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STATE OF MICHIGAN

IN THE SUPREME COURT

Supreme Court Case Nos. 167501, 167503

In re Estate of Jennifer Fowler

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

Appellee,

V

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

Appellant.

Court of Appeals Case No. 365600

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

In re Jennifer L. Fowler Trust

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

Appellant,

V

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

Appellee.

Court of Appeals Case No. 365603

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

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APPELLEE JULIE BROOKS, Personal Representative of the ESTATE OF HELEN FOWLER'S SUPPLEMENTAL BRIEF IN OPPOSITION TO THE APPELLANT'S APPLICATION FOR LEAVE TO APPEAL THE PUBLISHED DECISION OF THE COURT OF APPEALS

ORAL ARGUMENT REQUESTED

Respectfully submitted,

/s/John B. McNamee

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STATEMENT OF THE STANDARDS OF REVIEW

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

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STATEMENT OF QUESTIONS PRESENTED

A. Whether the 401(k) account funds at issue are exempt from attachment by the Estate of Helen Fowler (Helen's Estate)?

The Court of Appeals Answered:	No
The Appellee Answered:	No
The Appellant Answered:	Yes

B. Whether the life insurance proceeds at issue are subject to the claims by Helen's Estate to the extent that the Estate of Jennifer Fowler lacks sufficient assets to satisfy the claims?

The Court of Appeals Answered:	Yes
The Appellee Answered:	Yes
The Appellant Answered:	No

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STATEMENT OF FACTS

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

INTRODUCTION

This current application for appeal is contrary to of the Settlor/Grantor Jennifer Fowler's stated intent to pay valid claims against her estate, contained in her Last Will and Testament of Jennifer Fowler; and acknowledged in her revocable Jennifer Fowler Living Trust but rather in furtherance of the intent of the Personal Representative/Trustee Shelly Spacil (also a residual beneficiary named in the revocable trust), that the Helen Fowler Estate is to not receive "one dime". (Appellant's App'x p 421) Shellie Spacil testified that she would continue to spend whatever attorney fees and costs (from the trust) were necessary until a court ordered her otherwise. (Appellant's App'x p 422)

The Appellant did not argue before the Court of Appeals that MCL 700.7605(4) was a basis for ruling in favor of Appellant at to the 401k issue and never raised the Federal Court opinion in the Eastern District of Michigan titled *United States v Estate of Chicorel,* 2017 WL 595 E.D. MICH 1/17/2017 ((Appellant's Supplemental Appendix 3.)

The Appellee incorporates by reference the arguments made in the prior Appellee's Response to the Appellant's Application for Leave and Brief in Opposition which dealt with the case law and statutory arguments presented in the Appellant's initial brief. The Appellee incorporates by reference, in greater detail, the arguments raised by the Amicus Curiae Brief filed by the Probate Section of the State Bar. The Appellee will restrict this Supplemental Brief to the new arguments raised by Appellant for the first time in the Appellant's Supplemental Brief.

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ARGUMENT

A. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE REVOCABLE JENNIFER FOWLER LIVING TRUST, WHICH RECEIVED A LUMP SUM PAYMENT INTO SAID TRUST, FROM THE DTE SAVINGS AND STOCK OWNERSHIP PLAN IS GOVERNED PURSUANT TO A TRUST DEFINED UNDER MCL 700.7605(1).

I. Chicorel opinion

The *Chicorel, supra* opinion had to do with the United States attempt to "recover back taxes allegedly owed by Defendant Estate of Albert Chicorel" by seeking to amend its complaint. The federal judge's opinion denied the United States' motion to amend, ruling that as of the death of the Settlor (Albert Chicorel) the revocable trust had no become an irrevocable trust and relied upon MCL 700.7605(4) on the basis that the death benefit proceeds were now "held by Decedent's now-irrevocable trust". The Court immediately before stating its ruling stated that "Had Decedent used a testamentary trust instead of revocable living trust, sections 7605(1) and 7506(1) unambiguously would not apply and the death benefits would not be subject to the claims of the estate's creditors." Appellee agrees with that statement as it is exactly what MCL 700.7605(4) was intended to exempt.

