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# In the Michigan Supreme Court

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

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

Plaintiffs/Counter-Defendants/  
Appellees,

-vs-

CHARLENE FORBES, also known as  
ANGIE FORBES,

Defendant/Counter-Plaintiff/  
Appellant.

Supreme Court Case No. 163404  
Court of Appeals No. 343630  
Antrim County Case No. 16-009008-CH

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## AMICUS CURIAE BRIEF ON BEHALF OF THE PROBATE & ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN

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## **STATEMENT OF INTEREST OF AMICUS CURIAE**

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,488 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

### **SUPPORT**

The Probate Council authorized the filing of an amicus brief in the case of *Schaaf v Forbes* currently pending before the Michigan Supreme Court (Supreme Court Number 163404).

### **EXPLANATION**

The Michigan Supreme Court has invited the Probate Section to file an amicus brief weighing in on the following three questions:

- (1) whether the circuit court was vested with subject matter jurisdiction of the plaintiffs' complaint, which sought a determination of interests in the subject property and partition, see MCL 700.1302; MCL 700.1303;
- (2) whether Michigan law allows a trust to hold title to real property as a joint tenant with right of survivorship; and
- (3) whether the deeds in dispute in this case were valid insofar as they granted the trustee of a trust a life estate in the real property as a joint tenant with right of survivorship.

With regard to the first issue, the Probate & Estate Planning Section has a public policy decision-making body with 23 members. On June 10, 2022, the Section adopted its position after a discussion and vote at a scheduled meeting. 15 members voted in favor of the Section's position, 1 member voted against this position, 0 members abstained, 7 members did not vote.

With regard to the second and third issues, the Probate & Estate Planning Section has a public policy decision-making body with 23 members. On June 10, 2022, the Section adopted its position after a discussion and vote at a scheduled meeting. 15 members voted in favor of the Section's position, 0 members voted against this position, 1 member abstained, 7 members did not vote.

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**STATEMENT OF JURISDICTION**

The Amicus Party, the Probate Section, concurs with Plaintiffs-Appellees' Cindy Schaaf's, Colleen M. Fryer's and Gwen Mason's ("Plaintiffs") Statement of Appellate Jurisdiction as set forth in their Brief.

**STATEMENT OF RELIEF SOUGHT**

The Probate Section respectfully requests that this Court:

1. Affirm the Court of Appeals and hold that the circuit court had subject matter jurisdiction to adjudicate Plaintiffs' complaint on the merits, which sought a determination of interests in the subject property and partition; and
2. Affirm the Court of Appeals and hold that a trust cannot own real property as a joint tenant with right of survivorship because a trust is not a natural person, but reject the Court of Appeals' rationale to the extent it suggests that a trustee of a trust is not subject to this holding. The Probate Section requests that this Court expand the holding to include trustees.
3. The Probate Section takes no position whether the deeds in dispute were valid insofar as they granted the trustee of a trust a life estate in the real property as a joint tenant with right of survivorship because there is insufficient information presented in the Court of Appeals' opinion to permit this question to be answered. If the deeds were clear that the real property was held by joint tenants with rights of survivorship by the trust/trustee with a specified measuring life of a natural person in the deed for purposes of the trust/trustee's interest in the property, then the deeds could be valid.

**STATEMENT OF QUESTIONS INVOLVED**

1. Whether the circuit court was vested with subject matter jurisdiction to adjudicate Plaintiffs’ complaint, which sought a determination of interests in the subject real estate and partition.

Plaintiffs/Appellees answer: Yes

Defendant/Appellant answers: No

Michigan Court of Appeals answers: Yes

Probate Section answers: Yes

The Complaint alleges in essence a quiet title action in which the circuit court has jurisdiction and the probate court would have concurrent jurisdiction. MCL 600.605; MCL 700.1303. Plaintiffs’ complaint does not turn on the validity of the trust, trust interpretation or trust administration. MCL 700.1302.

2. Whether Michigan law allows a trust to hold title to real property as a joint tenant with right of survivorship (“JTWROS”)?

