>
> (vi) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.
>
> (vii) Release registration of a trust.
>
> (viii) Determine an action or proceeding that involves settlement of an irrevocable trust.

In addition to the probate court's exclusive jurisdiction under MCL 700.1302, the probate court also has concurrent jurisdiction over certain matters concerning the estate of a decedent, protected individual, ward, or trust. These include concurrent jurisdiction to determine a property right or interest, to authorize partition of property, to hear and decide claims by or against a fiduciary or trustee for the return of property, and to hear and decide a contract proceeding or action by or against an estate, trust, or ward. MCL 700.1303.

Notably, by having set forth and retaining specific statutory authorization for the circuit court to hear and decide matters concerning rights to real property, the Legislature provided that its grant of exclusive jurisdiction to the probate court over the administration and distribution of trusts did not extend to plaintiffs' real property claims. See MCL 600.2932(1) (a person "who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff"); MCL 600.3301 ("Actions containing claims for the partition of lands may be brought in the circuit courts . . . . Such actions are equitable in nature.").

Further, the Legislature declined to grant the probate court exclusive jurisdiction over *every* cause of action that might incidentally touch on such issues as a settlor's intentions, but instead confined that grant of exclusive jurisdiction to "[a] *proceeding* that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary . . . ." MCL 700.1302(b)(*vi*) (emphasis added). "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v Gen Motors Corp*, 448 Mich. 147, 160; 528 NW2d 707 (1995). The statutory reference to "a proceeding" that "concerns" trust matters suggests that the exclusive jurisdiction of the probate court under MCL 700.1302(b)(*vi*) covers not every issue that might arise from involvement of a trust, but rather to whole causes of action fundamentally arising from issues concerning the distribution of trusts, or the rights and duties of affected persons.

Here, plaintiffs did not ask the circuit court to construe, invalidate, or modify the Fitzpatrick Trust, or any other testamentary instrument, involved in the chain of title in the subject property. The parties brought to the circuit court disputes among living co-owners of real property over identification and resolution of their respective but overlapping interests, not issues concerning the distribution of, or rights under, the trusts that largely engendered those interests. Specifically, plaintiffs' complaint contained claims to determine interests in real property, for sale of the property, and for defendant's monetary contribution to the ownership responsibilities of the property. Defendant does not suggest that plaintiffs' claims for determining interests in real property, for sale of the property, and contribution were not actionable in the circuit court. Indeed, she could not validly make such a suggestion. Given the above, none of plaintiffs' claims fall within the exclusive jurisdiction of the probate court, and the circuit court thus did not err in exercising subject-matter jurisdiction in the present matter.

III. TRUST AS JOINT TENANT WITH RIGHTS OF SURVIVORSHIP

Defendant next argues that a trust may hold property as a joint tenant in common with rights of survivorship and the trial court erred in finding otherwise and in thereafter voiding certain conveyances to the parties from the Fitzpatrick Trust. We disagree.

In Michigan, there are five common types of concurrent ownership that are recognized relative to the ownership of real property: tenancies in common, joint tenancies, joint tenancies with full rights of survivorship, tenancies by the entireties, and tenancies in partnership. *Wengel v Wengel*, 270 Mich App 86, 93; 714 NW2d 371 (2006). Although an ordinary joint tenancy may be destroyed by an act that severs the joint tenancy (such as a conveyance of interest by one of the joint tenants), no act of a co-tenant can defeat the other co-tenant's right of survivorship in a joint tenancy with rights of survivorship. *Townsend v Chase Manhattan Mortg Corp*, 254 Mich App 133, 136; 657 NW2d 741 (2002).

Relevant to the instant matter, MCL 554.44 states that all grants and devises of lands:

> made to 2 or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

The above thus creates a presumption in favor of tenancies in common. Because estates in joint tenancy are not favored, all presumptions are against them. *Atha v Atha*, 303 Mich 611, 615; 6 NW2d 897 (1942).

In arguing that a trust may hold property as a joint tenant with rights of survivorship, defendant leans heavily upon the fact that the language used to convey the property interest to the trust specifically stated that the trust was to hold its property rights in that manner. However, simply saying something is intended or shall be does not necessarily make the intended act permissible or lawful. Common sense and relevant law establish that, contrary to defendant's position, a trust may not hold property as a joint tenant with rights or survivorship.

Under MCL 554.43, estates are divided into estates in severalty, in joint tenancy, and in common "the nature and properties of which respectively, shall continue to be such as are now established by law . . . ." Since the earliest recognition in Michigan of a joint tenancy with rights of survivorship in *Schulz v Brohl*, 116 Mich 603; 74 NW 1012 (1898), both this Court and our Supreme Court have consistently defined and applied the right of survivorship as it relates to the *life* and *death* of one joint tenant. "[T]he principal characteristic of the joint tenancy is the right of survivorship. Upon the death of one joint tenant, the surviving tenant or tenants take the whole estate." *Jackson v Estate of Green*, 484 Mich 209, 213; 771 NW2d 675 (2009). "A right of survivorship, which means that a surviving tenant takes ownership of the whole estate upon the death of the other joint tenant, does not exist in tenancies in common." *Wengel*, 270 Mich App at 94 & n 4. See also *Walters v Leech*, 279 Mich App 707, 711; 761 NW2d 143 (2008), citing 1 Cameron, Michigan Real Property Law (3d ed.), § 9.14, p. 328 (". . . at the heart of a tenancy by the entirety is the right of survivorship, meaning that when one party dies, the other party automatically owns the whole property.").

It has long been recognized that parties holding property as joint tenants with full rights of survivorship hold joint life estates with contingent remainders. *Albro v Allen*, 434 Mich. 271, 275; 454 NW2d 85 (1990). "Life estate" is defined as "[a]n estate held only for the duration of a specified person's life." *Black's Law Dictionary* (11 ed.). The key word in the definition is "life." The duration of a life estate is determined by a particular person's life and a trust, as an artificial entity, does not have a lifetime. With life comes the expectation of its antonym, death. "[T]he contingency is surviving the cotenants, and at the moment of death, the decedent's interest in the property passes to the survivor or survivors." *Albro*, 434 Mich at 274–275. A trust, however does not and cannot die. Rather, it terminates only through specifically required actions of a non-biological character. MCL 700.7410-MCL 700.7414.

Survivorship rights address the interests of natural persons, including the uncertainties normally attendant to natural persons' life spans. A trust, not being a natural person, has no actual residential needs, cannot occupy real property, and does not die. It is true that a trust cannot exist in perpetuity. A trust can, however, exist far beyond the lifespan of a natural person.[2] A trust holding property as a joint tenant with rights of survivorship thus potentially renders any such right of survivorship illusory.

MCL 565.48 provides further support for the premise that literal, physical death of a joint tenant is the key to the law's purpose in having created a joint tenancy with rights of survivorship. That statute provides:

> A register of deeds shall not record a deed or other instrument in writing that purports to convey an interest in land by the survivor or survivors under a deed to joint tenants or tenants by the entirety, unless, for each joint tenant or tenant by the entirety who is indicated in the deed or instrument to be deceased, a certified copy of the death certificate or other proof of death that is permitted by the laws of this state to be received for record by the register, is shown to have been recorded in the register's office by liber and page reference or is filed concurrently with the deed or other instrument and recorded as a separate document.

Because a trust does not die but instead terminates, MCL 554.44 leaves no room to conflate the definition of death beyond its practical meaning for purposes of joint tenancy with rights of survivorship. In short, we find that the trial court properly concluded that, as a matter of law, a trust may not hold real property as a joint tenant with rights of survivorship.

IV. PARTITION

Defendant asserts that the trial court erred in finding that the property was not fairly capable of being partitioned in kind. We disagree.

[2] The dissent points out that at common law, a trustee may hold title as a joint tenant. While that may be true, a trustee is different than a trust itself. The powers of a trustee are thus irrelevant for our purposes today. Moreover, a trustee may be a trustee for a natural person.

In deciding whether or how to partition real property, a court exercises its equitable powers. See MCL 600.3301 ("Actions containing claims for the partition of lands . . . are equitable in nature."). When reviewing equitable matters, this Court reviews for clear error the findings of fact in support of the equitable decision rendered and reviews de novo the ultimate decision. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997).

Defendant asserts that, according to MCL 600.3304, "[a]ll persons holding lands as joint tenants or as tenants in common may have those lands partitioned," but that, according to MCL 600.3308, "a person who has only an estate in reversion or remainder in the lands may not maintain a claim for their partition." However, the limitation in MCL 600.3308 applies to persons having "*only* an estate in reversion or remainder" (emphasis added), and thus, does not apply to holders of current possessory rights, whether or not those holders of existing possessory rights also happen to hold rights of reversion or remainder.

Moreover, a court entertaining an action for partition is obliged to determine "whether the premises can be partitioned without great prejudice to the parties." MCR 3.401(A)(1). If the court determines that partition cannot be achieved "without undue prejudice to the owners, it may order the premises sold in lieu of partition . . . ." MCR 3.401(C). The trial court specifically and carefully considered whether partition could be achieved without undue prejudice to the owners. It concluded that given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust, and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved."

We find no clear error in the trial court's determination regarding partition and prejudice to plaintiffs. Partition in kind of the subject parcel is not entirely practical in light of the attendant survivorship rights, and partition to the extent possible likely would engender further burdening of the use of Bussa Lane.

V. DOCUMENTATION

Defendant asserts that the trial court's decision on plaintiffs' contribution claim was flawed because the court relied on 305 pages of documents that plaintiffs withheld from discovery then suddenly produced less than 24 hours before trial. We disagree.

This Court reviews the trial court's evidentiary rulings, including those concerning discovery, for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993); *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000). An abuse of discretion occurs when a trial court makes an error of law or its decision falls outside the range of principled outcomes. *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

We first note that defendant claims plaintiffs' late submission of the challenged documents occurred less than 24 hours before trial. However, the documents were submitted 24 hours prior to the date *originally scheduled for trial* on the issue of contribution. The matter did not actually

proceed to trial at that time given that the parties agreed to have the trial court decide the question of contribution on the basis of briefing to be completed several weeks later.

In ruling on defendant's motion to disallow the documentation, the trial court specifically considered, among other things, the fact that a decision concerning the contribution issue was still several weeks away. Defendant fails to meaningfully address the trial court's reasoned ruling or the fact that the trial court stated it would evaluate previously unidentified documents and thereafter issue decisions concerning admissibility on a document-by-document basis. Defendant has therefore abandoned this issue on appeal. *Thompson*, 261 Mich App at 356.

VI. CONTRIBUTION

Defendant contends that the trial court erred in granting plaintiffs' claim for full share contribution from defendant for litigation that concluded in 2012 concerning the Bussa Lane easement. We disagree.

As noted, a court deciding whether or how to partition real property exercises its equitable powers. See MCL 600.3301. This includes its decisions concerning how to divide the proceeds of any sale to account for the equities of the situation. MCL 600.3336(2). "When partitioning the premises or dividing the money received from a sale of the premises among the parties the court may take into consideration the equities of the situation, such as the value of the use of the premises by a party or the benefits which a party has conferred upon the premises." MCL 600.3336(2).

"The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the common burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares." *Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975). "The doctrine of contribution between cotenants is based upon purely equitable considerations. It is premised upon the simple proposition that equality is equity. It is not, however, enforced unless reason and justice require that each of the cotenants contribute his proportionate share of the common burden." *Strohm v Koepke*, 352 Mich 659, 662; 90 NW2d 495 (1958). Such equitable relief should be granted at the court's discretion " 'according to the circumstances and exigencies of each particular case,' " as suggested by the evidence and guided by " 'the fixed principles and precedents of equity jurisprudence.' " *Youngs v West*, 317 Mich 538, 545; 27 NW2d 88 (1947), quoting 39 CJS, Equity, § 10, pp 328-329.

In this case, the trial court held that, "[a]s cotenants and beneficiaries of Leo Bussa, the Parties are jointly and equally responsible for the costs and attorney fees associated with Antrim County File No. 2011[-]008633[-]CH, and for the real estate taxes and expenses associated with maintenance of the Property," and thus that "Plaintiffs are entitled to contribution by the Defendant in this matter," including "for one-quarter of the costs and attorney fees" associated with the earlier litigation. While defendant contends that the prior litigation was elective and conferred no benefit on the property, she admits that she was among the parties who were substituted for Leo Bussa in the prior litigation upon his death and makes no claim that she did not agree with plaintiffs' position in the matter.

Moreover, defendant's assertion that MCL 600.3336(2) does not authorize a court "to consider a failed attempt to increase the property's value" has no merit. The ultimate merits or outcome of litigation bears no impact on the question of responsibility for maintaining it. And litigation intended to benefit an interest in real property does not necessarily cease to be beneficial, for purposes of determining responsibility for its costs, even if it is ultimately unsuccessful. As recognized by the trial court, the prior litigation was initiated to establish the scope of the easement and, ultimately, whether the scope of the easement prevented subdivision development of the property. The outcome of the prior easement litigation was necessary and relevant to each co-owner of the property such that the litigation was a common burden among them. Although the several easement litigants had substantial, if unequal, affected property interests, the presumption that "equality is equity" remains valid and defendant has failed to show that the trial court erred in ordering her to contribute equally to the expenses attendant to the earlier easement litigation.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jonathan Tukel

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 2

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August 11, 2021

STATE OF MICHIGAN

COURT OF APPEALS

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

v

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

FOR PUBLICATION
July 1, 2021

No. 343630
Antrim Circuit Court
LC No. 2016-009008-CH

ON REMAND

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

RIORDAN, J. (*concurring in part and dissenting in part*).

I concur with the majority that the circuit court had subject-matter jurisdiction over this case, that it did not abuse its discretion by considering more than 300 pages of documentation offered by plaintiffs, and that it did not err by requiring contribution to plaintiffs. However, I respectfully dissent from the majority's conclusion that the circuit court did not err by ruling that a trust cannot hold title to real property as a joint tenant with rights of survivorship.[1]

"The common law, which has been adopted as part of our jurisprudence, remains in force until amended or repealed." *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). See also MCL 554.43 ("Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter."). It is true that the common

[1] Because I would conclude that the circuit court erred in this regard, I also disagree with the majority that the circuit court's corresponding partition ruling should be affirmed as well.

law provided that neither corporations nor sovereigns may hold title as a joint tenant because "king and corporation can never die." 2 Blackstone, Commentaries on the Laws of England, p *184. That is, "because a corporation can survive indefinitely, which is contrary to the right of survival of a joint tenancy," a corporation may not hold title as a joint tenant under the common-law rule. 6A Fletcher, Cyclopedia of the Law of Corporations § 2816.

However, as the majority acknowledges, a trust could not exist in perpetuity under the common law. See *Scudder v Security Trust Co*, 238 Mich 318, 320; 213 NW 131 (1927). Thus, the basis for the common-law rule precluding a corporation from holding title as a joint tenant is inapplicable here. Indeed, the majority does not cite any authority providing that a trust may not hold title as a joint tenant under the common law. Rather, the majority offers "common sense" arguments to reach its conclusion. In my view, the common law and statutory framework provide to the contrary, and that is what we should follow to resolve the matter before us.

"A trust is a right, enforceable solely in equity, to the beneficial enjoyment of property the legal title to which is vested in another." *Fox v Greene*, 289 Mich 179, 183; 286 NW 203 (1939). " 'Trusts' in the broadest sense of the definition, embrace, not only technical trusts, but also obligations arising from numerous fiduciary relationships, such as agents, partners, bailees, etc." *Id.* (cleaned up). See also Restatement (Third) of Trusts § 2 ("A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons . . . .").

Our common law recognizes that a trustee may hold title as a joint tenant. See, e.g., *Norris v Hall*, 124 Mich 170, 176; 82 NW 832 (1900) ("The deed from Dyson to the five trustees expressly stated that they were to hold 'as joint tenants, and not as tenants in common.' "); *Fox*, 289 Mich at 184 ("[P]roperty held by a trustee who is a joint tenant, or tenant in common with another, may be partitioned at the instance of the trustee, or of any person beneficially interested in the trust.").[2] If a trustee may hold title as a joint tenant, it seemingly follows that the trust itself may be deemed as holding title as a joint tenant to the same extent. See *Ford v Wright*, 114 Mich 122, 124; 72 NW 197 (1897) (explaining that a trustee holds trust property). The conclusion that a trust may hold title as a joint tenant is consistent with the Restatement (Third) of Trusts § 40, which explains that "a trustee may hold in trust any interest in any type of property." Comment *b* to that section further explains:

> [L]egal or equitable present interests in real or personal property for life or for a term of years, and presently existing future interests, whether legal or equitable, whether reversionary interests, executory interests, or remainders (contingent, vested, or vested subject to being divested), may be held in trust.