The government in *Chicorel* did not need to pursue the state of Michigan statutory construct as they had all the authority it needed pursuant to *26 U.S. Cde Section 2036* which states:

> "The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth**),** by trust or otherwise under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death--
> …….

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Thus, for federal and state estate tax purposes, the assets of a decedent's revocable trust are a part of the decedent's taxable estate, and, thus, are subject to the tax liens that are automatically imposed by federal and state law on the assets of the taxable estate. IRC 2036; MCL 205.232. It is for that very reason that probate attorneys advise their clients to create irrevocable trusts as opposed to revocable trusts.

The touchstone of the federal judge's opinion is that the created revocable trust has been "transformed" into a fictitious "irrevocable Trust" upon the death of the settlor.

In order to reach that result, a great deal of pertinent Michigan statutory language, case law and long-standing probate principles have to be simply ignored.

(a) <u>Revocable Trust v Irrevocable Trust</u>

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

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

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

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

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

The distinction between a "revocable trust" and an "irrevocable trust" is determined at the time of the creation of the trust wherein the Settlor/Grantor determines if he or she wished to completely gives up assets and their entitlement to manage their assets during their lifetime. The legislature specifically provided the means by which a revocable trust is in fact "revoked". MCL 700.7602(3) states:

> (3) The settlor may revoke or amend a revocable trust in any of the following ways:
>
> (a) By substantially complying with a method provided in the terms of the trust.
>
> (b) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made inclusive, in either of the following ways:
>
> (i) If the trust is created pursuant to a writing, by another writing manifesting clear and convincing evidence of the settlor's intent to revoke or amend the trust.
>
> (ii) If the trust is an oral trust, by any method manifesting clear and convincing evidence of the settlor's intent.

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

Death of the settlor was not defined as a means by which a revocable trust becomes an irrevocable trust. In fact, MCL 700.7602(1) provides:

> "Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust."

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Thus, in order to determine if a trust is revocable versus irrevocable, one only has to look at the expressed language of the trust and the only term used in the revocable Jennifer Fowler Living Trust is REVOCABLE.

Historical context of a revocable trust being subject to creditor's claims.

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

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

The Legislature clearly encapsulated the "existing law" as it applied to revocable trusts and creditors in MCL 700.7506 as set forth below:

700.7506 Creditor's claim against settlor; "settlor" explained

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

The Commentary to the *Michigan Probate Sourcebook,* Martin/Harder (current to 01/10/2025); further highlights the statutory construct which was intended to provide creditors with relief involving revocable trusts.

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

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

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

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

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

> The term "property" is defined in 2 sections of EPIC and one section of POA.
>
> MCL 700.2901(i)
>
> "Property" means **anything** that may be the subject of ownership. Property includes both real and personal property and an interest in property,

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> including a present interest; a future interest; a legal interest; and equitable interest; and interest acquired by testate succession; by intestate or other statutory succession, by succession to a disclaimed interest, or by lapse or release of power of appointment; or an interest that may be acquired under a governing instrument.
>
> MCL 700.1106(x)
>
> "Property" means **anything** that may be subject of ownership, and includes both real and personal property or in interest in real or personal property.
>
> MCL 556.112(a)
>
> "Property" means **any** legal or equitable interest in real or personal property, including choses in action.

At the time of Jennifer Fowler's death, no one else had any authority as to determine what would become of her property, or her interest in her property, other than herself. Up until then she had the only and absolute authority to determine what would happen to her property upon her death. Up until then, she could have changed the designation of not only the beneficiary of her 401k plan (which was clearly hers and hers alone interest in the 401k plan) but also the designation of the beneficiary of her Metropolitan insurance policy (contract). At the time of death, the decedent Jennifer Fowler's determination, (the intent of the Grantor/Settlor), are to be followed by the successor trustee, the Appellee Sherry Spacil, irrespective of what Ms. Spacil may have wanted to happen. If in fact, the decedent Jennifer Fowler had wished to give up her right to make those determinations at an earlier stage than right up to the time of her death, she could have created an irrevocable trust. The decedent, at any time in her life, did not create an irrevocable trust. What she did was create a revocable Jennifer Fowler Living Trust, that does not become an "irrevocable trust" as a trust instrument has to be created by the Settlor/Grantor. In fact, the revocable Jennifer Fowler Living Trust is still in existence and according to its terms, and the Decedent Jennifer Fowler's intent is to be

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followed in the disposition of her property after her death.

more than one meaning. *Id.* at 247.