Plaintiffs/Appellees answer: No

Defendant/Appellant answers: Yes

Michigan Court of Appeals answers: No

Probate Section answers: No

Michigan Law generally does not permit a trust and/or the trustee of a trust to hold real property as a JTWROS because a trust is not a natural person. A trust cannot be used as a measuring life for purposes of a trust/trustee owning property as a JTWROS; only a natural person can be used as a measuring life for purposes of owning property as a JTWROS because only a natural person lives and dies. However, a trust and/or trustee may hold real property as a JTWROS if there is a

specified measuring life of a natural person in the deed for purposes of the trust/trustee's interest in the property.

3. Whether the deeds in dispute in this case were valid insofar as they granted the trustee of a trust a life estate in the real property as a joint tenant with right of survivorship.

The Probate Section takes no position whether the deeds in dispute were valid insofar as they granted the trustee of a trust a life estate in the real property as a JTWROS because there is insufficient information presented in the Court of Appeals' opinion to permit this question to be answered. If the deeds were clear that the real property was held by JTWROS by the trustee/trust with a specified measuring life in the deed that is a natural person for purposes of the trust/trustee's interest in the property, then the deeds could be valid.

## **STATEMENT OF FACTS**

The Amicus Party, the Probate Section, concurs with Plaintiffs' Statement of Facts set forth in their Brief. The specific facts of this matter are not pertinent to the first two policy issues addressed in this Brief.

The Probate Section offers no opinion on the third issue posed by this Court of whether the deeds in dispute were valid insofar as they granted the trustee of a trust a life estate in the real property as a JTWROS. It is the Probate Section's view that the Court of Appeals' decision is not specific enough to permit this question to be answered and there may be additional facts that are necessary for its determination. If the deeds were clear that the real property was held by the trust/trustee as a JTWROS, with a specified measuring life that is a natural person in the deed, for purposes of the trust/trustee's interest in the property, then the deeds could be valid.

### **STANDARD OF REVIEW**

Subject matter jurisdiction is a question of law this Court reviews *de novo*. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017). Whether a trust can own property as a JTWR0S involves statutory interpretation and presents a question of law that is reviewed *de novo* by this Court. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

**I. INTRODUCTION**

One of the primary goals of estate planning practitioners is to create as much reasonable certainty as possible within the planning they establish for their clients. For hundreds of years, the common law rule planners have relied on has been that “none but natural persons can take in joint tenancy. *Telfair v Howe*, 3 Rich Eq 235, 243; 55 Am Dec 637 (SC App Eq 1851). This rule supports the defining characteristic of joint tenancy - - the right of survivorship - - and the survivor owning the entire property upon the death of the other co-owner(s). This view has been echoed by numerous American courts over the past two centuries.

As a result, many attorneys counseling and drafting estate plans for their clients have relied upon the common law principle that trusts/trustees cannot be joint tenants with rights of survivorship (JTWROS). The Court of Appeals agreed with this rule of law and it is the Probate Section’s position this holding should be affirmed by this Court and should be extended to include trustees. In the Probate Section’s view, the Court of Appeals reached the correct result, but in so doing used a flawed rationale. It made rulings concerning the nature of trusts and the relationship between trusts and trustees which run counter to the Michigan Trust Code and the common law. This incorrect rationale included the Court of Appeals’ finding that a trust is an ‘artificial entity’ as opposed to a fiduciary relationship between the settlor, trustee, and beneficiary. The Court of Appeals also incorrectly ruled that the trustee is different from the trust itself, and that the powers of the trustee are not relevant to its decision. Well-established Michigan law holds a trust cannot take any action; instead it is the trustee of a trust that takes all action on behalf of the trust. Technically, only a trustee, and not a trust, should be identified as the grantor and/or the grantee of real property on the deed for property held in trust. Unless corrected, these findings or

suggestions by the Court of Appeals will set bad precedent, wreak havoc on existing estate plans, and throw into confusion future trust administration and litigation.