[2] I acknowledge that *Norris* and *Fox* concerned properties in which the joint tenants were all trustees. Nonetheless, such cases illustrate that there was no blanket common-law prohibition against a trustee holding title as a joint tenant.

Accordingly, in my view, the common-law authorities cited above weigh in favor of a rule that a trust may hold title as a joint tenant, or at a minimum, fail to establish a contrary rule.

Alternatively, even if there was a common-law rule providing that a trust may not hold title as a joint tenant, I would conclude that such a rule has been superseded and replaced by statute. The Michigan Trust Code, which is set forth as Article VII of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*., is a comprehensive scheme with dozens of provisions addressing virtually every aspect of trust law. "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 390; 738 NW2d 664 (2007) (quotation marks and citations omitted). Thus, for example, this Court has held that the Michigan Trust Code sets forth the exclusive grounds for removal of a trustee and that a trustee cannot be removed for additional grounds at common law. *In re Gerald L Pollack Trust*, 309 Mich App 125, 161-163; 867 NW2d 884 (2015).

Relevant to this case, there is no provision within the Michigan Trust Code that precludes a trust from holding title to real property in the same manner as a natural person. This absence is noteworthy because the Michigan Trust Code includes several provisions otherwise limiting trusts and trustees. See, e.g., MCL 700.7404 ("A trust may be created only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve."); MCL 700.7815(3)(b) ("A trustee may not exercise a power to make distributions pursuant to a discretionary trust provision in a manner to satisfy a legal obligation of support that the trustee personally owes another person."). Further, the Michigan Trust Code includes several provisions conferring broad powers upon trusts and trustees to hold, manage, and distribute trust property. See, e.g., MCL 700.7816(1)(b)(*ii*) ("A trustee, without authorization by the court, may exercise all of the . . . [p]owers appropriate to achieve the proper investment, management, and distribution of the trust property."); MCL 700.7817(g) ("[A] trustee has . . . [the power to] acquire property, including property in this or another state or country, in any manner for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, or change the character of trust property."). In my view, the express conferral of such powers, coupled with the absence of any express limitation that would be controlling here, shows the Legislature's intent to supersede and replace any common-law rule that may have existed to prohibit a trust from holding title as a joint tenant.

I respectfully disagree with the majority that "[c]ommon sense and relevant law establish that . . . a trust may not hold property as a joint tenant with rights of survivorship." The common-law rule against a corporation holding title as a joint tenant—which the majority extends here to trusts—is, according to one court, "universally criticized and generally ignored in the United States." *Bank of Delaware v Bancroft*, 269 A2d 254, 255 n 1 (Del Ch 1970).[3] Indeed, the rule

[3] In *Bancroft*, the Delaware Court of Chancery ruled that a trust company may hold title as a joint tenant with rights of survivorship because a Delaware statute conferring the powers of "a legally qualified individual" upon such companies superseded the common-law rule to the contrary.

was revoked in England in 1899 by the Bodies Corporate (Joint Tenancy) Act, 1899, 62 & 63 Vic.C. 20. *Id*. As illustrated by this case itself, application of the rule results in a division of interests that, in all likelihood, was completely unforeseeable by both the grantor and the grantees at the time of the trust's creation. Even if such a peculiar outcome is compelled by the common law applicable to corporations and joint tenancies, our Legislature has sensibly abrogated that common law with respect to trusts in order to provide stability and certainty to trustees and those who engage with them.

Accordingly, I respectfully dissent from the majority's conclusion that a trust cannot hold title to real property as a joint tenant with rights of survivorship.

/s/ Michael J. Riordan

See also Bogert, Trusts & Trustees (2d ed) § 145 ("In the United States, where a trust company or bank is made co-trustee with an individual, it is usual to provide in the trust instrument for survivorship in the corporate trustee. If such a provision is not made, . . . the ancient law with regard to the inability of corporations to act as joint tenants is deemed to be still in force . . . .").

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 3

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August 11, 2021

Order

October 30, 2020

160503

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,
Plaintiffs/
Counterdefendants-Appellants,

v

SC: 160503
COA: 343630
Antrim CC: 2016-009008-CH

CHARLENE FORBES, a/k/a ANGIE FORBES,
Defendant/
Counterplaintiff-Appellee.

_____/

On order of the Court, the application for leave to appeal the August 6, 2019 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the Court of Appeals judgment and we REMAND this case to the Court of Appeals to determine whether the circuit court was vested with subject matter jurisdiction of the case, see MCL 700.1302; MCL 700.1303. The Court of Appeals erred in reaching the merits before the threshold jurisdictional issue was resolved. See *Bowie v Arder*, 441 Mich 23, 56 (1992) ("When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void."). Once the determination of subject matter jurisdiction is made, the Court of Appeals shall reconsider (if necessary) the legal issue raised by the defendant on appeal.

We do not retain jurisdiction.

t1027

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 30, 2020

Clerk

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

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Supreme Court No. 160503

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Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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August 11, 2021

STATE OF MICHIGAN

COURT OF APPEALS

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

v

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
August 6, 2019

No. 343630
Antrim Circuit Court
LC No. 2016-009008-CH

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

In this dispute among co-owners of real property, defendant appeals as of right the circuit court's orders voiding certain purported conveyances, ordering that the property be sold intact in lieu of partitioning it, and awarding plaintiffs contribution relating to the costs associated with certain earlier litigation connected with the subject property. We reverse in part, affirm in part, vacate in part, and remand to the circuit court for further proceedings consistent with this opinion, including consideration of whether, in light of this holding, the circuit court has subject matter jurisdiction to hear this case.[1]

[1] In her reply brief on appeal, defendant challenged the jurisdiction of the circuit court to hear and decide this case, on the basis of MCL 700.1302(b)(vi)'s grant of "exclusive legal and equitable jurisdiction" to the probate court over "[a] proceeding that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary," including to "determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right." Although a party may not normally raise a new issue in a reply brief, MCR 7.212(G), "a challenge to subject-matter jurisdiction may be raised at any time."

I. FACTS

Mae Fitzpatrick and Leo Bussa, mother and son, jointly owned property on the west shoreline of Torch Lake, located in Milton Township, Michigan, and the associated littoral rights. In the 1980s and 1990s, a portion of the waterfront property was divided into seven separate parcels for residential development. Access to the seven lots was through the subject parcel by an easement on a private road, Bussa Lane. After the division, the remaining Bussa/Fitzpatrick property was an 80-acre northern parcel, which was sold in 2015, and a 60-acre southern parcel. Bussa Lane provided the only means of access to the latter parcel as well.

Fitzpatrick died in 2004, leaving Bussa as the trustee of the Fitzpatrick Trust. Bussa endeavored to restructure ownership of the subject 60-acre parcel by executing five conveyances. First, he, as trustee of the Bussa Trust, conveyed to himself, as an individual, the trust's half interest. He then conveyed that interest to himself, defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while retaining his own enhanced life estate.[2] This left the Fitzpatrick Trust retaining its half interest in the subject parcel as a tenant in common, and the other half, formerly that of the Bussa Trust, shared by Bussa personally, along with defendant and plaintiffs Schaaf and Fryer, as joint tenants with rights of survivorship.

Bussa then, as trustee of the Fitzpatrick Trust, simultaneously conveyed half of the latter trust's interest to himself as trustee of the Fitzpatrick Trust, and to plaintiff Mason, "as Joint Tenants with Rights of Survivorship," while retaining his own personal enhanced life estate, and the other half of that interest to himself, again as trustee of the Fitzpatrick Trust, and to defendant, and plaintiffs Schaaf and Fryer, "as Joint Tenants with Rights of Survivorship," while again retaining his own enhanced life estate.

Shortly before he died, Bussa commenced litigation relating to a proposed subdivision of the parcel and use of the Bussa Lane easement. The owners of the seven adjacent parcels objected to any increased burden on that easement, and they contested the litigation. Upon Bussa's death, the instant parties were substituted as plaintiffs in the case, who continued the litigation. That case ended in a ruling that acknowledged that the 60-acre parcel had the right to use the easement, but prohibited the further burdening of the easement by allowing additional owners or newly created parcels to use it.

Plaintiff Mason, as successor trustee of the Fitzpatrick Trust, drew up and filed deeds confirming the transfers from Bussa to the remaindermen. Plaintiffs contested the validity of the conveyances that purport to have the Fitzpatrick Trust as a joint tenant with rights of survivorship. The circuit court agreed that "a Trust cannot hold Property as a joint tenant with rights of survivorship," and thus that the Fitzpatrick Trust "had no authority to convey the

---

Adams v Adams, 276 Mich App 704, 708-709; 742 NW2d 399 (2007). However, we conclude that it is appropriate to permit the circuit court to decide this issue in the first instance.

[2] An enhanced life estate is "a life estate reserved in the grantor and enhanced by the grantor's reserved power to convey." Frank, *Ladybird Deeds*, Mich BJ 30, 30 (June, 2016).

Property as joint tenants with rights of survivorship." The court voided the attendant conveyances, which left the interests in the Fitzpatrick Trust's half of the subject parcel to pass in accord with the terms of the trust itself. The circuit court recognized the resulting interests in the subject property as follows:

Gwen Mason (Plaintiff)	An undivided one-half interest in a one-half undivided interest in the entire Parcel as a tenant in common with the other parties;
Cindy Schaaf (Plaintiff)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with right of survivorship as to the other interests in that one-half;
Colleen Fryer (Plaintiff)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half;
Charlene Forbes (Defendant)	An undivided $16^{2}/_{3}$ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided one-third interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half.

The court summarized the ownership situation as "an undivided one-half of the Parcel . . . held by the Parties as tenants in common" and "[t]he other undivided half . . . owned by Plaintiff Schaaf, Plaintiff Fryer and Defendant Forbes as joint tenants with full rights of survivorship." The parties do not dispute that the circuit court correctly identified the interests of the parties if indeed Bussa's and Mason's conveyances of the Fitzpatrick Trust's real property are set aside.

The circuit court concluded that given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust, and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved." Accordingly, the court ordered

that the property be sold intact.

The circuit court further held that the parties, "[a]s cotenants and beneficiaries of Leo Bussa," were "jointly and equally responsible for the costs and attorney fees" associated with the earlier litigation concerning the easement, and also "for the real estate taxes and expenses associated with maintenance of the Property." The court set forth detailed findings and calculations, and concluded that plaintiffs were "entitled to $30,000.86 of Defendant's share from the sales proceeds of the Property." This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo questions of law, *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 124; 680 NW2d 485 (2004), including matters of statutory interpretation, *Bank v Michigan Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016).

III. JOINT TENANCY WITH RIGHTS OF SURVIVORSHIP HELD BY A TRUST

The circuit court held, without reference to any legal authority, that the conveyances from the Fitzpatrick Trust failed by operation of law. On appeal, plaintiffs argue, without citation to any legal authority, that the circuit court correctly decided this issue. We disagree.

Plaintiffs' position finds some support in the common law, where corporations and sovereigns could not hold title as a joint tenant because the "king and corporation can never die." 2 Blackstone, Commentaries on the Laws of England, p *184. Presumably, the lack of reciprocity in survivorship precluded these entities from holding and conveying land in this manner. See 6A Fletcher, Cyclopedia of the Law of Corporations § 2816; 2 Tiffany Real Prop §423 (3d ed); 10 McQuillin Mun Corp §28:19 (3d ed). Notably, the common law rule was limited to corporations and sovereigns, and was not explicitly extended to trusts, which do not enjoy a perpetual existence because of the rule against perpetuities.[3] However, to the extent that the common law does support plaintiffs' position, it has been abrogated by statute.

MCL 554.44 states that, "[a]ll grants and devises of lands, made to 2 or more **persons**, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy." (Emphasis added.) Thus, § 554.44 creates a presumption in favor of tenancy in common. *Matter of Estate of Kappler*, 418 Mich 237, 239; 341 NW2d 113 (1983). MCL 554.45 provides an exception to this rule, stating that, "[t]he preceding section shall not apply to mortgages, nor to devises or **grants made in trust,** or made to executors, or to husband and wife." (Emphasis added.) These statutes abrogate the common law principles regarding joint tenancy, and because they are not limited to natural persons or otherwise exclude trusts, the conveyance at issue does not fail by operation of law.

[3] The common law rule against perpetuities has been adopted in Michigan by statute, but has been amended to allow for perpetual trusts of personal property. MCL 554.51, *et seq.*; MCL 554.71, *et seq.*; 554.91 *et seq.*; *Moffit v Sederlund*, 145 Mich App 1, 14; 378 NW2d 491 (1985).

MCL 8.3 states, "In the construction of the statutes of this state, the rules stated in sections 3a to 3w shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature." MCL 8.3*l* states that "[t]he word 'person' may extend and be applied to bodies politic and corporate, as well as to individuals." Although this definition does not expressly include trusts, it does show the intention that the term "person" include entities other than natural persons.[4] Additionally, the legislature could have limited the term "person" in § 554.44 to mean only natural persons. We cannot read into a statute what the legislature did not include, *Book-Gilbert v Greenleaf*, 302 Mich App 538, 547; 840 NW2d 743 (2013), and limiting § 554.44 to apply only to natural persons would require this Court to rewrite the statute.

Moreover, the presumption established in § 554.44 is limited by § 554.45, which expressly exempts "grants made in trust." Words in a statute should not be construed in a vacuum, but should be read together to harmonize the meaning, giving effect to the act as a whole. *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). The express exemption in § 554.45 of "grants made in trust," along with its cross-reference to § 554.44, further evidences the legislative intent to expand the meaning of "person" to include trusts.

Additional textual support is found in MCL 565.49, which states:

> Conveyances in which the grantor or 1 or more of the grantors are named among the grantees therein shall have the same force and effect as they would have if the conveyance were made by a grantor or grantors who are not named among the grantees. Conveyances expressing an intent to create a joint tenancy or tenancy by the entireties in the grantor or grantors together with the grantee or grantees shall be effective to create the type of ownership indicated by the terms of the conveyance.

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[4] Notably, MCL 8.3*l* does not state that the term "person" can extend and "be applied ***only*** to bodies politic and corporate, as well as to individuals" as the dissent concludes. *MCL 8.3l* does not limit "individuals" to mean only natural persons. Because so, we apply the ordinary meaning of the term, *Grossman v Brown*, 470 Mich 593, 598; 685 NW2d 198 (2004), and turn to *Black's Law Dictionary* (11th ed), which defines "individual" as "1. Existing as an indivisible entity. 2. Of, relating to, or involving a single person *or thing*, as opposed to a group." (Emphasis added.) Returning to the definition of "person" we note that *Black's Law Dictionary* (11th ed) defines the term as follows:

> 1. A human being – Also termed natural person. 2. The living body of a human being <contraband found on the smuggler's person>. 3. *An entity* (such as a corporation) that is recognized by law as having most of the rights and duties of a human being • In this sense, the term includes partnerships and other associations, whether incorporated or unincorporated. [Emphasis added.]

Thus, the plain and ordinary meaning of the terms "individual" and "person" aligns with the definition provided by MCL 8.3*l*.

Again, the legislature abrogated the common law by statute, and abolished strict adherence to the four unities doctrine. *Albro v Allen*, 434 Mich 271; 454 NW2d 85 (1990). However, the statute includes no language which hints at an intent to limit to natural persons the ability to hold a joint tenancy with rights of survivorship. Moreover, the statute requires that this Court to give full effect to the conveyance despite a grantor-trustee also being a grantee on an instrument attempting to convey a joint tenancy with a right of survivorship.

Finally, there are no provisions in EPIC[5] that suggest any legislative intent to prohibit a trust from holding and conveying real property in this manner. Rather, in the definitions section of EPIC, MCL 700.1106(o), defines "person" as "an individual or an organization." MCL 700.1106(i), further defines "organization" as, "a corporation, **business trust**, estate, **trust**, partnership, limited liability company, association, or joint venture; governmental subdivision, agency, or instrumentality; public corporation; or another legal or commercial entity." (Emphasis added.) In Article II of EPIC, which concerns intestacy, wills, and donative transfers, the legislature has limited the term "persons" in the following manner:

> (1) This part shall be known and may be cited as the "disclaimer of property interests law".
>
> (2) As used in this part:
>
> ***
>
> (h) "**Person**" includes an entity and an individual, but **does not include** a fiduciary, an estate, or **a trust**. [MCL 700.2901 (emphasis added).]

"Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). "Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Id.* (cleaned up).