The Legislature was well aware of the "context of the entire act" and the "judicial interpretations of the existing law" when it passed EPIC and the MTC. The Legislature clearly encapsulated the "existing law" as it applied to revocable trusts and creditors in MCL 700.7506 and MCL 700.7605.

The attempt to characterize a "revocable trust" as becoming an "irrevocable trust" at time of death has already been argued and decided in the matter of *Sparling v Sparling,* No. 355843 (Mich Ct App June 16, 2022, unpublished) (See Appellee's Supplemental Appendix 1). The Court of Appeals held:

> Perhaps in anticipation of the issues with the preceding argument, John claims that the reference to revocable trusts applies equally to irrevocable trusts because once a settlor is deceased, all the settlor's trusts become irrevocable. This argument, however, again ignores the plain words of the statute, ***which clearly focuses on the time period immediately preceding the settlor's death, not after.*** To read the statute otherwise would render the term "revocable" surplusage, as the qualifier would be unnecessary under John's interpretation. See *Ayotte v Dep't of Health and Human Servs,* 337 Mich App 29, 39; 972 NW2d 282 (2021) (stating this Court will avoid a construction that would render any part of the statute surplusage or nugatory" (quotation marks and citations omitted). In other words, if the **Legislature intended that all trusts—revocable or irrevocable—were subject to MCL 700.7604, it would not have needed to add the phrase "revocable at the settlor's death,**" Accordingly the trial court did not err when it denied John's motion for summary disposition on the basis that MCL 700.7604 barred Mary's claims.
>
> MCL 700.7605(1) clearly and unambiguously states:
>
> **(1) The property of a trust** over which the settlor has the right without regard to the settlor's mental capacity, ***at his or her death***, either alone or in conjunction with another person, **to revoke the trust** and revest principal in himself or herself is subject to all of the following, but only to the extent that the settlor's property subject to probate administration is insufficient to satisfy the following expenses, claims, and allowances:
>
> While the focus of both the federal court in *Chicorel, supra,* and the Probate section

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is on the language "or other than to a settlor's estate" a more complete examination of MCL 700.7605(4) reveals the phrase has no application to the revocable Jennifer Fowler Living Trust.

MCL 700.7605(4) reads:

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

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

The Estates and Protected Individuals Code (EPIC) defines an "Estate" as follows in MCL 700.1104(b):

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

MCL 700.7606 specifically requires:

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

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

> (a) If the **decedent was the settlor of more than 1 trust described in section 7605(1)**, the charges described in that section are payable pro

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> rata from those trusts based on the gross values of the respective trusts on the date of the decedent's death. Each trustee is entitled to right of contribution as necessary to effect the pro rata liability. The allocation and contribution, however, are subject to provisions in the trust regarding the allocation and burden of the charges. If there is a conflict between the terms of the trusts regarding the allocation and burden of the charges, the **decedent's will controls**.

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

The "other than the settlor's estate" is intended to cover circumstances wherein the recipient is not the Settlor/Grantor's trust which is part and parcel of the decedent's estate.

EPIC provides the clear and proper framework for the resolution of this matter.

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

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

As the commentary to MCL 700.3805(3) states:

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

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

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

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

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

> (1) If a donee has a general power of appointment, any interest that the donee has power to appoint or has appointed is to be treated as property

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of the donee for the purposes of satisfying claims of the donee's creditors, as provided in this section.

(2) If a donee has an unexercised general power of appointment and the donee can presently exercise such power, any creditor of the donee may by appropriate proceedings reach any interest that the donee could appoint, to the extent that the donee's individual assets are insufficient to satisfy the creditor's claim. If the donee has exercised the power, the creditor can reach the appointed interests to the same extent that under the law relating to fraudulent conveyances the creditor could reach property that the donee has owned and transferred.