This Court should affirm the Court of Appeals' ruling that the circuit court had subject matter jurisdiction to adjudicate Plaintiffs' complaint involving the parties' interest in the property. This Court should also affirm the Court of Appeals' ruling prohibiting trusts from owning property as a JTWROS because the trust is not a natural person.<sup>1</sup> This Court should reject the Court of Appeals' footnote that suggests a trustee is distinct from the trust itself and not subject to the rule, which is contrary to established law. To avoid establishing bad precedent, it is critical for this Court to expand the Court of Appeals' holding to apply to trusts and trustees equally.

## **II. ARGUMENT**

### **A. The Circuit Court Was Vested With Subject Matter Jurisdiction To Adjudicate Plaintiffs' Complaint To Determine Interests In Real Estate And Partition**

Subject matter jurisdiction is a question of law this court reviews de novo. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000). "Jurisdiction does not inhere in a court. Jurisdiction is conferred on the court by the power that creates it." *Detroit v Rabaut*, 389 Mich 329, 331; 206 NW2d 625 (1973). "Subject matter jurisdiction is the right of the court to exercise judicial power over a class of cases, not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending." *Joy v Two-Bit Corp*, 287 Mich 244, 253; 283 NW 45 (1938). A court's subject matter jurisdiction is determined only by reference to the allegations listed in the complaint. *Grubb Creek Action Committee v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668; 554 NW2d 612 (1996). "The question of jurisdiction does not

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<sup>1</sup> This rule recognizes a trust/trustee may hold title to real property as a JTWROS if a natural person's life is specified as a measuring life for the trust/trustee's interest in the property, within the deed.

depend on the truth or falsity of the charge, but upon its nature...”. *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). Subject matter jurisdiction exists if it is apparent from the allegations in the complaint that the matter alleged falls within the class of cases over which the court has power to act. *Grubb Creek, supra*, 218 Mich App at 668.

Circuit courts are courts of general jurisdiction that have authority to “exercise ... original jurisdiction to hear and determine all civil claims and remedies except, where the exclusive jurisdiction is given in the constitution or by statute to some other court...” MCL 600.605; Const. 1963, art. VI § 1. The circuit court has jurisdiction over equitable claims. *Beach v Township of Lima*, 489 Mich 99; 802 NW2d 1 (2011). Quiet title and partition actions are equitable claims. *Id.* MCL 600.2932; MCL 600.3301. Consequently, the circuit court was vested with subject matter jurisdiction to decide Plaintiffs’ quiet title and partition action, unless exclusive jurisdiction was granted by statute to the probate court to adjudicate the nature of the claims alleged in Plaintiffs’ complaint.

Jurisdiction of the probate court is governed by MCL 700.1302 and 1303. Unlike the circuit court, the probate court is a court of limited jurisdiction. Exclusive jurisdiction of the probate court is established under MCL 700.1302. The probate court’s concurrent jurisdiction is granted by MCL 700.1303. Read together, the plain reading of the statutes which empower the probate court with jurisdiction shows that the Legislature did not grant the probate court with exclusive jurisdiction over every type of claim involving trusts and estates. Nor did the Legislature make an exception of quiet title and partition claims involving trusts and estates from the general jurisdiction of the circuit court. MCL 600.605; MCL 700.1303(1)(a)(b). To the contrary, the Legislature specifically excluded these types of proceedings from the probate court’s exclusive jurisdiction and only granted it concurrent jurisdiction. MCL 700.1303(1)(a)(b).

For the reasons more fully set forth below, the Probate Section requests the Court of Appeals decision be affirmed. The circuit court had subject matter jurisdiction to decide plaintiffs' quiet title and partition claims and to adjudicate the complaint on the merits. This conclusion is supported by the allegations in Plaintiffs' complaint and is buttressed by the rules governing statutory construction, the interplay between the statutes involved, and the clear language of the statute. The probate court is vested with concurrent jurisdiction only to determine claims involving a property right or partition. MCL 700.1303(1)(a)(b).

1. The General Jurisdiction of the Circuit Court

Jurisdiction over quiet title actions was granted to the circuit court under MCL 600.2932.

It provides, in part:

(1) Any person, whether he is in possession of the land in question or not, 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, whether the defendant is in possession of the land or not.

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(5) Actions under this section are equitable in nature.