When reading the act as a whole, it is apparent the legislature knew how to limit the definition of person to exclude trusts from the definition of "person" as it did so in § 700.2901. However, this Court cannot read that same limiting language into the statutes regarding property conveyances, §§ 554.44-45 and § 565.49, or read as surplusage the provisions in § 700.1106 which recognize a trust as a person. *Robinson v City of Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010) ("In interpreting a statute, we must avoid a construction that would render part of the

[5] The Estates and Protected Individuals Code, Act 386 of 1998 (EPIC). "In 1998, the Michigan Legislature enacted EPIC, 1998 PA 386, which became effective April 1, 2000. The new law, which repealed and replaced the Revised Probate Code, 1978 PA 642, MCL 700.1 *et seq.,* was intended to modernize probate practice by simplifying and clarifying the law concerning decedents' affairs and by creating a more efficient probate system. MCL 700.1201; MCL 700.1303(3)." *In re Leete Estate*, 290 Mich App 647, 661; 803 NW2d 889 (2010).

statute surplusage or nugatory.") (cleaned up).[6]

Accordingly, we hold that a trust may hold and convey real property as a joint tenant with rights of survivorship. The conveyances from the Fitzpatrick Trust to itself, plaintiffs, and defendant, as joint tenants with rights of survivorship, do not fail by operation of law, and we reverse the circuit court's ruling on this issue.

IV. PARTITION AND CONTRIBUTION

Additionally, the circuit court's ruling on Count II, requesting partition of the property, was based on the proportionate property interests of the parties, which in turn was based on an erroneous legal conclusion, and is therefore vacated.

With regard to Count III, plaintiffs' request for contribution, we affirm. "Contribution is an equitable remedy based on principles of natural justice." *Tkachik v Mandeville*, 487 Mich 38, 47; 790 NW2d 260 (2010). The circuit court's ruling on this issue was not made with regard to the respective property interests of the parties. In fact, it was made in *disregard* of those interests, assessing the four parties equal shares of the costs, relying on the equitable maxim that "equality is equity."

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[6] The dissent presumably concludes that the legislature has not abrogated the common law, and therefore, a trust cannot hold property as a joint tenant with the right of survivorship because trusts cannot die as a natural person does. As we stated *supra*, this is a questionable extension of the common law, which only prohibited the monarch and corporations from holding property in this manner. Blackstone and the seminal case, *Law Guarantee and Trust Society v Governor & Co of the Bank of England*, 24 QBD 406 (1890), teach that the fundamental principle underlying the right of survivorship is the *reciprocity* of survivorship, meaning that no party may exist perpetually. See 2 Blackstone, Commentaries on the Laws of England, pp **184-185, n 33 (stating that the right of survivorship, or *jus accrescendi*, "ought to be mutual" but that another reason for prohibiting corporations from holding such rights is that it might be "ruinous to the family of the deceased partner" to permit capital or stock to pass in this manner, and thus, "[t]he right of survivorship, for the benefit of commerce, holds no place among merchants") (citation omitted). This reasoning does not apply to trusts that cannot exist in perpetuity. See MCL 554.51, *et seq*.; MCL 554.71, *et seq*.; 554.91 *et seq*. Accordingly, there is no reason why the right of survivorship should be made exclusive to beings that enjoy a natural life, as opposed to trusts that also are subject to the rule against perpetuities.

Further, the dissent recites the *Black's Law Dictionary* (11th ed) definitions of "right of survivorship" and "death" for the proposition that the right of survivorship may only be held by a natural person susceptible to "cessation of all vital functions and signs." However, the complete entry for "death" reads as follows: "The ending of life; the cessation of all vital functions and signs. — Also termed decease; demise." "Demise" is defined as, "[t]he death of a person or (figuratively) of a thing; the end of something that used to exist <the corporation's untimely demise>." *Black's Law Dictionary* (11th ed). Accordingly, the plain meaning of the terms associated with rights of survivorship do not limit enjoyment of this right to only natural persons.

V. LATE-OFFERED DOCUMENTATION

Defendant argues that the circuit court erred by receiving, and considering, more than 300 pages of documentation plaintiffs offered only as the case proceeded to the issue of contribution. We disagree. We review a circuit court's evidentiary rulings for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). This includes a court's decisions concerning discovery. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000). "A trial court does not abuse its discretion when its decision falls within the range of principled outcomes." *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016).

Defendant characterizes plaintiffs' late submission of documents as occurring less than 24 hours before trial, but, in fact, it was on the eve of the day originally scheduled for trial on the issue of contribution, but which proceeding brought to light that plaintiff Fryer could not be present because of a medical issue, and also that the parties had agreed to have the court decide the question of contribution on the basis of briefing to be completed several weeks hence.

In responding to defendant's motion to disallow the recent submissions, the circuit court took into account, among other things, that a decision on contribution was still several weeks away:

> First, any documents that were identified either formally as trial exhibits or that were produced as part of discovery are available as trial documents in this case, which would include largely apparently, based on the representations of counsel, the documentation that has been offered or is intended to be offered by the plaintiff in this case; however, any documents that were not specifically identified or reasonably identified pursuant to the normal general identifications that attorneys use in their witness and exhibit lists would not be admissible. There will be an opportunity in reply briefs for argument with regard to admissibility of documentation. So, my expectation is that probably largely in the reply briefs there will be arguments regarding admissibility of individual documents, the parties are welcome to make those for any reason whatsoever and the Court will rule on those in a case by case basis. But, again, these documents were largely provided by the defense, they are known to the defense, while they were not specifically identified as trial exhibits and while defendant is correct the initial trial was to be heard I believe in the fall of 2016, which would mean the initial trial exhibits would have been due in the fall or late summer, August probably of 2016, we are now six months beyond that, we have had multiple hearings on this matter since that time, the element of surprise if you will particularly with regard to matters that have been produced pursuant to discovery requests simply doesn't exist. The parties know what the files are, they know what the potential exhibits are, so, again, we'll allow matters that are at least identified somehow in the witness and exhibit list and we'll take argument regarding anything that isn't or any objections to matters that are on the witness exhibit list in the reply briefs and the Court will decide those on a case by case basis.

On appeal, defendant continues to complain about the filing of "305 pages of proposed

trial exhibits," without any of the differentiation that the circuit court called for. Further, defendant does not dispute the validity of the court's distinguishing between documents that were and were not "specifically identified or reasonably identified pursuant to the normal general identification that attorneys use in the witness and exhibit lists," does not take issue with the court's statement concerning what would and would not be deemed admissible thereafter, and does not assert that she acted on the invitation to specify objectionable documents in the briefing to follow, let alone that the circuit court made any erroneous decisions in connection with such activity.

To summarize, defendant on appeal reiterates the general objection to plaintiffs' offering of more than 300 pages of documents collectively, with no acknowledgement that the circuit court was prepared to distinguish the offerings in meaningful ways and issue decisions on admissibility accordingly. Defendant's failure to offer cogent argument relating to the circuit court's thoughtful ruling from the bench on her objection to plaintiffs' recent offering of abundant production, or to assert that she accepted the court's invitation to sort through the documents and offer more nuanced reasons for objecting to the admission of some, constitutes abandonment of the issue. See *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007) ("It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims, or unravel and elaborate the appellant's arguments, and then search for authority either to sustain or reject the appellant's position.").

VI. CONCLUSION

We reverse in part, vacate in part, affirm in part, and remand to the circuit court for further proceedings consistent with this opinion, including consideration of whether, in light of this holding, the circuit court has subject matter jurisdiction to hear this case.

/s/ Jonathan Tukel
/s/ Michael J. Riordan

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 5

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August 11, 2021

STATE OF MICHIGAN

COURT OF APPEALS

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON, Plaintiffs/Counterdefendants-Appellees,	UNPUBLISHED August 6, 2019
v	No. 343630 Antrim Circuit Court LC No. 2016-009008-CH
CHARLENE FORBES, also known as ANGIE FORBES, Defendant/Counterplaintiff-Appellant.	

Before: TUKEL, P.J., and SERVITTO and RIORDAN, JJ.

Servitto, J. (*dissenting*).

I respectfully dissent. While I agree with the majority that the circuit court did not abuse its discretion in receiving and considering more than 300 pages of documentation that plaintiffs offered as the case proceeded to the issue of contribution, I disagree with the majority's conclusion that a trust can hold and convey property as a joint tenant with rights of survivorship.

At the outset, I would find that the trial court had jurisdiction to hear and decide this case. "Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). The circuit court is a court of general jurisdiction, extending to "all civil claims and remedies except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. See also Const 1963, art 6, § 1. The Legislature exercised its prerogative to limit the jurisdiction of the circuit court when it vested the probate court with "exclusive legal and equitable jurisdiction" over "[a] proceeding that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary," including to "determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right." MCL 700.1302(b)(*vi*).

The Legislature indicated that its grant of exclusive jurisdiction to the probate court over the administration and distribution of trusts did not extend to plaintiffs' real property claims by having set forth and retaining specific statutory authorization for the circuit court to hear and decide matters concerning rights to real property. See MCL 600.2932(1) (a person "who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff"); MCL 600.3301 ("Actions containing claims for the partition of lands may be brought in the circuit courts . . . . Such actions are equitable in nature.").

Further, the Legislature did not grant the probate court exclusive jurisdiction over necessarily *any* cause of action that might incidentally touch on such issues as a settlor's intentions, but instead confined that grant to "[a] *proceeding* that concerns the . . . distribution . . . of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary . . . ." MCL 700.1302(b)(*vi*) (emphasis added). "[T]he meaning of the Legislature is to be found in the terms and arrangement of the statute without straining or refinement, and the expressions used are to be taken in their natural and ordinary sense." *Gross v Gen Motors Corp*, 448 Mich 147, 160; 528 NW2d 707 (1995). The statutory reference to "a proceeding" that "concerns" trust matters suggests that the exclusive jurisdiction of the probate court under MCL 700.1302(b)(*vi*) covers not necessarily every issue that might arise from involvement of a trust, but rather to whole causes of action fundamentally arising from issues concerning the distribution of trusts, or the rights and duties of affected persons.

The issue in this case primarily concerned the legal question of whether a trust—any trust—may hold and convey property as a joint tenant with rights of survivorship. Plaintiffs set forth three specific causes of action in "Plaintiffs' Second Amended Complaint to Determine Interest in Property and For Partition": (1) an "Action to Determine Interests in Land", (2) "Partition", and (3) "Contribution." In count I, plaintiffs specifically asserted that any transfers from the Fitzpatrick Trust to plaintiffs and defendant, as joint tenants with rights of survivorship, were ineffective because the trust could not own the property with rights of survivorship. In count II, plaintiffs asserted that they and defendant are co-owners of the subject property with each owning an undivided interest in the whole property, and that because it has become impossible for all to jointly possess and enjoy the whole of the property, the property should be sold and the proceeds divided. In count III, plaintiffs asserted that defendant has not shared in the responsibilities of ownership of the property, and that they were entitled to contribution for paying more than their fair share of the expenses associated with the property. The parties brought to the circuit court disputes among living co-owners of real property over identification and realization of their respective but overlapping interests, not issues concerning the distribution of, or rights under, the trusts that largely engendered those interests. Plaintiffs did not ask the circuit court to construe, invalidate, or modify the Fitzpatrick Trust, or any other testamentary instrument involved in the chain of title in the subject property, and defendant does not suggest that plaintiffs' claims for determining interests in land, partition, and contribution were not actionable in the circuit court. Moreover, the circuit court did not rule on any issue concerning any trust settlor's intent, the scope of any trust, or the administration of any trust, and need not have done so because, as it recognized, the issue for resolution was the legal issue of whether a trust can hold property as a joint tenant with rights of survivorship. I believe that jurisdiction over this matter properly lies with the circuit court.

Next, I agree with the trial court that a trust cannot own or convey property as a joint tenant with rights of survivorship. First, I am not convinced that the majority's interpretation of MCL 554.44 is correct. MCL 554.44 states that all grants and devises of lands:

> made to 2 or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

The majority relies upon the definition of "person" in MCL 8.3*l* to conclude that use of the word "persons" in MCL 554.44 includes a trust. However, MCL 8.3*l* explicitly states that the word "person" can extend to "bodies politic and corporate, as well as to individuals." Thus, in clear and unambiguous terms, "person" is extended to political and corporate bodies under that provision. The majority concludes that MCL 8.3*l*, because it does not contain the word "only", can be extended to include trusts. I disagree.

First, MCL 8.3*l* does not state that "person" may include, but is not limited to, "bodies politic and corporate, as well as to individuals." It simply states that it may include those three specifically named things. Absent any legislative expression indicating that it intended to include other entities, the statute must be read according to its plain language. It is axiomatic that "if the statute's language is clear and unambiguous, then judicial construction is inappropriate and the statute must be enforced as written." *People v Lewis*, 503 Mich 162, 165; 926 NW2d 796 (2018). To apply MCL 8.3*l*, this Court need not, and indeed must not, look any further than the unambiguous statutory language.[1]

While the majority indicates that "bodies politic and corporate as well as to individuals" is not meant to be an exhaustive list included in the definition of "person" under MCL 8.3*l*, the legislature is wholly capable of indicating when its use of listed items in a statute is not meant to be an exhaustive list. See, e.g., *People v Feeley*, 499 Mich 429, 438; 885 NW2d 223 (2016)("the Legislature's use of the phrase 'including, but not limited to'. . . indicates that it intended an expansive and inclusive reading . . . this particular phrase is not 'one of limitation,' but is instead meant to be illustrative and purposefully capable of enlargement.). "This Court cannot assume that language chosen by the Legislature is inadvertent. *Bush v Shabahang*, 484 Mich 156, 169; 772 NW2d 272 (2009).

I find further guidance on this issue in *McCormick v Carrier*, 487 Mich 180, 188; 795 NW2d 517 (2010). Overruling precedent, the *McCormick* Court held that the Court in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), improperly expanded the language of MCL 500.3135. "[T]he *Kreiner* majority went astray and gave the statute a labored interpretation inconsistent with common meanings and common sense." *McCormick*, 487 Mich at 205. The *McCormick* Court noted that the *Kreiner* Court applied "its chosen definition" to certain terms in

[1] The majority cites various legal treatises to support its position. Treatises, however, "are not binding authority; rather, they are considered only as potentially persuasive authority." *Fowler v Doan*, 261 Mich App 595, 601; 683 NW2d 682 (2004). Where, as here, we are presented with an unambiguous statute, reference to nonbinding authority is unnecessary.

the statute, and interjected two terms that were not in MCL 500.3135, thereby shifting the meaning of one word "from the most natural contextual reading of the word." *Id*. at 206.

In the matter before this Court, I believe that the majority, too, has judicially expanded MCL 8.3*l,* applying its chosen definition, and has given the statute an interpretation inconsistent with its plain meaning and common sense. Again, the statute states very clearly that the word person "may extend and be applied to bodies politic and corporate, as well as to individuals." The majority focuses on the term "individuals" and relies upon a definition of that term to include a single "*thing*" as a basis for determining that a trust (presumably as a *thing*) is included in the definition of "person" for purposes of MCL 8.3*l*. I, however, look at the context, and do not isolate that word in determining its meaning. After all, when interpreting statutes, "we must not read a word or phrase of a statute in isolation; rather, each word or phrase and its placement must be read in the context of the whole act." *Alvan Motor Freight, Inc v Dept of Treasury*, 281 Mich App 35, 40; 761 NW2d 269 (2008). In context, it is clear that the Legislature intended in MCL 8.3*l* to clarify that when the word "person" is used (and not otherwise specifically defined) in a statute, that word does not only refer to "person" in its most commonly understood definition (an individual, i.e. single, human being), but that it additionally refers to political and corporate bodies. In other words, I would read MCL 8.3*l* to mean that "person" applies not just to individuals (understood as single human beings), but also to political and corporate bodies. This interpretation takes into consideration that the Legislature stated that the word "person" may "extend" ("to spread or stretch forth; to increase the scope, meaning, or application of." Merriam-Webster's Collegiate Dictionary (11th ed.)) to corporate and political bodies in addition to the previously understood ("as well as") individuals. And, trusts are distinctly dissimilar to political and corporate bodies such that their inclusion into the two specified bodies cannot be fairly inferred. I would therefore find that the word "person" as it appears in MCL 554.44 refers only to individuals, political bodies, and corporate bodies. Consequently, I would find that neither the presumption set forth in MCL 554.44, nor the exception to that presumption set forth in MCL 554.45, applies in this matter.

I believe that the primary issue before this Court, whether a trust may own and transfer real property as a joint tenant with rights of survivorship, can be very simply resolved by looking to the plain, unambiguous statutory language of MCL 8.3*l*, and taking a common sense approach by additionally looking at the definition of and explanation concerning ownership as joint tenants with rights of survivorship. The earliest recognition of a joint tenancy with rights of survivorship in this state appears in *Schulz v Brohl*, 116 Mich 603; 74 NW 1012 (1898). In that case:

> the interest created by a deed to Peter Brohl and Christine Schulz "and to the survivor of them" was described as **"a moiety to each [party] for life, with remainder to the survivor in fee."** 116 Mich at 605, 74 NW 1012. Peter conveyed his interest to a third party, Joseph Brohl, reserving a life estate. Subsequent to Peter's death, Christine Schulz brought an action to quiet title. The Court held in her favor, stating that **"[n]either grantee could convey the estate so as to cut off the remainder."** *Albro v Allen*, 434 Mich 271, 276; 454 NW2d 85 (1990). [Emphasis in original]

Since that time, both this Court and our Supreme Court have consistently defined and applied a joint tenancy with rights of survivorship as concerned with the *life* and *death* of one joint tenant.