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

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

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

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

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

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

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

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

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

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

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

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

> "My Trustee is authorized, but not directed to pay the following:
>
> ***
>
> Legally enforceable claims against me or my estate. "

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

Retirement Plans

> "Despite any conflicting provisions in my trust, no expenses, claims, or death taxes shall be paid out of any retirement plan assets which become trust property as a result of my death, unless my Trustee has first used all other assets available to my Trustee".
> (Joint Trial Exhibit 2-Article 6 Section 6(a)-pg 6-4, Appellee's App'x p 35)

The above trust provision is in accord with Michigan case law and MCL 700.7605(1) which provides that a revocable trust asset is subject to the claims of creditor against Jennifer Fowler's estate.

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ARGUMENT II

B. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE METROPOLITAN LIFE INSURANCE PROCEEDS, WHICH WERE PAID TO THE REVOCABLE JENNIFER FOWLER LIVING TRUST, AS THE DESIGNATED BENEFICIARY OF THE LIFE INSURANCE POLICY, ARE AVAILABLE AS TRUST ASSETS OF THE REVOCABLE JENNIFER FOWLER LIVING TRUST TO BE TRANSFERRED IN ACCORDANCE WITH THE STATUTORY REQUIREMENTS OF MCL 500.2207(2) MCL 700.7605, MCL 700.7606, MCL 700.7607, MCL 700.3805, MCL 556.123 AND THE EXPRESSED TERMS OF THE LAST WILL AND TESTAMENT OF JENNIFER FOWLER AND THE REVOCABLE JENNIFER FOWLER LIVING TRUST TO SATISFY THE WRONGFUL DEATH JUDGMENT OF THE APPELLEE ESTATE OF HELEN FOWLER.

I. INTRODUCTION

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

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

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

(a) MCL 700.7604(4) is not applicable to the facts of this matter.

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

The "other than the settlor's estate" is intended to cover circumstances wherein the recipient is not the Settlor/Grantor's trust which is part and parcel of the decedent's estate.

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

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

As the commentary to MCL 700.3805(3) states:

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

Again, EPIC is quite clear in MCL 700.3805(3) that "a trust described in section 7605(1)" (revocable trust) is definitively and without question a source of satisfying "claims and allowances", along with any other source of nonprobate transfers. If this Court were to adopt Appellant's position, then a personal representative could never certify to the trustee of a "decedent's revocable trust" because it would always be "irrevocable" upon death, which would be in direct contradiction to the statutory scheme of EPIC and the MTC.

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

> Sec.6101.
>
> (1) **A provision for an nonprobate transfer on death in an insurance policy,** contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument that is intended to result in 1 or more of the following:
>
> (a) Money or another benefit due to, controlled by, or owned by the decedent before death is paid after the descendant's death to a person, including a trustee of a trust created by will, whom the decedent designates either in a separate instrument or in a

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> separate writing, including a will, executed either before, at the same time as, or after the instrument.

MCL 700.3805(3) and MCL 700.6101(1) definition of nonprobate transfers include proceeds of the Metropolitan insurance policy owned by the decedent Jennifer Fowler who chose to make the beneficiary of the policy upon her death the revocable Jennifer Fowler Living Trust. It is clear that life insurance proceeds received by the decedent Jennifer Fowler's revocable trust are not exempt under MCL 700.7605(4).

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

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

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

RELIEF REQUESTED

The Appellee, the Estate of Helen Fowler respectfully requests this Honorable Court to deny the Appellant revocable Jennifer Fowler Living Trust's application for leave to

appeal.

CERTIFICATE OF COMPLIANCE WITH MCL 7.212

In compliance with MCL 7.212 and ADM File No. 2019-16, I certify that this brief contains 6,197 countable words and the typeface used in this brief is Arial, set in a 12-point font except for footnotes.

Dated: May 28, 2025

/s/ John B. McNamee
John B. McNamee

Respectfully submitted,

Dated: May 28, 2025

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