MCL 600.3301 provides the circuit court's jurisdiction over partition proceedings:

Actions containing claims for the partition of lands may be brought in the circuit courts, including, but not limited to, the matters covered in this chapter. Such actions are equitable in nature.

The foregoing grant of jurisdiction to the circuit court to adjudicate property disputes and claims for the partition of land is undisputed. Thus, unless exclusive jurisdiction was granted to the probate court to adjudicate these classes of cases under the Estate & Protected Individuals Code (EPIC), the circuit court properly exercised its power to adjudicate Plaintiffs' complaint. The Court of Appeals reviewed the allegations in Plaintiffs' complaint and like the circuit court

properly determined the probate court did not have exclusive jurisdiction over the type of proceeding brought by Plaintiffs. Its decision should be affirmed by this Court.

2. The Scope of Exclusive Jurisdiction EPIC Grants the Probate Court Is Limited. EPIC Specifically Exempts Quiet Title and Partition Actions From the Probate Court's Exclusive Jurisdiction, Only Granting It Concurrent Jurisdiction.
  - a. The probate court's jurisdiction under EPIC, MCL 700.1101 et seq.

A probate court's jurisdiction, powers, and duties shall be provided by law. Mich Const 1963 art. VI, §15. MCL 600.841(1)(A)(a) establishes the jurisdiction and power of the probate court, and *inter alia*, as conferred on it by EPIC. Unlike the circuit court that is a court of general jurisdiction, the probate court is a court of limited jurisdiction that derives its power from statutes. *Manning v Amerman*, 229 Mich App 608, 611; 582 NW2d 539 (1998).

EPIC vests the probate court with exclusive legal and equitable jurisdiction of specific types of proceedings enumerated under the statute. MCL 700.1302. In granting the probate court exclusive jurisdiction over a limited scope of legal and equitable proceedings, the Legislature removed those types of proceedings from the circuit court's general jurisdiction. MCL 600.605. MCL 700.1302(b) establishes the exclusive legal and equitable jurisdiction of the probate court as it relates to trusts. It provides:

- (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.

Pointedly, the grant of exclusive jurisdiction covers generally “a proceeding that concerns the validity, internal affairs or settlement of a trust...the distribution of a trust...the declaration of rights that involve a trustee or trust beneficiary...” and proceedings specifically enumerated under the statute. MCL 700.1302(b)(i)-(viii). At the same time, however, the Legislature specifically enumerated several types of proceedings that were not covered under the exclusive jurisdiction of the probate court, even though the case was “in regard to an estate of a decedent, protected individual, ward or trust.” As to these proceedings, the probate court was only granted concurrent jurisdiction. MCL 700.1303.

MCL 700.1303 grants the probate court concurrent jurisdiction over certain enumerated legal and equitable proceedings. MCL 700.1303 provides in part:

- (1) In addition to the jurisdiction conferred by section 1302 and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent, protected individual, ward, or trust:
  - (a) Determine a property right or interest.
  - (b) Authorize partition of property.

The underlying purpose of the probate court’s concurrent jurisdiction is stated in the statute. The Legislature granted the probate court concurrent jurisdiction over certain classes of proceedings to simplify the disposition of an action or proceeding by permitting a party to “consolidate[e] the probate and other related actions or proceedings in the probate court.” MCL 700.1303(3). To the extent concurrent jurisdiction is recognized, whether it will be exercised or

declined rests largely with the discretion of the court.<sup>2</sup> *Fid Mut life Ins Co v Blain*, 144 Mich 218, 220; 107 NW2d 834 (1906).