See e.g., *Jackson v Estate of Green*, 484 Mich 209, 213; 771 NW2d 675 (2009) ("the principal characteristic of the joint tenancy is the right of survivorship. Upon the death of one joint tenant, the surviving tenant or tenants take the whole estate."); *Walters v Leech*, 279 Mich App 707, 711; 761 NW2d 143 (2008), citing 1 Cameron, Michigan Real Property Law (3d ed.), § 9.14, p. 328 (". . . at the heart of a tenancy by the entirety is the right of survivorship, meaning that when one party dies, the other party automatically owns the whole property."). Indeed, "right of survivorship" is even defined in Black's Law Dictionary (11th ed.) as "[a] joint tenant's right to succeed to the whole estate upon the death of the other joint tenant." "Death", in turn, is defined as "the ending of life; the cessation of all vital functions and signs." Black's Law Dictionary (11th ed.).

Logically, survivorship rights obviously address the interests of natural persons, including the uncertainties normally attending to natural persons' life spans. A trust, not being a natural person, has no actual residential needs, cannot occupy real property in fact, and does not "die." Common sense indicates that it cannot end its life or that all of its vital functions and signs could cease. Instead, a trust comes to an end on its own terms or by other orderly processes. As plaintiffs point out, if a trust could maintain its own interest in real property as a joint tenant with the right of survivorship, the survivorship interests of any joint tenants who are natural persons would be substantially "illusory—because the trust would never 'die' and thus those other tenants would have nothing more than a life estate in the property." I would thus affirm the circuit court's orders voiding the purported conveyances concerning the Fitzpatrick Trust property as a joint tenant with rights of survivorship.

I would also affirm the circuit court's holding that the parties' interests were better served by sale of the subject parcel than by attempting partition in kind. Defendant asserts that, according to MCL 600.3304, "[a]ll persons holding lands as joint tenants or as tenants in common may have those lands partitioned," but that, according to MCL 600.3308, "a person who has only an estate in reversion or remainder in the lands may not maintain a claim for their partition." However, the limitation in MCL 600.3308 applies to persons having "*only* an estate in reversion or remainder" (emphasis added), and thus, does not apply to holders of current possessory rights, whether or not those holders of existing possessory rights also happen to hold rights of reversion or remainder. Here, I believe that the trial court did not err in concluding that, given the existence of the survivorship rights resulting from the valid conveyances of the real property from the Bussa Trust and the subject parcel's reliance on an easement for access to and from the nearest public road, which easement could not be further burdened, "partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved."

I would affirm the circuit court's rulings in their entirety.

/s/ Deborah A. Servitto

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 6

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August 11, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

SCHAAF, FRYER & MASON,
Plaintiff,

v. Case No. 16-9008-CH

CHARLENE ANGIE FORBES,
Defendant,
_____/

MOTION

Traverse City, Michigan - Monday, May 15, 2017

BEFORE THE HONORABLE KEVIN A. ELSENHEIMER

APPEARANCES:

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REPORTED BY: Karen M. Copeland (CSR-6054)
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I N D E X

WITNESSES

None

EXHIBITS

None

Bellaire, Michigan

Monday, May 15, 2017 - at 10:29 a.m.

(Court, counsel and parties present)

THE COURT: This is the time, date and place set for oral argument on cross motions for summary disposition in the matter of Schaaf, et al versus Forbes 16-09008-CH.

Again, we have cross motions for summary disposition. I'm not sure who wishes to proceed first, I guess it's whoever filed first.

So the parties are aware, the Court has had an opportunity to review all of the documents and has spent a considerable amount of time going over the title issues with regard to the property. The Court has some familiarity of the property as a long time resident of Antrim County.

But, let's go ahead and proceed with oral argument.

Mr. Kern, you go ahead and lead off.

MR. KERN: This is really a fascinating case. What we have for Count I is determination of the parties interest by virtue of the deeds that were issued after Mr. Bussa's death. And, the plaintiff is actually -- was a co-personal representative of the estate issued deeds to Gwen Mason, who is a tenant in common, 25 percent

interest, she received half of May's undivided one-half, and the other one-half of May's went to joint tenants with the right of survivorship, which is the deed plaintiff's counsel is challenging.

Leo Bussa's one-half of the property passed to the three joint tenants with rights of survivorship without passing through a trust. He took it out of his trust and put it in his own name and then transferred it, so that's not at issue. We know half of the property is joint tenants with rights of survivorship, so we are only talking about May's one-half. Of May's one-half, we are only talking about one-half of that because Gwen Mason has one-half as tenant in common from that. We don't deny the ability to partition the property, that she should be able to take off 25 percent and go ahead and sell that property.

Now, the partition is a bit premature and not yet ripe since we don't know exactly that's all we're taking off the property. Plaintiff's counsel's issue is quite novel as far as I can tell from my research. Interestingly you'll see Exhibit 1 from our motion for summary disposition went into an article that was written by a well esteemed attorney talking about this is how lady bird deeds operate in the State of Michigan and how trusts are used to accomplish that.

THE COURT: I don't think there is any dispute as to whether lady bird deeds are lawful mechanisms in Michigan, I think we can move right past there. I don't think there is opposition regarding that.

MR. KERN: Sure. Next argument that plaintiff's counsel has is that the grantor cannot be a trust. He cites to authority saying, well, a corporation can't be and an LLC can't be therefore the trust can't be. Which, the essence of that argument can't pass on rights of survivorship because it never dies; well, that's not necessarily what I believe we have the case to be here. The actual deed does not pass it to the trust, it passes to Leo Bussa, as trustee. The importance of that is that is the life of being, which is why I go into the analysis of the rule of perpetuities isn't being addressed here. If you take the argument the trust cannot hold survivorship to its ultimate end, the reason being is the rules against perpetuities would apply. I think plaintiff's counsel has failed to come forward and meet his burden necessary in order to be able to over turn all of the trusts in the state as well as the country that currently use a trust to prevent uncapping of taxes. His argument is essentially going to be anybody's trust who holds survivorship rights is thus invalid and you must take the property out of the trust,

put it in your own name plus the co-owners name at the time of death, it must be personally owned before you can pass it without uncapping the taxes. None of the parties dispute that is the purpose behind this preventing uncapping taxes standard 9.3 which provides the legality of lady bird deeds, but that's as far as it goes. Even the article we cite from Attorney Frank does not cite authority for that proposition, when he says your trust can be used in order to hold survivorship rights and that's where I think counsel's argument is novel and hasn't been addressed in this state and in this Court. I suggest their evidence has not come forward to meet the burden necessary to over turn status quo of the successful use of trusts to hold it, especially in consideration of the fact the life in being is specified, as Leo Bussa Corporation does not have a life in being, LLC does not have a life in being. But, if it was transferred to Leo Bussa, as president of this company that's a life in being as soon as he passes a way or he's no longer president then it no longer survives and it would pass to the other people.

THE COURT: One of the challenges that I'm having with that argument is that it places frankly a choice on the part of the grantor as to whether or not, or I suppose anybody taking from the grantor, as to

whether or not the grantor is transferring on behalf of the trust or transferring individually, in other words using the same language. I think if you were in a different position in this lawsuit you could come in and say no, no, no the transfer was intended to be on behalf of the trust and not necessarily on behalf of Mr. Bussa.

MR. KERN: So that presents a good question, which is, is there a difference between this deed when it says Leo Bussa as trustee of May's trust versus if it just said May's trust, is that different? Are we talking about two different things or not? Because one seems like it would be trust as grantor, the May Fitzpatrick trust and the other one saying Leo Bussa. To me it seems like a difference. That's a question to be addressed aside from can the trust hold survivorship rights.

THE COURT: How would the trust transfer property other than through the actions of the trustee?

MR. KERN: I don't doubt -- I agree the trustee would be the one that transfers it. Does the trustee have to have that personal name on that deed when Leo Bussa, trustee, is no longer trustee. Let's say he steps down, he doesn't pass he steps down as trustee and a new one is appointed, do you have to issue a new deed to say now it's Angie Forbes as trustee of the May Fitzpatrick trust?

THE COURT: Is there a land title standard on point, I didn't look that up, but, with regard to the transfer of trust property that there is a destination? Again, I'm digging.

MR. KERN: I'm not familiar with it.

THE COURT: I apologize for bringing the issue up.

Continue.

MR. KERN: That's one question, does it make a difference with Leo Bussa trust versus just saying May Fitzpatrick trust, that's a question to be answered before you get to the question can the trust hold survivorship rights, that's essentially my argument.

I will leave it to counsel to carry the burden to say the trust does not hold survivorship and then reserve the opportunity to discuss the partition aspect of it since that came from plaintiff's motion rather than mine.

We have explored the option, but we've stopped at a point of trying to decide to pay an engineer to do this split for us because we don't know the percentage of the split to be.

THE COURT: Let's talk about partition in a moment.

First, I agree, we need to resolve the issues

with regard to the title itself. So, Mr. Kern, thank you.

Mr. Alward, I I'll let you proceed. But, I am interested in your position. I know what your position is, your support for the idea as to whether or not a trust can hold a remainder in interest, please.

MR. ALWARD: Your Honor, we didn't file this motion to invalidate the deeds, as counsel suggests. We're simply having the Court determine what those interests are in those deeds and whether you name them a lady bird deed or hummingbird deed doesn't matter, they are deeds.

We put forth three arguments as to why those deeds in our opinion conveyed the property to the parties as tenants in common.

First argument, which is the one Mr. Kern's addressed both orally and in his response, has to do with whether a trust can hold property as a joint tenant with the rights of survivorship, and our position is that the trust never dies and therefore you cannot hold property as -- a trust can't as a joint tenant with rights of survivorship when it never dies.

THE COURT: Because you are not a person.

MR. ALWARD: Exactly. Same reason you would have as a corporation, it doesn't die. Leo could die, we

could change to successor trustee, but the trust remains.

In addition, your Honor, we had two other arguments. We don't believe that the May trust granted the parties the authority to transfer the property as joint tenants with rights of survivorship. Nothing in the trust specifically allows for that transfer to be done as joint tenants with rights of survivorship. And, the statute is clear, if there is not specific authority then those conveyances are as tenants to the parties, as tenants in common.

THE COURT: That's consistent with the language actually in the trust, is it not?

MR. ALWARD: That is correct. That is correct.

THE COURT: Please continue.

MR. ALWARD: Third argument we had dealt with the four unities, your Honor. And, I must confess that wasn't my original argument, that came from one of our associates but I thought it was a good one once I started looking at it.

Four unities are:

Parties must receive interest in the property at the same time. Now, what we have to remember when we talk property, we're talking the entire parcel. There are two undivided 50 percent interests, but the property is the whole. There is no suggestion that the parties

receive title to that property at the same time because they did not, they didn't receive from a single deed which is another one of the requirements of the unities argument. There were several deeds. In fact, one of the deeds conveyed the property to Gwen Mason as a tenant in common.

The parties didn't meet the requirements of the four unities, therefore the conveyances that were made, although they say joint tenants with rights of survivorship, clearly don't pass the test to be that, therefore the conveyances were as tenants in common.

Did the Court want to hear the argument on the partition, or did it have questions with respect to the arguments I already raised?

THE COURT: I understand the arguments with regard to title.

Let's give Mr. Kern an opportunity to reply on the title issue. I think the best approach here is for me to go ahead and rule on the title issues then we can proceed to talk if necessary about partition.

All right, Mr. Kern, please reply.

MR. KERN: Thank you.

I won't reply to argument number one considering that was the basis of my starter argument.

Argument two is that May's trust didn't convey

survivorship rights. Number one, it's the deed that conveyed survivorship rights, not May's trust. If you are challenging the deed does not properly represent the intent of May's trust, that's a probate challenge.

THE COURT: Mr. Kern, does the powers vested in the trustee by the trust convey the power to -- from the settler of the trust convey the power to the trustee to grant property, to grant assets, by joint tenancy?

MR. KERN: Yes, it granted Leo Bussa full authority to dispose of that property as he saw fit. If he added survivorship rights when he passed it on there is nothing wrong with that according to the trust. What counsel's argument is in the trust that did not contain specific language of passing on survivorship rights. If you are going to argue the deed didn't represent what the trust said then you do that in Probate Court.

The reason they didn't make that argument in Probate Court: Number one, one of the plaintiffs was the personal representative that signed those deeds and added the survivorship right that was conveyed so she would be challenging her own actions saying I did it then but I did it wrong; and, two, there is a no contest provision, if they brought that argument up in Probate Court they would lose everything they were supposed to inherit on the argument, that's why the argument is being brought

here in a back door version of saying this deed shouldn't have conveyed survivorship rights. You are saying the deed does not reflect testator's intent as to the trust, there is a reason that argument was never made and they have been litigating in Probate Court for years and that's not one of the arguments made there. That's the reason why, no contest provision, as well as a person who executed it as plaintiff herein.

Now, that goes into the same argument of number three, he says four unities are not present, he says they are not present for the four parties. Nobody is talking about four parties, we are talking about three parties, that's where his faulty logic starts. If you add in Gwen Mason you can say, sure, it wasn't a single deed, sure it doesn't convey the same interest, sure you can break-up the unities by adding in Gwen Mason. Gwen Mason is not part of it. The four unities are in the deed that passed on survivorship. The four unities are all there, time, title, interest, everything. It's a single deed, that's one deed that's being challenged here. So the argument is flawed from the beginning of the four unities because it starts with the premise the four parties are to be considered. We admit Gwen was not part of it, only these three received all the same interest at the same time and those unities are present.

THE COURT: Thank you.

Go ahead, Mr. Alward.

MR. ALWARD: Mr. Kern's argument fails to address the issue that one deed that did have three parties on it was only for half of the property, it did not convey, as unities require, the entire property, because the entire property is a full 60 acres, not one-half of one-half.

THE COURT: All right.

This is a motion for summary disposition. There are cross motions for summary disposition, both of which focus on title issues involving a 60 acre property located on Torch Lake, Michigan with 894' of frontage, a beautiful piece of property, and certainly one that has apparently been in the Bussa/Fitzpatrick family for some time and is now, as we see often with some of the larger pieces of property, particularly those that border waterfront, is being fought over between various interests and various parts of families. And, it's to the Court's judgment now as to whether or not certain transfers of property were valid under Michigan law. And, to determine what the appropriate title, current title, is, at least with regard to the recorded documents and, frankly, a couple of unrecorded documents.

So, let's go through some of the facts.

This property goes back to 1963, when it was transferred from Ms. Fitzpatrick who we have called I think throughout this hearing, Mae, M-A-E, to herself and Leo Bussa, B-U-S-S-A, as to full rights of survivorship. In 1998 there were amendments to a trust that Mr. Bussa had and amendments to a trust Ms. Fitzpatrick had as well and there were transfers into their trusts, individual trusts, an undivided one-half interest in the subject property as tenants in common. Now, the next transfers occurred in 2010, which is when Mr. Bussa's trustee transferred 50 percent interest in his property to himself as an individual subject to the lady bird deed that we've been talking about, which is an enhanced life estate and power to convey during his lifetime. He has an individual transferred and undivided 50 percent in his property, again subject to the enhanced life estate and power to convey to himself, Schaaf, S-C-H-A-A-F, Fryer, and Forbes, as joint tenants with rights of survivorship.

Now, looking at the Fitzpatrick side of the property. Fitzpatrick died in 2004 and Bussa became trustee of the Fitzpatrick trust in 2011. Bussa's the trustee of the Fitzpatrick estate -- pardon me, trust not estate, transferred an undivided 50 percent interest in property to Bussa as Fitzpatrick trustee and Mason as joint tenants with full rights of survivorship. And,

Bussa as Fitzpatrick trustee transferred an undivided 50 percent interest to himself as trustee and Schaaf, Fryer and to Forbes as joint tenants with full rights of survivorship.

Now, in 2011, in March of 2011, Leo Bussa, the transferor in the deeds I just described passed away. And, in April of 2011 Mason, as successor to the Fitzpatrick trust conveyed an undivided 50 percent interest to Mason as an individual, but this deed was never recorded and Mason as successor to the Fitzpatrick trust conveyed an undivided 50 percent interest to Schaaf, Fryer and Forbes as joint tenants with rights of survivorship. But, this deed also was never recorded.

It's apparent that the parties have been litigating with regard to this property and other matters involving family assets for some period of time, but this particular complaint for partition initially was filed back in May of 2016, so just about a year ago. There were various matters that were handled late last year, there was a default that was resolved, there was a motion for summary disposition that was filed in October of 2016, that was withdrawn, and the parties amended their complaints and we wound up where we are today, with the plaintiff's first amended complaint being for partition in Count I and Count II for contribution and the second

amended complaint adding an action to determine the interest in land, which is again why we're here today. The answer and counter complaint seeks contribution and unjust enrichment, and in Count II, quantum meruit, breach of contract and claim of quiet title, and Count III, statutory and common law conversion.

We're here today on defendant's motion for summary disposition as to Count I, that is an action to determine interest in land, and plaintiff's cross-motion for partial summary disposition, as to Count I, that is an action to determine interest in land, and Count II, which is the partition issue.

So, that's the history.

Let's talk a little bit about the standard of review with regard to the legal issues. Motions for summary disposition can be brought pursuant to one of several different themes, they are set forth in the Court Rules that the parties are well aware. Specifically with regard to these motions we're looking at MCR 2.116(C)(8), these are failure to state a claim motions, essentially they are saying that relief -- pardon me, relief cannot be granted and legal sufficiency of the claim must be tested, and that is Spiek, S-P-I-E-K, versus Department of Transportation 456 Mich 331, that's a 1998 case.

When reviewing a (C)(8) motion only the legal

basis of the complaint is examined, the factual allegations are accepted as true, along with any fair inferences that may be drawn from them, and unless a claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. Motions under (C)(8) should be denied, and that is Mills versus White Castle Systems Incorporated, 167 Mich App 202, a 1988 case.

Now, the motions have also been filed under (C)(10), which tests the factual support for a claim, and that should be granted when there is no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law. Again, these cases are well-known to the parties, Dressel versus an Ameribank, 468 Mich 557, and that's a 2003 case. Under a (C)(10) motion a party can move for dismissal of a claim saying there is no genuine issue as to fact and the moving party is entitled to judgment or partial judgment as a matter of law. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, open an issue as to whether reasonable minds can differ on a particular point, and that is West versus General Motors Corporation, 469 Mich 177, also a 2003 case. The moving party is required to specifically identify undisputed factual issues and support its

position with documentary evidence. The non-movant then has the burden of showing that there is a genuine issue of disputed fact, that is Meagher, M-E-A-G-H-E-R, versus Wayne State University, 222 Mich App 700, 1997.

All right. Let's talk a little bit about some of the principles involved in this case. A standard or ordinary joint tenancy is characterized by four unities: first is unit of interest; the second unit of title; third unit of time; and, fourth, is unit of possession. The chief characteristic of an ordinary joint tenancy is right of survivorship, which means that upon the death of one of the joint tenants the surviving tenants take or assume ownership of the whole, and this is Wengel versus Wengel, W-E-N-G-E-L, 207 Mich App 286, a 2006 case, and it's set forth by statute MCL 554.44. In an ordinary joint tenancy right of survivorship can be destroyed by severances of the joint tenancy through the act of one tenant, such as a conveyance to a third party or levy or sale and remaining joint grantee become tenants in common. A joint tenancy requires an expressed declaration of joint tenancy in order to be created, and that is Weiler, W-E-I-L-E-R, versus Hempel 4 Mich App 654, 1966.

A joint tenancy with full rights of survivorship is a more unique animal and created by

express language directly referencing words of survivorship as contained in the granting instrument, and thus this tenancy is comprised of a joint life estate with dual contingent remainders, and that is again the Wengel case as cited above.

The operative remainder in the joint tenancy with full rights of survivorship is in fee simple, when a survivorship feature of the ordinary joint -- pardon me, while the survivorship of the ordinary joint tenancy may be defeated by the act of a co-tenant the dual contingent remainders of the joint tenancy full rights of survivorship are indestructible. The contingent remainder of a co-tenant is not subject to being destroyed by the actions of other co-tenants. Again, also the Wengal case.

Although a joint tenant with rights of survivorship can achieve partial partition through the conveyance of the life estate the partition does not effect the remainders, Wengal again.

Importantly, joint tenancy is an estate in fee simple for life, for years, or a will arising by purchase or grant between two or more persons, and that is direct from Black's Law Dictionary, fourth edition.

Estates in joint tenancy are not favored and all presumptions are against them. Conveyance in which

the grantor or one or more of the grantors are named among the grantees shall have the same force and effect as they would if the conveyance was made by a grantor or grantors who are not named by the grantees, MCL 565.49.

Conveyances expressing an intent to create a joint tenancy or tenancy by the entireties in the grantor or grantors together with the grantee or grantees shall be effected to create the type of ownership indicated by the terms of the conveyance, again 565.49.

All right, joint property -- strike that.

We've been discussing trusts here as well. And, trusts are fiduciary relationships with respect to property that subject the person who holds the title to the property to equitable duties to deal with the property for the benefit of another person, which fiduciary relationship rises out of a manifestation of an intent to create it, and that's of course MCL 700.29011(1)(J).

Importantly, when the trust shall be expressed in the instrument creating the estate every sale, conveyance or other acts of the trustees in contravention of the trust shall be absolutely void, MCL 555.21.

There has been some discussion about a ladybird deed, and I want to discuss that briefly, it's simply a transfer of real property by a warranty or quitclaim deed

to a contingent grantee that reserves a life estate and the lifetime power to convey the property and unilaterally defeat the grantee's interest because the grantor still has unrestricted interest in the property, the transfer is not an investment. Tenants in common, joint tenants or tenants by the entireties can be used to designate multiple remainder persons. The grantor can also name his or her revocable trust as a remainder person.

All right. As to analysis, this property has been divided since 1998 through two separate lineages if you will. The first lineage, as indicated earlier, I call the Fitzpatrick side, the second lineage I called the Bussa side. And, they transferred somewhat differently. There is dispute regarding some portion of the transfers, but I will discuss where the Court feels the title is currently vested, how and why.

Again, ladybird deeds are permitted under MCL 211.27(A)(7), and have been used effectively for years to prevent property tax on capping, so, that apparently is the reason the deeds were used initially in this case. The Court has no information as to whether or not that was effective, but that is certainly one of the reasons that they are used.

It's clear that Mr. Bussa saw to avoid property

taxes on capping for the property by transferring his 50 percent of the property to himself Shaaf, Fryer and Forbes, with joint tenants with full rights of survivorship, and these transfers were done properly. And, his undivided 50 percent is currently held by Shaaf, Fryer and Forbes as joint tenants with full rights of survivorship. Now, Bussa as May Fitzpatrick's trustee sought to transfer May Fitzpatrick's undivided 50 percent to Mason and the trust, and subsequently the trust remaining interest to Shaaf, Fryer and Forbes as joint tenants with full rights of survivorship. It {PAERS/} to the Court that these transfers were not done properly. May as trustee could have transferred the property naming herself and others as grantees to avoid uncapping; however, it does appear upon her death there was no way to avoid uncapping. A trust cannot hold property as joint tenants with rights of survivorship because joint tenancies are limited to natural persons and a natural person has a lifetime and a specific date of death. A trust can have a perpetual succession and does not necessarily have to die. A conveyance attempting to transfer property to a trust as joint tenant with rights of survivorship is therefore voidable.

Here, the transfer from May's trust to Mason and May's trust as joint tenants with a right of

survivorship is voidable, and voided subsequent transfers are voidable and are voided. The trustee acts as the agent of the trust and not in an individual capacity; therefore, whether or not a trustee has a measurable life, as with Mr. Bussa in this case, is not relevant. Mr. Bussa could transfer trust property to Mason and the trust as tenants in common but not as joint tenants with the right of survivorship because, again, the trust does not have a measurable life. The language of May's trust indicates that she wanted her 50 percent to be conveyed to the grantees as tenants in common, she does not include any power in the trust to grant a joint tenancy or to grant survivorship language and the Court believes that language is necessary under Michigan law.

The trust is very clear, 50 percent shall be distributed to Gwen Mason. If Ms. Mason is not surviving then her share shall be divided and distributed equally among Shaaf, Fryer and Forbes and 50 percent distributed to Elton Bussa. If Elton Bussa is not surviving his shall be divided and distributed equally among Shaaf, Fryer and Forbes; thus, by the terms of the trust Mason would own one-half of May's 50 percent, that being 25 percent of the whole property, and Shaaf, Fryer and Forbes would each own 16.6 percent of May's 50 percent of the joint tenancy or 8.3 percent of the whole

as tenants in common -- pardon me, I said joint tenancy, I meant of the tenants in common. Let me restate that. Thus, Mason would own one-half of May's 50 percent, or 25 percent of the whole property and Shaaf, Fryer, and Forbes would each own 16.6 percent of May's 50 percent, or 8.3 percent of the whole as tenants in common.

All right. Under Leo's 50 percent, and this is not necessarily in dispute, under Leo's 50, Shaaf, Fryer and Forbes each own 16.6 percent of that property -- pardon me, of the entire property. Under May's 50 percent, Mason owns 25 percent of the entire property, and Shaaf, Fryer and Forbes each own 8.3 percent of the total property. If we were to remove the form of ownership then Mason, Shaaf -- Shaaf, Fryer and Forbes would each own approximately a 25 percent interest in the property. This appears to the Court to be essentially what was intended by Leo and May in the long run. However, because Leo did transfer property with joint full rights 50 percent of the property is owned by Shaaf, Fryer and Forbes as joint tenants with rights of survivorship. The deeds conveying May's 50 percent however are invalid for reasons already stated, but pursuant to her trust, ownership is as follows, Mason, Shaaf and Fryer and Forbes would each own May's 50 percent as tenants in common. Mason would own 50 percent

of her share, Shaaf, Fryer and Forbes 16.6 percent each, thus, one-half of the property is owned as joint tenants with rights of survivorship and one-half of the property is owned as tenants in common.

All right. Having found how the property is titled currently, the next question we need to go to is the question of partition. The Court again has had the opportunity to take a look at the drawings that were provided by the parties, the exhibits provided by the parties with regard to the property itself, the Court has some limited familiarity with the property.

This would be your argument, Mr. Alward.

MR. ALWARD: Can I take a minute to collect my thoughts now that we had the first part decided?

Having determined that there is an ownership as tenants in common, the law provides that we can now go forward with the partition, which is what my clients would like to do.

In determining the partition, however, we have to look at this Court's prior ruling, Judge Rodgers' opinion, with respect to --

THE COURT: The access.

MR. ALWARD: The access, Bussa Lane.

The property, according to that opinion, at least the way I read, is we cannot put any more houses or

make any more divisions to that property and still have access on Bussa Lane, it is limited to that single property having access. Thus, it is our position the property in order to be partitioned must be sold as a whole because that then would allow the owner to provide a single dwelling or single use, a single family, for that single property and not violate the Court's order with respect to use of that easement, and I believe that is the only alternative available.

The defendants have argued because defendant owns a piece of abutting property that access could be made that way, perhaps the defendant can use that as access, the plaintiff certainly can't, we have no interest in that property. The only access my clients have is on Bussa Lane; therefore, it's our opinion the property needs to be partitioned and needs to be sold. There is no way to make an equitable division of that property where you would divide and have additional parcels that would need to have access through Bussa Lane.

THE COURT: Would your position be different if the lane -- pardon me, not the lane, if the abutting access -- some rights were granted to the subject property from the abutting access? Or, are your clients seeking sale of the property and that's it?

MR. ALWARD: Although I've only been involved in this action, I do know that there have been three or four other actions as Mr. Kern has eluded to. And, I think the Court has -- I don't want my parties back involved in the situation where there is going to be more issues, more fighting, more whose got what rights and whatnot. The simplest in my opinion, easiest and most practical way to handle it, is to sell it, and that then resolves the issue.

Now, keep in mind if there is other access, if the defendant had some interest she can be a buyer, but I believe it needs to be sold. I don't believe we want these parties to have to continue to work together with another piece of property when we can't work together on the one we have.

THE COURT: Mr. Kern, as to partition?

MR. KERN: Sure.

I think you put plaintiff's counsel in a quick answer position by asking him what you did, which is are your clients still forcing the sale. Now, having heard my decision when the purpose of the sale was to joint tenants with rights of survivor were never going to collect any money during their lifetime the way deed is set, now that your position is they are joint tenants in common they collect regardless if you sell the entire

property. Now, you asked him a question and he hasn't had an opportunity to consult with them to see if that's adequate, that's my point. We are prematurely moving into the idea of partition without having taken now some time to analyze that and go to our engineers and say here's what we need to do to get 8.3 percent for one, 8.3 percent for this one, 16.6 percent for this one.

THE COURT: Do the parties have currently scheduled a facilitative mediation on this matter?

MR. KERN: We did it already without the benefit of Count I being determined and it was un successful for primarily the reason for determining whose getting paid out or not.

THE COURT: Partition can go several ways as these parties know, I can appoint a special master to review and approve the sale or division proposal, or the parties could take that upon themselves.

MR. KERN: Save the money, themselves, right.

THE COURT: I'm simply looking for an interest here. I agree making a decision today with regard to sale is likely inappropriate given the fact you just had the opportunity to ear my ruling with regard to the title issues, which I think are necessary in order for you to make decisions going forward for all parties. So, I would like to give the parties an opportunity to

constructively develop a solution on their own; however, I would like that to have a deadline so if you are unable to do so the Court would then appoint a special master to go ahead and make those determinations.

THE COURT: Mr. Alward.

MR. ALWARD: May I?

THE COURT: Please, Mr. Alward, yes.

MR. ALWARD: I have no problem sitting down trying to come to a resolution, we tried that, it hasn't worked. Now with the Court's determination on Count I we will have a better result. But, the bottom line is with that easement the way it is, I don't know how you're going to divide the property. I don't know if the Court has any thoughts it wants to express. Quite candidly, you looked at this, it was a quick response to after we just found this but quite candidly it's an easy response because I don't believe there is any other resolution.

THE COURT: Counsel, you may be right. I'm not going to intrude on what is a long standing set of issues between these parties. But, looking at the documents you provided to me, it does appear the adjoining property could certainly be deeded if there was a desire, an easement could be deeded over to the plaintiffs in order to access, also while there is a judgment with regard to Bussa Lane, judgments can be revisited, particularly, I

don't know if there are other parties to that particular action, I know the lane provides access -- appears to provide access, again, I am only looking at the exhibit, it appears to provide access to some other properties other than Bussa property, perhaps that particular judgment could be revisited. I'm not trying to put ideas in your head, I'm not trying to tell you how to ultimately decide this. And the best solution might ultimately be to have a sale of the property; however, the Court's not in a position to make that determination today without the parties having a full opportunity to see whether or not there is a resolution now you know how the Court views the title issue.

So, Mr. Alward?

MR. ALWARD: Excuse me, your Honor, I apologize. We have deadlines the Court has imposed with respect to I think a settlement conference is coming up Friday if I'm not mistaken. I have no problem in sitting down quickly and you put the deadline on us how quickly we have to sit down, but I would like the Court to move those other deadlines out while we focus on this issue, if that's okay with the Court.

THE COURT: Mr. Kern?

MR. KERN: Agreed.

THE COURT: All right.

Well, it sounds like if everybody is going to be here Friday anyway that might be a very good day to begin work on this.

Would the parties be able now that you have an idea as to the title issues to work constructively on Friday to come up with a solution?

Why wouldn't the parties be?

MR. KERN: Because it's a little too soon for starters. You mentioned the other properties, that's how the other lawsuit started, you first had to ask other neighbors whether they consent to the split, we have to figure out how to split it, and maybe neighbors are agreeable to it. The last one was going to Court because the proposed subdivision, 80 acres up here, was going to be split like crazy and this 60 acres split like crazy and neighbors said we don't agree with that, that's how the lawsuit started. In this situation we have to have engineers map out how is best to do that, if we're going to physically divide it, if not just a buy out, and, two, what do neighbors think of this proposed plan of engineers will they consent or no, that would mute the point of whether you are overextending the use of it. So, I think there is more work to do than party trial briefs, exhibits to be filed as well in advance, so.

THE COURT: Fair point.

Would the parties be amenable to an administrative stay to give you 60 days to work on the various legal and engineering issues with regard to this matter? And, after 60 days, the Court would reopen the file and set it for a conference, a final conference, and we fish or cut the bait at that point, Mr. Alward?

MR. KERN: Yeah.

THE COURT: I don't want to extend the period so long as to get you out of the sale season, if in fact we are heading towards a sale.

MR. ALWARD: My point exactly, your Honor. Frankly, the issue of Bussa Lane is the one that's driving this. Because we can go spend as much in engineering, or defendants can, but if you can't have access on Bussa Lane it isn't going to matter.

THE COURT: Unless there is access on the --

MR. ALWARD: Unless --

THE COURT: -- the LLC property.

MR. ALWARD: Unless defendant wants to come up with some proposal that's going to take access that's not going to take 60 days for that to take place.