The rules of statutory construction require the court to determine “the meaning of the Legislature...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 877 (1906). A review of the statutory language here confirms that the Legislature did not confer on the probate court the same powers and duties of a court of general jurisdiction just because an estate or trust is involved. The statutory scheme bifurcated the grant of jurisdiction to the probate court between exclusive and concurrent jurisdiction. MCL 700.1302; 700.1303. This structure granted exclusive jurisdiction to the probate court, *inter alia*, over proceedings that “concern” the administration, or distribution of a trust or the ability to instruct a trustee or determine an immunity, power, privilege, duty or right. MCL 700.1302(b). In so doing, this structure only removed certain legal and equitable proceedings that “concern” trusts from the circuit court’s general jurisdiction. It did not make an exception for every type of legal or equitable proceeding “in regard to” a trust or estate just because a trust or an estate was involved. The Legislature expressed its intent in clear terms and left no ambiguity when it granted the probate court concurrent jurisdiction to adjudicate proceedings to determine a property right or interest and partition in regard to property held in trust. Had the Legislature intended to grant the probate court

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<sup>2</sup> MCL 700.1302(2) outlines the procedure for cases in which there is concurrent jurisdiction in the probate court. It provides upon motion of the party and after a finding and order on the jurisdictional issue, the court may order removal of the action or proceeding to the probate court. MCL 700.1302(2). Defendant did not avail herself of this procedure and the fact that the circuit court had jurisdiction and has already adjudicated the merits of Plaintiffs’ complaint, renders it moot.

exclusive jurisdiction over every type of action where a trust, estate, trustee or trust beneficiary were involved or was a party, it would have said so.

Statutory construction requires the court to resolve "...every doubt in favor of retention rather than divesture of jurisdiction." *Paley v Coca Cola Co*, 389 Mich 583, 592-593; 209 NW2d 232 (1973). To divest the circuit court of jurisdiction over proceedings included in its subject matter jurisdiction requires a clear mandate of law. *Id.* at 592. The statute divesting the circuit court of jurisdiction must be expressed in clear and unambiguous language. *Id.* at 593.

There is no EPIC statute that divests the circuit court of jurisdiction over proceedings to determine a property right or interest and partition involving property held in trust. In fact, we have just the opposite --- a statute in clear and unambiguous language that simply grants the probate court concurrent jurisdiction over these types of proceedings.

Plaintiffs' complaint involves a proceeding to determine an interest in property that falls squarely within the circuit court's jurisdiction. In analyzing whether subject matter jurisdiction properly resided in the circuit court, the Court of Appeals carefully reviewed the question of the grant of exclusive jurisdiction to the probate court and the allegations in Plaintiffs' complaint and properly held the exclusive jurisdiction of the probate court did not cover these proceedings. The Legislature "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). The statutory reference to "a proceeding" that "concerns" trust matters suggests that the exclusive jurisdiction of the probate court under MCL 700.1302(b) 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 the trustee or affected persons.

The issue before this Court is whether Plaintiffs' complaint alleges a quiet title action as Plaintiffs' maintain, or whether as Defendant argues, Plaintiffs' complaint seeks a determination of whether a trustee "can" execute a deed conveying Trust property to himself as trustee of the Fitzpatrick trust and others (reserving an enhanced life estate for himself) as JTWR0S. Defendant frames the issue improperly and stresses whether the "trustee can..." to argue exclusive jurisdiction rests in the probate court. A review of the allegations in Plaintiffs' complaint, however, reveals Defendant's flawed reading.

Plaintiffs' complaint does not ask the circuit court to determine whether the Trustee had authority to execute a deed and distribute trust property. Of course he did. The question is what interests were conveyed to the parties by these deeds. Plaintiffs' complaint seeks this determination. In Count I of the Complaint, Plaintiffs ask the circuit court to determine the parties' interest in real property based on the deeds and for partition or sale of the property in Count II, depending upon the circuit court's determination of the property interests in Count I. Plaintiffs' complaint describes the deeds in question and how they came about. Plaintiffs recite the deeds were executed by Leo Bussa, Trustee of the Fitzpatrick Trust. The deeds at issue convey the real property to them individually and Mr. Bussa as Trustee of the Fitzpatrick Trust as JTWR0S. Plaintiffs' complaint asks the circuit court to determine what interest in real property was conveyed to them and the trust by these deeds that were executed and delivered to them by the Trustee, Mr. Bussa.