THE COURT: Well, I think what I'll do is this, I'll put this matter on administrative hold for 30 days, that takes it off my docket essentially so I don't have to report on progress and I give you folks an opportunity

to work through those issues. We'll put this on administrative hold for 30 days, during that time period it's my expectation the parties will proceed in good faith to resolve these outstanding issues. And, if it's necessary we'll go ahead in 30 days and have a final conference, at which we'll discuss the resolution of the parties issue.

Are there any other matters we need to deal with today?

MR. KERN: No, your Honor.

MR. ALWARD: I don't believe so, your Honor.

THE COURT: Parties have their marching orders.

MR. KERN: We do.

THE COURT: Mr. Alward, can I get an order from you with regard to today's motions?

MR. ALWARD: Yes, your Honor.

THE COURT: Thank you.

Good luck to you all.

(11:25 a.m. - proceedings concluded)

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CERTIFICATE OF OFFICIAL COURT REPORTER

STATE OF MICHIGAN

COUNTY OF ANTRIM

I, Karen M. Copeland, Official Court Reporter in and for the County of Antrim, State of Michigan, do hereby certify that this is a true and correct transcript of my stenotype notes with the assistance of Computer-Assisted Transcription to the best of my ability of the proceedings held before the Honorable Kevin A. Elsenheimer, Circuit Court Judge in the matter of SCHAAF, FRYER & MASON v. FORBES, File No. 16-9008-CH, on Monday, May 15, 2017.

S/: Karen M. Copeland
Karen M. Copeland, CSR-6054, RPR
Official Court Reporter

Dated: This 2nd day of April, 2018

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 7

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August 11, 2021

STATE OF MICHIGAN

IN THE 13th CIRCUIT COURT FOR THE COUNTY OF ANTRIM

Cindy Schaaf, Colleen M. Fryer, and Gwen Mason,

Plaintiffs/ Counter-Defendants

CASE NO. 16-9008-CH

Honorable Kevin A. Elsenheimer

v

Charlene Forbes a/k/a Angie Forbes,

Defendant/ Counter-Plaintiff.

Thomas Alward (P31724)
Jennifer L. Whitten (P75487)
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ORDER

At a session of said Court held at the Grand Traverse County Courthouse in Traverse City, Michigan on the _____ day of July, 2017

PRESENT: THE HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

This matter having come before the Court for hearing on the Defendant/Counter-Plaintiff's Motion for Summary Judgment and the Plaintiffs'/Counter-Defendants' Motion for Partial Summary Judgment, the Court having read the parties' briefs, heard oral argument and being otherwise duly advised in the matter,

NOW THEREFORE, for the reasons set forth on the record,

IT IS HEREBY ORDERED as follows with respect to the 60 acre parcel located in Milton Township, Antrim County, Michigan ("Property") legally described as follows:

> A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr ¼ of NW fr ¼) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

(1) The conveyances, as detailed hereafter, to the parties from the Mae E. Fitzpatrick Trust uad 05/08/1998, as amended ("Trust"), of the Trust's undivided 50% interest in the Property are void for the reason that a Trust cannot hold Property as a joint tenant with rights of survivorship and because the Trust had no authority to convey the Property as joint tenants with rights of survivorship. The void conveyances include:

(a) Deed dated February 9, 2011and recorded on February 10, 2011 in Liber 812, Page 2584 from Leo Bussa as Trustee of the Trust to Leo Bussa as Trustee and Gwen Mason, as joint tenants with rights of survivorship

(b) Deed dated February 9, 2011 and recorded on February 10, 2011 in Liber 812, Page 2586 from Leo Bussa as Trustee of the Trust to Leo Bussa as Trustee, Cindy Schaaf, Colleen M. Fryer and Charlene Forbes, aka Angie Forbes, as joint tenants with rights of survivorship.

(c) Deed dated April 22, 2011 but never recorded from Gwen Mason as Trustee of the Trust to Cindy Schaaf, Colleen M. Fryer and Charlene Forbes, aka Angie Forbes, as joint tenants with rights of survivorship.

(2) The parties currently hold the following interest in the Property, formerly held by the Trust:

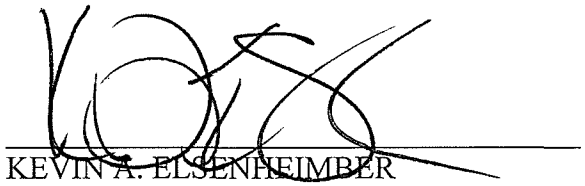
(a) Gwen Mason owns an undivided 50% interest in an undivided 50% interest in the Property (which is equivalent to a 25% interest in the entire Property) as a tenant in common with the other parties.

(b) Cindy Schaaf, Colleen Fryer and Charlene Forbes collectively own an undivided 50% interest in an undivided 50% interest in the Property (which is equivalent to a 25% interest in the entire Property) as tenants in common.

(3) The conveyance, dated December 7, 2010 and recorded on December 9, 2010 at Liber 810, Page 2983, from Leo Bussa to Leo Bussa, Cindy Schaaf, Colleen Fryer and Charlene Forbes, of an undivided 50% interest in the Property as joint tenants with rights of survivorship is a valid conveyance. Thus, Cindy Schaaf, Colleen Fryer and Charlene Forbes currently hold an undivided 50% interest in the Property, formerly owned by Leo Bussa, as joint tenants with rights of survivorship.

(4) This Order is not a final order and does not resolve this matter.

(5) Upon entry of a final order by this Court, this Order may be recorded by any party to confirm ownership of the Property.



KEVIN A. ELSENHEIMER
Circuit Court Judge

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In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

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Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 8

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August 11, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

CINDY SCHAFF, COLLEEN M. FRYER,
and GWEN MASON,

Plaintiff,

v

File No. 2016009008CH
HON. KEVIN A. ELSENHEIMER

CHARLENE FORBES a/k/a ANGIE FORBES,

Defendant.
/

Thomas Alward (P31724)
Jennifer L. Whitten (P75487)
Attorneys for Plaintiffs

Brace Kern (P75695)
Attorney for Defendant

DECISION AND ORDER REGARDING PARTITION

Decedents Leo Bussa and Mae Fitzpatrick jointly owned property on the west shoreline of Torch Lake, located in Milton Township, Michigan, and the associated littoral rights. In the 1980's and 1990's, a portion of the waterfront property was divided into seven separate parcels for residential development.[1] After the division, the remaining Bussa/Fitzpatrick property was an 80-acre northern parcel, which was sold in 2015, and a 60-acre southern parcel.[2] The 60-acre parcel (hereinafter the "Parcel") is currently owned by Cindy Schaaf, Colleen Fryer, Gwen Mason and Charlene Forbes (collectively the "Parties"), as descendants and relatives of Bussa and Fitzpatrick. The present owners disagree as to how the Parcel should be divided and sought the assistance of the Court in resolving their disputes.

Pursuant to the Court's previous Order, issued August 15, 2017, the current ownership of the Parcel is as follows:

[1] The original division, pursuant to the Grant of Easement, recorded with the Antrim County Register of Deeds: Liber 348, pages 14-26, indicates the north-eastern portion of property was divided into seven individual parcels or home sites.
[2] See Antrim County Register of Deeds, Liber 856, Page 685.

Gwen Mason (Plaintiff)	An undivided one-half interest in a one-half undivided interest in the entire Parcel as a tenant in common with the other parties;
Cindy Schaaf (Plaintiff)	An undivided 16 ⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided ⅓ interest in a one-half undivided interest in the entire Parcel as a joint tenant with right of survivorship as to the other interests in that one-half;
Colleen Fryer (Plaintiff)	An undivided 16 ⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided ⅓ interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half;
Charlene Forbes (Defendant)	An undivided 16 ⅔ percent interest in a one-half undivided interest in the entire Parcel as a tenant in common, and An undivided ⅓ interest in a one-half undivided interest in the entire Parcel as a joint tenant with rights of survivorship as to the other interests in that one-half.

The question currently before the Court is whether the Parcel may be partitioned between the Parties, pursuant to MCR 3.402, or whether partition would result in undue prejudice and a sale in lieu of partition should be ordered.[3] The Court heard oral arguments on August 14, 2017, has reviewed the briefing and now issues this decision and order for the reasons set forth herein.

In an action for partition, the court determines whether the premises can be partitioned without great prejudice to the parties, the property's value and use and any other matters the court finds pertinent.[4] Partition of lands held in joint tenancy or tenancy in common may be accomplished voluntarily by cotenants or by judicial action.[5] Physical division of jointly held property is preferred method of partition.[6] Although partition in kind is favored, the court may order sale and division of proceeds when it concludes that equitable physical division cannot be achieved.[7] Where partition of jointly held property by physical division results in inequalities in owner's shares, court may award money payments to offset the difference.[8] Dual contingent remainders of joint life estates are not subject to partition, as they are not possessory estates.[9]

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[3] MCR 3.401(B).
[4] *In re Temple Marital Trust*, 278 Mich App 122, 144; 748 NW2d 265 (2008).
[5] *Albro v Allen*, 434 Mich 271; 454 NW2d 85 (1990).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*

The relevant statute allowing for partition is MCL § 600.3308, which states:

> Any person who has an estate in possession in the lands of which partition is sought may maintain a claim for partition of those lands, but a person who has only an estate in reversion or remainder in the lands may not maintain a claim for their partition.

Partition is also controlled by MCR 3.401, which reads in pertinent part as follows:

> (A) Matters to Be Determined by Court. On the hearing of an action or proceeding for partition, the court shall determine
>
> (1) whether the premises can be partitioned without great prejudice to the parties;
>
> (2) the value of the use of the premises and of improvements made to the premises; and
>
> (3) other matters the court considers pertinent.
>
> (B) Partition or Sale in Lieu of Partition. If the court determines that the premises can be partitioned, MCR 3.402 governs further proceedings. If the court determines that the premises cannot be partitioned without undue prejudice to the owners, it may order the premises sold in lieu of partition under MCR 3.403.

As the Court has already determined that each party to this litigation has a possessory estate in the Parcel, the statutory requirement to seek a partition is met. The remaining question is whether the special characteristics of the Parcel warrant a partition in kind or a sale in lieu of partition.

Plaintiffs, relying on MCR 3.403, make several arguments in favor of a sale in lieu of partition. First, Plaintiffs suggest that a partition of the subject property which reflects its unusual ownership structure would necessarily result in (at least) five distinct "sub" parcels. As per the Court's ownership determination above, an undivided one-half of the Parcel is held by the Parties as tenants in common. The other undivided half of the Parcel is owned by Plaintiff Schaaf, Plaintiff Fryer and Defendant Forbes as joint tenants with full rights of survivorship. Without consideration of other objections raised by Plaintiffs, a physical partition of the tenancy in common ownership is essentially mathematical. Plaintiff Mason would be entitled to one-half of the interest, which would result in a parcel equal to 25% of the entire property. The remaining interests in the tenancy in common would be divided equally among Schaaf, Fryer and Forbes, resulting in three parcels each having 8 ⅓ percent of the whole.

When the joint tenancy is divided, however, the matter becomes more complex. As discussed above, the survivorship interests in a joint tenancy with full rights of survivorship cannot be partitioned and cannot be terminated absent the agreement of the parties holding the

contingency. While the joint tenancy itself could be divided equally among them, joining Schaaf, Fryer and Forbes' interests in the joint estate with their interests in the tenancy in common subjects the latter to the dual contingent remainders held by the joint tenants. A tenancy in common may not be encumbered with a survivorship feature as that would destroy the unity of possession.[10]

The Court agrees with Plaintiffs that to equitably partition the Parcel in a manner that protects the tenancy in common from the operation of the joint tenancy's dual contingent remainders would require subdividing the Parcel into minimum of five "sub" parcels. One-half of the Parcel would be split among the Parties as their interests appear as tenants in common and the other half of the property would be held by Schaaf, Fryer and Forbes and joint tenants with full rights of survivorship. The latter half could be further partitioned to reflect the three owners' possessory interests, but would retain the survivorship feature.

This analysis is further compounded by the fact that the subject Parcel does not adjoin a public road. Bussa Road, which is a public road, is south of and parallel to the Parcel. Bussa Lane, a private road created by Grant of Easement, begins approximately at the intersection of Bussa Road and Wallen Lane, crosses over the Parcel and provides access to the seven residential properties developed in the 1980's and 1990's. While the Parties may lawfully access the Parcel using Bussa Lane, the easement has been the subject of litigation in this circuit.[11]

In addressing the easement, Judge Philip Rodgers, Jr. determined that the Parties, "as Owners of [the] Parcel…the servient estate, have all the 'rights and benefits of ownership consistent with the easement' and [retained] the 'right to use the property in common' with the [dominant estate owners]."[12] Further, the Court held that the Parties may use the portion of Bussa Lane that crosses the Parcel for ingress and egress purposes, but did not have the ability to exceed the scope or increase the burden on the easement by providing access to "additional parties, such as new lot owners."[13]

The Parties' rights to access the Parcel via Bussa Lane are associated with their ownership interests and would therefore continue post-partition. However, creating five or more

---

[10] *Devries v Brydges I,* 94 Mich 957 (1892). See Sections 9.2 and 9.4 of Cameron's Michigan Real Property Law.
[11] Collectively, the Parties were the plaintiffs in Antrim Case No. 2011008633CH, *Cindy Schaaf et al v Ronald Ring et al.*
[12] See Decision and Order Granting Plaintiff/Counter-Defendants' Motion for Summary Disposition and Granting in Part and Dismissing in Part Defendants/Counter-Plaintiffs' Motion for Summary Disposition, filed October 3, 2012.
[13] *Id.*

"sub" parcels to preserve the survivorship interest in the joint tenancy would arguably be adding "additional parties" and thus, an impermissible expansion of the easement.[14] Such an expansion would seem to violate the Court's holding in the prior case of *Schaaf v Ring*.

In contrast, the Defendant argues that partition in kind is warranted because alternative methods for accessing the Parcel exist. Bussa Road LLC owns real property located on Bussa Road and adjacent to the Parcel.[15] Defendant, as a member of Bussa Road LLC, suggests that the Parties could use the LLC property to access the Parcel, which would avoid the issue of ingress and egress on Bussa Lane. Further, Defendant maintains that she could grant the Plaintiffs access rights as part of a partition in kind of the Parcel. However, there is no firm proposal to do same before the Court. Currently, only the Defendant has guaranteed access to the Parcel over the LLC property and thus, the Court will not consider the LLC property in determining whether to allow partition in kind.[16]

For the reasons stated herein, a partition in kind would result in undue prejudice to the Plaintiffs and an equitable physical division of the Parcel cannot be achieved. As such, it is the finding of this Court that sale of the Parcel and division of the proceeds between the Parties is the appropriate relief in this case. The Court orders the entire Parcel be sold, in lieu of partition, pursuant to MCR 3.403.

IT IS SO ORDERED.

08/25/2017
09:23AM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

[14] All of the lots created pursuant to a partition of the property would be alienable, although the lot(s) held as a joint tenancy with full rights of survivorship would still be subject to the dual contingent remainder.
[15] Antrim County Parcel No. 05-12-218-002-45.
[16] An easement over the LLC property would require a unanimous agreement by the Parties and it is clear to the Court that it is the Parties' *inability* to agree on solutions that brought them to Court to begin with. Therefore, the Court will not compound this matter by requiring the Parties to reach an agreement on access across the LLC property.

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 9

Brace Kern (P75695)
BEK LAW, PLC
3434 Veterans Drive
Traverse City, MI 49684
info@BraceKern.com
(231) 499-5380

Attorney for Defendant/Appellant

August 11, 2021

STATE OF MICHIGAN

IN THE 13th CIRCUIT COURT FOR THE COUNTY OF ANTRIM

Cindy Schaaf, Colleen M. Fryer, and Gwen Mason,

Plaintiffs,

CASE NO. 16-9008-CH

Honorable Kevin A. Elsenheimer

v

Charlene Forbes a/k/a Angie Forbes,

Defendant.

Thomas Alward (P31724)
Jennifer L. Whitten (P75487)
Alward Fisher Rice Rowe & Graf, PLC
Attorneys for Plaintiff
202 E. State St., Ste. 100
Traverse City, MI 49684
(231) 346-5400

Brace Kern (P75695)
BEK Law, PLC
Attorney for Defendant
3434 Veterans Drive
Traverse City, MI 49684
(231)-492-0277

ORDER OF SALE

At a session of said Court held at the Courthouse
in the Village of Bellaire, Antrim County, Michigan
on the ____ day of _____, 2017

This matter having coming before the Court on Motions for Summary Disposition brought by both Plaintiffs and Defendant; the Court having entered a Decision and Order on August 25, 2017, requiring that the 60-acre parcel located in Milton Township, Antrim County, Michigan ("Premises"), which is the subject of this litigation, be sold as one parcel in lieu of partition; and the Court having denied Defendant's Motion for Reconsideration;

NOW, THEREFORE, pursuant to the Court's Order and in order to complete the sale of the Premises in lieu of partition, IT IS HEREBY ORDERED:

A. Attorney R. Edward Kuhn is hereby appointed as Commissioner to administer the sale of the Premises. The Commissioner shall be paid his fee from the proceeds of the sale of the Premises pursuant to MCR 3.402.

B. The Premises, which is more fully described as

   A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr ¼ of NW fr ¼) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West

   shall be sold as a single parcel.

C. There is no minimum price at which the Premises may be sold.

D. The sale shall be a cash sale with no credit terms.

E. No proceeds shall be retained for the benefit of unknown owners, infants, parties outside Michigan or parties who have dower interest or life estates.

F. The Premises shall be listed for sale by the Commissioner through Bob and Tia Rieck of Coldwell Banker Schmidt Realtors at an initial listing price of $2,250,000.00.

G. Upon receipt of a purchase agreement acceptable to the Commissioner, the Commissioner shall, pursuant to MCR 3.403(B)(4) file a report with the Court, requesting the Court to confirm the sale. The Court may confirm the sale at a hearing with reasonable notice to Plaintiffs and Defendant.

H. If the Court confirms the sale, pursuant to MCR 3.403(B), the Commissioner shall be authorized to execute conveyances pursuant to the sale, and pursuant to MCR 3.403(C) deduct the costs of expenses of the proceeding, including the Plaintiffs' reasonable attorney fees as determined by the Court, from the proceeds of the sale and pay them to Plaintiffs' attorney. Thereafter, the Commissioner shall, pursuant to MCR 3.403(D), deduct any other costs and divide the proceeds of the sale among the parties in proportion to their respective interests, i.e. each party having a 25% interest in the entire Premises.

IT IS SO ORDERED.

Dated: 12/11/2017
12:10PM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

Honorable Kevin A. Elsenheimer, Circuit Court Judge

W:\Fryer, Colleen\Trust Real Estate Matter\Order for Partition REVISED 10.30.17docx.docx

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 10

Brace Kern (P75695)
BEK LAW, PLC
3434 Veterans Drive
Traverse City, MI 49684
info@BraceKern.com
(231) 499-5380

Attorney for Defendant/Appellant

August 11, 2021

Instrument 201000009630 OR
Liber Page 810 2089

201000009630
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY NIEPOTH - 268
12-01-2010 At 12:01 pm.
QUIT CLAIM 17.00
OR Liber 810 Page 2089 - 2090

QUIT CLAIM DEED

The Grantor:	Leo Bussa, Trustee of the Leo Bussa Trust UAD 05/08/98, as amended,
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,
Conveys and quit claims to:	Leo Bussa a/k/a Leo J. Bussa, ("Grantee"),
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,

the following described premises situated in the Township of Milton, County of Antrim and the State of Michigan:

That part of Government Lot four (4), Section 7, Township 29 North, Range 8 West, lying West of the * North and South line; ALSO, the Southwest fractional one-quarter (SW fr 1/4) of the Southwest fractional one-quarter (SW fr 1/4) of Section 7, Township 29 North, Range 8 West.

* North and South line starting on the South line of said Section seven (7). 2645 feet East of the Southwest corner of the Section and running North1°30' West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any.

For no consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and MCL 207.505, Section 5(a).

The Grantor also grants to the Grantee the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this 30th day of November, 2010

Received
ANTRIM COUNTY MICHIGAN
11-30-2010 03:57 pm.

Instrument 201000009630 OR Liber 810 Page 2090

Signed by:

Leo Bussa - Trustee

Leo Bussa, Trustee

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me this 30th day of November, 2010, by Leo Bussa, Trustee.

Michelle D. Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

* * * * *

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantee

Tax Parcel #
05-12-207-023-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 11

Brace Kern (P75695)
BEK LAW, PLC
3434 Veterans Drive
Traverse City, MI 49684
info@BraceKern.com
(231) 499-5380

Attorney for Defendant/Appellant

August 11, 2021

Instrument 201000009630 OR
Liber Page 810 2089

201000009630
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY NIEPOTH - 268
12-01-2010 At 12:01 pm.
QUIT CLAIM 17.00
OR Liber 810 Page 2089 - 2090

QUIT CLAIM DEED

The Grantor:	Leo Bussa, Trustee of the Leo Bussa Trust UAD 05/08/98, as amended,
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,
Conveys and quit claims to:	Leo Bussa a/k/a Leo J. Bussa, ("Grantee"),
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,

the following described premises situated in the Township of Milton, County of Antrim and the State of Michigan:

That part of Government Lot four (4), Section 7, Township 29 North, Range 8 West, lying West of the * North and South line; ALSO, the Southwest fractional one-quarter (SW fr 1/4) of the Southwest fractional one-quarter (SW fr 1/4) of Section 7, Township 29 North, Range 8 West.

* North and South line starting on the South line of said Section seven (7). 2645 feet East of the Southwest corner of the Section and running North1°30' West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any.

For no consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and MCL 207.505, Section 5(a).

The Grantor also grants to the Grantee the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this 30th day of November, 2010

Received
ANTRIM COUNTY MICHIGAN
11-30-2010 03:57 pm.

Instrument 201000009630 OR Liber 810 Page 2090

Signed by:

Leo Bussa - Trustee

Leo Bussa, Trustee

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me this 30th day of November, 2010, by Leo Bussa, Trustee.

Michelle D. Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

* * * * *

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantee

Tax Parcel #
05-12-207-023-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

Instrument 201000009862 OR | Liber Page 810 2981

201000009862
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY NIEPOTH - 268
12-09-2010 At 09:47 am.
QUIT CLAIM 17.00
OR Liber 810 Page 2981 - 2982

QUIT CLAIM DEED

The Grantor:	Leo Bussa, Trustee of the Leo Bussa Trust UAD 05/08/98, as amended,
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,
Conveys and quit claims to:	Leo Bussa a/k/a Leo J. Bussa, ("Grantee"),
Whose address is:	11148 Bussa Road, Rapid City, Michigan, 49676,

An undivided fifty percent (50%) interest in and to the following described premises situated in the Township of Milton, County of Antrim and the State of Michigan:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any.

For no consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and MCL 207.505, Section 5(a).

The Grantor also grants to the Grantee the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this 7th day of December, 2010

Signed by:

Leo Bussa - Trustee

Leo Bussa, Trustee

Received
ANTRIM COUNTY MICHIGAN
12-08-2010 03:56 pm.

Instrument 201000009862 DR Liber 810 Page 2982

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me this 7th day of December, 2010, by Leo Bussa, Trustee.

Michelle D. Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

* * * * *

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantor

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 12

Brace Kern (P75695)
BEK LAW, PLC
3434 Veterans Drive
Traverse City, MI 49684
info@BraceKern.com
(231) 499-5380

Attorney for Defendant/Appellant

August 11, 2021

Instrument 201000009863 OR
Liber Page 810 2983

201000009863
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY NIEPOTH - 268
12-09-2010 At 09:47 am.
QUIT CLAIM 17.00
OR Liber 810 Page 2983 - 2984

QUIT CLAIM DEED

(subject to enhanced life estate)

Subject to the enhanced life estate below, the Grantor, **Leo Bussa a/k/a Leo J. Bussa,** whose address is **11148 Bussa Road, Rapid City, Michigan, 49676**, quit claims to,

Grantees, **Leo Bussa a/k/a Leo J. Bussa, Cindy Schaaf, Colleen M. Fryer and Charlene A. Forbes a/k/a Angie Forbes** whose addresses are **11148 Bussa Road, Rapid City, Michigan, 49676; 5532 N. Meridian Road, Peru, Indiana, 46970; 10191 Bates Road, Williamsburg, MI 49690; and 4136 Hollow Haven Lane, Mancelona, MI 49659, respectively,** as Joint Tenants with Rights of Survivorship,

An undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any, excepting therefrom all oil, gas and mineral rights which are reserved to Grantor.

The Grantor reserves and grants unto **Leo Bussa a/k/a Leo J. Bussa**, a life estate coupled with an unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3. This power to convey includes the power to sell, gift, mortgage, lease, including the right to lease oil, gas and mineral rights, divide as allowed by law, and otherwise dispose of the property.

For no monetary consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and (r); and MCL 207.505, Section 5(a) and (o).

The Grantor also grants to the Grantees the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Received
ANTRIM COUNTY MICHIGAN
12-08-2010 03:56 pm.

Instrument 201000009863 OR | Liber 810 | Page 2984

Dated this 7th day of December,

Signed by:

Leo Bussa

Leo Bussa a/k/a Leo J. Bussa

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me in Antrim County this 7th day of December, 2010, by Leo Bussa a/k/a Leo J. Bussa.

Michelle D. Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

****

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantor

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 13

Brace Kern (P75695)
BEK LAW, PLC
3434 Veterans Drive
Traverse City, MI 49684
info@BraceKern.com
(231) 499-5380

Attorney for Defendant/Appellant

August 11, 2021

Instrument Liber Page
201100000975 OR 812 2584

201100000975
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY NIEPOTH - 268
02-10-2011 At 10:05 am.
QUIT CLAIM 17.00
OR Liber 812 Page 2584 - 2585

QUIT CLAIM DEED

(subject to enhanced life estate)

Subject to the enhanced life estate below, the Grantor, **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,** whose address is **11148 Bussa Road, Rapid City, Michigan, 49676**, quit claims to,

Grantees, **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended, and Gwen Mason,** whose addresses are **11148 Bussa Road, Rapid City, Michigan, 49676, and 3662 Island Lake, Kalkaska, Michigan, 49646, respectively** as Joint Tenants with Rights of Survivorship,

An undivided fifty percent (50%) interest in the Mae E. Fitzpatrick Trust's undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any. Not including oil, gas and mineral rights which have previously been severed.

The Grantor reserves and grants unto **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,** a life estate coupled with an unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3. This power to convey includes the power to sell, gift, mortgage, lease, including the right to divide as allowed by law, and otherwise dispose of the property.

For no monetary consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and (r); and MCL 207.505, Section 5(a) and (o).

The Grantor also grants to the Grantees the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Received
ANTRIM COUNTY MICHIGAN
02-09-2011 03:57 pm.

Instrument 201100000975 OR | Liber 812 | Page 2585

Dated this.9th day of February, 2011

Signed by:

Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me in Antrim County this 9th day of February, 2011, by Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

Notary Public: John W. Unger
Antrim County, Michigan
My commission expires: April 29, 2011
Acting in the County of Antrim

****

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantor

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 14

Brace Kern (P75695)
BEK LAW, PLC
3434 Veterans Drive
Traverse City, MI 49684
info@BraceKern.com
(231) 499-5380

Attorney for Defendant/Appellant

August 11, 2021

Instrument Liber Page
201100000976 OR 812 2586

201100000976
Filed for Record in
ANTRIM COUNTY MICHIGAN
PATTY MIEPOTH - 268
02-10-2011 At 10:05 am.
QUIT CLAIM 17.00
OR Liber 812 Page 2586 - 2587

QUIT CLAIM DEED

(subject to enhanced life estate)

Subject to the enhanced life estate below, the Grantor, **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,** whose address is **11148 Bussa Road, Rapid City, Michigan, 49676**, quit claims to,

Grantees, **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended, Cindy Schaaf, Colleen M. Fryer and Charlene Forbes a/k/a Angie Forbes,** whose addresses are **11148 Bussa Road, Rapid City, Michigan, 49676, 5532 N. Meridian Road, Peru, Indiana, 46970; 10191 Bates Road, Williamsburg, MI 49690; and 4136 Hollow Haven Lane, Mancelona, MI 49659, respectively** as Joint Tenants with Rights of Survivorship,

An undivided fifty percent (50%) interest in the Mae E. Fitzpatrick Trust's undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any. Not including oil, gas and mineral rights which have previously been severed.

The Grantor reserves and grants unto **Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,** a life estate coupled with an unrestricted power to convey the premises during his lifetime pursuant to Land Title Standard 9.3. This power to convey includes the power to sell, gift, mortgage, lease, including the right to divide as allowed by law, and otherwise dispose of the property.

For no monetary consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(a) and (r); and MCL 207.505, Section 5(a) and (o).

The Grantor also grants to the Grantees the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

Received
ANTRIM COUNTY MICHIGAN
02-09-2011 03:57 pm.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this.9th day of February, 2011

Signed by:

Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me in Antrim County this 9th day of February, 2011, by Leo Bussa, Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

Notary Public: John W. Unger
Antrim County, Michigan
My commission expires: April 29, 2011
Acting in the County of Antrim

****

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without Opinion as to Division Rights. Legal Description provided by Grantor.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantor

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 15

Brace Kern (P75695)
BEK LAW, PLC
3434 Veterans Drive
Traverse City, MI 49684
info@BraceKern.com
(231) 499-5380

Attorney for Defendant/Appellant

August 11, 2021

QUIT CLAIM DEED

The Grantor:	**GWEN MASON, Successor Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,**
Whose address is:	**3662 ISLAND LAKE, KALKASKA, MICHIGAN, 49646,**
Conveys and quit claims to:	**CINDY SCHAAF, COLLEEN M. FRYER and CHARLENE FORBES A/K/A ANGIE FORBES ("Grantees") as Joint Tenants with Rights of Survivorship,**
whose addresses are	**5532 N. Meridian Road, Peru, Indiana, 46970; 10191 Bates Road, Williamsburg, MI 49690; and 4136 Hollow Haven Lane, Mancelona, MI 49659, respectively,**

An undivided fifty percent (50%) interest in the Mae E. Fitzpatrick Trust's undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

> A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any. Not including oil, gas and mineral rights which have previously been severed.

This deed is given to confirm title already vested in the Grantee and to cure a technical defect in the chain of title.

For no consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(n) and MCL 207.505, Section 5(l).

The Grantor also grants to the Grantees the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this 22nd day of April, 2011,

Signed by:

Gwen Mason, Trustee

Gwen Mason, Successor Trustee of the
Mae E. Fitzpatrick Trust dated May 8, 1998,
as amended

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me this 22nd day of April, 2011, by Gwen Mason, Successor Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

Michelle D Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

* * * * *

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without
Opinion as to Division Rights.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantees

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

QUIT CLAIM DEED

The Grantor:	**GWEN MASON, Successor Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended,**
Whose address is:	**3662 ISLAND LAKE, KALKASKA, MICHIGAN, 49646,**
Conveys and quit claims to:	**GWEN MASON ("Grantee"),**
Whose address is:	**3662 ISLAND LAKE, KALKASKA, MICHIGAN, 49646,**

An undivided fifty percent (50%) interest in the Mae E. Fitzpatrick Trust's undivided fifty percent (50%) interest in and to certain real property in the Township of Milton, County of Antrim, State of Michigan, described as follows:

> A strip of land off the North side of the Northwest fractional quarter of the Northwest fractional quarter (NW fr 1/4 of NW fr 1/4) and of Government Lot 1 of sufficient width, North and South, to contain sixty (60) acres, being in Section 18, Town 29 North, Range 8 West.

Together with all the structures and appurtenances and also subject to easements, restrictions and reservations, and mortgages of prior record, if any. Not including oil, gas and mineral rights which have previously been severed.

This deed is given to confirm title already vested in the Grantee and to cure a technical defect in the chain of title.

For no consideration. Exempt from transfer tax pursuant to MCL 207.526, Section 6(n) and MCL 207.505, Section 5(l).

The Grantor also grants to the Grantee the right to make all lawful division(s) under Section 108 of the Land Division Act, Act No. 288 of Public Acts of 1967.

The above-described premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Dated this 22nd day of April, 2011,

Signed by:

Gwen Mason, Trustee

Gwen Mason, Successor Trustee of the
Mae E. Fitzpatrick Trust dated May 8, 1998,
as amended

STATE OF MICHIGAN)
)ss.
COUNTY OF ANTRIM)

The foregoing instrument was acknowledged before me this 22nd day of April, 2011, by Gwen Mason, Successor Trustee of the Mae E. Fitzpatrick Trust dated May 8, 1998, as amended.

Michelle D. Valuet

Notary Public: Michelle D. Valuet
Antrim County, Michigan
My commission expires: August 27, 2017
Acting in the County of Antrim

* * * * *

Drafted by and when recorded return to:
John W. Unger (P21679)
John W. Unger, P.L.L.C.
(Without opinion as to Title & Without
Opinion as to Division Rights.)
107 E. Broad St., P.O. Box 1079
Bellaire, MI 49615

Send subsequent tax bills to:
Grantee

Tax Parcel #
05-12-218-001-00

Recording Fee: $17.00

Transfer Tax: State: $ 0.00
County: $ 0.00

In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. Jonathan Tuckel, Deborah Servitto, and Michael Riordan

CINDY SCHAAF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiffs/Counterdefendants-Appellees,

V.

CHARLENE FORBES, also known as ANGIE FORBES,

Defendant/Counterplaintiff-Appellant.

Supreme Court No. 160503

Court of Appeals No. 343630

Antrim County Circuit Court Case No. 2016-009008-CH

DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

EXHIBIT 16

Brace Kern (P75695)
BEK LAW, PLC
3434 Veterans Drive
Traverse City, MI 49684
info@BraceKern.com
(231) 499-5380

Attorney for Defendant/Appellant

August 11, 2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

CINDY SCHAFF, COLLEEN M. FRYER, and GWEN MASON,

Plaintiff,

V

File No. 2016009008CH
HON. KEVIN A. ELSENHEIMER

CHARLENE FORBES a/k/a ANGIE FORBES,

Defendants.
/

Jennifer L. Whitten (P75487)
Attorney for Plaintiffs

Brace Kern (P75695)
Attorney for Defendant

SECOND AMENDED CIVIL SCHEDULING CONFERENCE ORDER

At a session of said Court held in the Courthouse, said County and State, on this 21st day of July, 2017.

PRESENT: HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

A Pre-Trial Scheduling Conference was conducted in this matter on this date and the parties, or their counsel, having had the opportunity to participate through their written submissions, and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

The Administrative Stay entered May 17, 2017 is lifted.

PLEADINGS

The pleadings are **UNSATISFACTORY. PLEADINGS MAY BE AMENDED BY RIGHT AS ALLOWED BY RULE, THEREAFTER BY MOTION AND LEAVE OF THE COURT.**

WITNESSES AND EXHIBITS

Counsel shall file a list of witnesses and exhibits [per MCR 2.401(I)], and exchange copies of exhibits no later than **February 5, 2017.**

Witnesses or exhibits not under the control of a party and which become known or made available to a party through the discovery process may be later added so long as the disclosure is prompt and no prejudice is shown.

Failure to comply with this paragraph will bar the introduction of the evidence or testimony at trial.

DISCOVERY

The discovery deadline in this case shall be **April 28, 2017.** All discovery requests shall be filed on or before the discovery deadline and all depositions shall be scheduled to occur on or before that date. No further discovery shall be allowed except by leave of Court upon good cause shown.

LIEN HOLDERS

The Court SHALL be promptly notified of lien holders and the names and addresses of lien holders' contact persons so that a lien holder representative may be ordered to attend alternative dispute resolution proceedings pursuant to MCR 2.410(D)(2)(a) and/or settlement conference pursuant to MCR 2.401(F)(1).

MOTIONS

All motions shall be HEARD PRIOR to the day of the final Pre-Trial/Settlement Conference and shall strictly comply with MCR 2.119, including responses; otherwise, they will be considered untimely.

Any motion for Summary Disposition shall be due within five (5) days.

ALTERNATIVE DISPUTE RESOLUTION
MCR 2.411 - FACILITATIVE MEDIATION

This Court, in its efforts to streamline the Court docket and promote cost-effective, timely dispute resolution, diverts this case to other resources. The parties are to seek and participate in mediation as a means of resolving this conflict. MCR 2.411. A listing with mediators and services is attached to this Order. Questions about this process are to be directed to this Court's ADR Clerk, Mr. Brandt A. Waldenmyer, 231/922-4741; or **bwaldenmyer@grandtraverse.org .**

The Court has determined that mediation is appropriate in this case. The mediation is to be completed prior to **April 28, 2017.**

Except for good cause shown, the parties' attorneys or the parties, if unrepresented, shall confer and select a mediator or mediation service within 14 days of the date of the Order and notify the ADR Clerk in writing of the mediator they have selected. In the event that the parties do not notify the ADR Clerk of their selection within the 14 days allowed, the ADR Clerk will select a mediator without notice to the parties and advise the parties or their attorneys who will be conducting the mediation.

In the event that the parties' attorneys or the parties, if unrepresented, fail to timely notify the ADR Clerk that the parties do not agree on a mediator or fail to timely notify the ADR Clerk in writing of the selection of a mediator, the parties' attorney or the unrepresented parties shall be SANCTIONED by the Court in the amount of $250. Each party shall pay a proportionate share of the $250 sanction. For example, in a case involving two Plaintiffs and three Defendants, each party shall pay 20 percent or $50 to the Court.

Mediators are encouraged to require each party to deposit 50 percent of the proposed costs in advance for their services. If the deposit is not fully utilized, any excess should be returned to the parties within 7 days of the completion of the mediation service. Any remaining balance of the mediation fee shall be paid within 28 days of the date of the mediator's bill is mailed. Failure to pay shall be considered as contempt of this Order.

Within 21 days of the date of this Order, the mediator or mediation service shall advise the ADR Clerk and all parties, in writing, the date and time set for the mediation. The parties will provide the mediator or mediation service with a copy of the Civil Scheduling Conference Order.

In the event the parties resolve their issues prior to mediation, **THE PARTIES SHALL NOTIFY THE MEDIATOR AT LEAST 48 HOURS PRIOR TO THE SCHEDULED MEDIATION SESSION.** In the event the parties fail to provide such advance notice to the mediator, within 14 days after the scheduled mediation session, the parties shall pay to the mediator a minimum charge for four hours based on the mediator's hourly rate to be divided equally among all parties. For example, if the mediator's hourly fee is $90 per hour, a Plaintiff and a Defendant would pay $180 each to the mediator.

TRIAL counsel and each named party SHALL be present for the mediation. Corporations, partnerships and governmental entities SHALL be represented by persons who have information and authority adequate for responsible and effective participation in the mediation for all purposes including settlement. Representatives of lien holders and representatives of insurance carriers SHALL be present and have information and authority adequate for responsible and effective participation in the mediation for all purposes including settlement.
Within 7 days after the completion of the mediation, the mediator shall so advise the ADR Clerk, stating only the date of completion of the process, who participated in the mediation, whether settlement was reached, and whether further ADR proceedings are contemplated. If the case is settled through mediation, within 21 days the attorneys or the parties, if

unrepresented, shall prepare and submit to the Court the appropriate documents to conclude the case.

OFFER OF JUDGMENT

Parties who wish to pursue case evaluation may arrange the proceeding on a date of their choice with a panel of their choosing. Facilities for the proceeding may be reserved at the Courthouse. Otherwise, you may choose to use the Offer of Judgment procedure described in MCR 2.405.

FINAL PRE-TRIAL/SETTLEMENT CONFERENCE

Scheduled for **August 2017** in the Court's chambers in TRAVERSE CITY. A Final Pre-Trial/Settlement Conference Notice will be forwarded by Circuit Court Administration.

PRIOR TO the Final Pre-Trial/Settlement Conference, counsel shall electronically file: (1) a TRIAL BRIEF; (2) **COMPLETE** copies of PRE-MARKED TRIAL EXHIBITS; (3) proposed FULL TEXT JURY INSTRUCTIONS; and (4) a proposed VERDICT FORM. For non-jury trials, counsel shall electronically file any STIPULATED FACTS and PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, in lieu of jury instructions.

PLAINTIFF(S) SHALL pre-mark trial exhibits using **NUMBERS**. Any composite exhibits should be identified using the main exhibit's sequential number and an alphabetical suffix to identify the composite portions of the exhibit. DEFENDANT(S) SHALL pre-mark trial exhibits using **LETTERS**. Any composite exhibits should be identified using the main exhibit's sequential letter and a numerical suffix to identify the composite portions of the exhibit.

Jury instructions shall be CASE SPECIFIC, employing the applicable pronouns and including all relevant language as counsel would have the instructions read to a jury. There may be no more than one instruction per page and all Comments, History and Use Notes shall be deleted. A copy of these jury instructions, in revisable **Word format**, shall be emailed to **bbearup@grandtraverse.org** at least **SEVEN (7) DAYS** PRIOR TO the commencement of trial.

Settlement will be fully explored at this Conference. TRIAL counsel and each named party SHALL be present. Corporations, partnerships and governmental entities SHALL be represented by persons who have information and authority adequate for responsible and effective participation in the conference for all purposes including settlement. Representatives of lien holders and representatives of insurance carriers SHALL be present and have information and settlement authority adequate for responsible and effective participation in the conference for all purposes including settlement.

Unless counsel have submitted to Circuit Court Administration an executed Stipulation and proposed Order dismissing the litigation PRIOR to the Final Settlement Conference, counsel who believe the case has been settled shall nevertheless attend the Final Settlement Conference

with their clients for purposes of placing the settlement on the record or completing the conference.

Failure to comply with every requirement of this conference paragraph may result in a default or a dismissal as may be appropriate against the offending party or attorney and an award of sanctions to each non-offending party. MCR 2.401(G).

TRIAL DATE

Estimated duration of **NON-JURY** trial: **One (1)** day. A trial notice will be forwarded by Circuit Court Administration.

MISCELLANEOUS PROVISIONS

IT IS FURTHER ORDERED that the objections found within the deposition transcripts shall be resolved and the transcripts edited no later than **TWO (2) WEEKS** PRIOR TO trial or the objections shall be deemed to have been waived.

IT IS FURTHER ORDERED that NO adjournments shall be allowed. Any objections to this Order shall be filed within seven (7) days from the date hereof.

IT IS SO ORDERED.

07/21/2017
01:13PM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

PHILIP E. RODGERS, JR.
THOMAS G. POWER
CIRCUIT JUDGES

State of Michigan

Thirteenth Judicial Circuit

328 WASHINGTON STREET, SUITE 300
TRAVERSE CITY, MICHIGAN 49684
(231) 922-4701
c13court@grandtraverse.org
www.13thcircuitcourt.org

COUNTIES
ANTRIM
GRAND TRAVERSE
LEELANAU

TERI QUINN
Court Administrator

General Civil Mediation Resources and Practitioners

Individuals providing Mediation services to parties referred by this Court must have, at a minimum, the following qualifications:

1) Completion of SCAO approved training as a mediator. As in PA 286, "mediator" means an impartial, neutral person who assists parties in voluntarily reaching their own settlement of issues in a dispute and who has no authoritative decision-making power.

2) Have one or more of the following:

   a) Juris doctor degree or graduate degree in conflict resolution; or
   b) 40 hours of mediation experience over two years including mediation, co-mediation, observation, and role-playing in the context of mediation.

3) Observe two general civil mediation proceedings conducted by an approved mediator, and conduct one general civil mediation to conclusion under the supervision and observation of an approved mediator.

An applicant who has specialized experience or training, but does not meet the above requirements, may apply to the ADR Clerk for special approval.

MEDIATION SERVICES ARE AVAILABLE THROUGH:

1) **CRS, Inc.** is a non-profit organization (www.CRSMediationTC.org) that operates in full compliance with Community Dispute Resolution Act. CRS volunteer mediators provide free and low cost mediation services for those who cannot afford to pay a private mediator and CRS assigns paid mediators to cases when appropriate. CRS can be reached at 231/941-5835 in Traverse City, Michigan, or **CaseManager@CRSmediationtc.org**

2) The Court-Approved Mediators are listed below and continued on the following page.

Tracy L. Allen
586/979-6500
tallen@mediate.com
$425/Hr. or $4,250/day
www.Mediate.com

William M. Azkoul
616/235-5500
wmazkoul@gmnp.com
$275/Hr.
www.gmnp.com

Todd R. Bailey
231/421-7990
888/529-2259 toll free
trb@bailey-lawoffice.com
$125/Hr.
www.Bailey-LawOffice.com

Steven L. Barney
231/838-1500
SteveBarney@TrueNorthADR.com
$275/Hr.
www.truenorthadr.com

David A. Bieganowski
dbiegan@charter.net
231/947-6073
$150/Hr. & costs

Holly T. Bird
231/392-2491
hollytbirdattorney@gmail.com
$150/Hr.

Douglas S. Bishop
231/946-4100
doug1@bishopheintz.com
$250/Hr. & costs or flat fee
www.BishopHeintz.com

John R. Blakeslee
231/486-4555
jblakeslee@shrr.com
$225/Hr. & costs
www.SHRR.com

Scott S. Brinkmeyer
616/632-8011
sbrinkmeyer@mikameyers.com
$250 for 6 Hrs.; $1,800 per day; $200/Hr. over 8 Hrs. Please contact re travel.
www.mikameyers.com

William E. Clark, Jr.
888/875-5769 toll free
wcmediator@yahoo.com
$150-225/Hr. & costs
www.ClarkMediator.com

Michael I. Conlon
231/946-2700
mic@runningwise.com
$185/Hr.
www.RunningWise.com

Alan J. Couture
231/946-2700
ajc@runningwise.com
$200/Hr.
www.RunningWise.com

Mark R. Dancer
231/929-0500
dancer@ddc-law.com
$200/Hr. & costs
www.DDC-Law.com

Alton T. Davis
989/370-1891
atd365@gmail.com
$250-$400/Hr. and costs
(Unavailable Jan to mid- May)

William M. Davison
231/946-2700
wmd@runningwise.com
$195/Hr.
www.RunningWise.com

== *CONTINUED* ==

Lawrence J. Day
810/603-3400
larry@mediationday.com
$500/attorney up to 5 hrs.

Michael H. Dettmer
231/946-0044
Mike@envlaw.com
$180/Hr.
www.EnvLaw.com

Frederick D. Dilley
616/726-2200
fdilley@fosterswift.com
$325/Hr.
www.FosterSwift.com

W. Peter Doren
231/947-0400
doren@sondeeracine.com
$195/Hr. & costs
www.SondeeRacine.com

Pamela C. Enslen
269/276-8112
penslen@wnj.com
$370/Hr.
www.wnj.com

David W. Fershee
231/347-1410
david@stedmanfershee.com
$250/Hr.
www.StedmanFershee.com

Richard J. Figura
231/326-2072
rfigura@figuraLaw.com
$200/Hr. & costs
www.Figuralaw.com

Sandra J. Franklin
231/735-1237
Franklintechlaw@icloud.com
$175/Hr. & costs
www.Technologyadr.com

Byron P. Gallagher, Jr.
517/853-1515
BPG@thegallagherlawfirm.com
$250/Hr.
www.TheGallagherLawFirm.com

Gary Allen Gardner
231/941-5878
gary@rosigardner.com
$150/Hr.

Robert B. Guyot III
231/947-0808
rguyot@guyotlaw.com
$125/Hr. & costs

R. Jay Hardin
231/714-0702
Jay@hardinlawtc.com
$225/Hr. & costs

Richard A. Hooker
248/567-7403
rahooker@varnumlaw.com
$350/Hr.
www.VarnumLaw.com

Lee Hornberger
231/941-0746
leehornberger@leehornberger.com
$200/Hr. & costs
www.LeeHornberger.com

Peter D. Houk
517/482-5800
phouk@fraserlawfirm.com
$350/Hr.
www.FraserLawFirm.com

Dale Ann Iverson
616/560-2243
daleiverson@justmediation.com
$220/Hr. & costs
www.JustMediation.com

Charles B. Judson
231/929-4878
cjudson@shrr.com
$225/Hr. & costs
www.SHRR.com

Brace E. Kern
231/492-0277
kern@law-bek.com
$400/half day-$800/full day
www.law-bek.com

Thomas F. Koernke
616/458-7900 ext. 202
tkoernke@grandlaw.com
$250/Hr. No charge for travel
www.GrandLaw.com

David M. Lick
517/371-8294
DLick@fosterswift.com
$325/Hr.
www.fosterswift.com

Kelly Reed Lucas
517/485-0400
kreedlucas@loomislaw.com
$275/Hr.
www.LoomisLaw.com

Paula J. Manderfield
517/377-0847
pmanderfield@fraserlawfirm.com
$300/Hr.
www.FraserLawFirm.com

Paula K. Manis
517/485-0400
pkmanis@loomislaw.com
$295/Hr. & expenses incurred
www.LoomisLaw.com

E. Thomas McCarthy, Jr.
616/458-9224
tmccarthy@shrr.com
$350/Hr. & costs
No chg to/from Traverse City
www.SHRR.com

Todd W. Millar
231/947-6800 x110
tmillar@SwoggerandBruce.com
$225/Hr.
www.SwoggerandBruce.com

David R. Munroe
231/533-8815 or 231/676-0087
drm@munroe.net
$200/Hr. mediation time
$150/Hr. prep/travel costs

Bruce W. Neckers
616/233-5157
bneckers@rhoadesmckee.com
$300/Hr
www.RhoadesMcKee.com

Michael D. Nelson
989/732-5221
Michael@nelsonplc.com
$200/Hr.
www.nelsonplc.com

Jeffrey J. Noorman
231/946-7020
jjn@noormanlaw.com
$150/Hr.
www.noormanlaw.com

John Olson
231/883-7888
jolson@realestateonetc.com
$150/Hr. & costs
www.RealEstateOne.com

Daniel P. O'Neil
231/929-9700
oneil@thompsononeillaw.com
$200/Hr. & costs
www.thompsononeillaw.com

Dustin P. Ordway
616/450-2177
dpordway@ordwaylawfirm.com
$200/Hr. (negotiable) & costs
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