This is a straightforward quiet title action in which the circuit court had jurisdiction to adjudicate Plaintiffs' complaint and decide the issues on the merits. Given the deeds executed by the Trustee, the question is what interest did the trustee convey to the parties? The fact that the determination impacts the outcome of distribution of trust property to beneficiaries does not

change the nature of the proceeding or invoke the exclusive probate court jurisdiction. If that were so, one could argue that every case involving a trust, trustee or trust beneficiary would have to be covered under the exclusive jurisdiction of the probate court. But the statute is more nuanced and clearly provides otherwise. Such a reading ignores the distinction between the grant of exclusive and concurrent jurisdiction.

Defendant argues the probate court has exclusive jurisdiction because this action is a “proceeding that concerns the distribution of the trust or the declaration of rights that involve a trust, trustee or trust beneficiary.” MCL 700.1302(b). That argument, however, ignores the actual allegations in the complaint which provide the basis for determining the nature of the proceeding. Those allegations clearly ask for a ruling as to what interests the parties have in the real property. When an estate or trust or beneficiary is involved, the case may tangentially impact the distribution provisions. If this were the measure to determine the exclusive jurisdiction of the probate court and not the allegations in Plaintiffs’ complaint, nearly every proceeding could fall under the probate court’s exclusive jurisdiction when a trust or estate or beneficiary were involved. To adopt such a reading ignores the general rules of statutory construction against divestment of jurisdiction; it ignores the plain language in the statute; it ignores the statutory framework adopted by the Legislature to limit the exclusive jurisdiction of the probate courts; and it totally undermines and renders superfluous the statute granting the probate court concurrent jurisdiction.

The statute provides the probate court with a limited grant of exclusive legal and equitable jurisdiction over “a proceeding that concerns a trust that arises in the administration or distribution of a trust”. MCL 700.1302(b)(v). Courts must look to the allegations in the complaint in order to determine the nature of the proceeding. To find exclusive jurisdiction in the probate court, the court making that determination must be satisfied the proceeding arises out of the administration

or distribution of a trust, or that it seeks to determine relative to a trustee an immunity, power or right. MCL 700.1302(b)(v)(vi). The circuit court here was not asked to determine any of these types of proceedings. The claims raised in Plaintiff's Complaint asked the court to determine their interests in real property based on the deeds and then requested either partition or sale of the property. Both of these claims are within the jurisdiction of the circuit court. MCL 600.2932(1) and MCL 600.3301. These claims are also within the concurrent jurisdiction of the probate court. MCL 700.1303(a) and (b). The fact that the outcome of such suit might impact the distribution that had already occurred under the trust to the beneficiaries who are parties to this suit, does not transform Plaintiff's complaint into a proceeding that could bring it within the exclusive jurisdiction of the probate court.<sup>3</sup>

Instructive is *In Re Estate of Rudell*, 286 Mich App 391; 780 NW2d 884 (2009). Like this case, *Rudell* involved a real property dispute. There the *Rudell* personal representative and trustee brought a claim in probate court for quiet title. The *Rudell* complaint sought a determination regarding title to property and asked the court to declare two deeds invalid. On appeal, the defendant challenged the subject matter jurisdiction of the probate court over the quiet title action and asserted the claim had to be brought in circuit court. In deciding the appeal, the *Rudell* court considered the interplay between the general jurisdiction of the circuit court and the concurrent jurisdiction of the probate court. The *Rudell* Court of Appeals rejected the jurisdictional challenge and held: "Lest there be any confusion on this matter, we wish to make clear that ...the probate court has concurrent legal and equitable jurisdiction to determine property rights and interests with

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<sup>3</sup>As it turns out, the circuit court's determination of the parties' interests in real property based on the deeds mirrored the interests granted to them in the Fitzpatrick Trust.

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respect to an estate of decedent, a protected individual, a ward or a trust.” *Rudell*, 286 Mich App at 393 n.1.; MCL 700.1303(1)(a). 56 Wayne L. Rev. 1493 \*1496 (Fall 2010).<sup>4</sup>

*Rudell* is a mirror image of the type of proceeding at issue here. Such a proceeding is only within the concurrent jurisdiction of the probate court. It does not fall within the probate court’s domain of exclusive jurisdiction. MCL 700.1302; MCL 700.1303. Here, Plaintiffs chose to bring the case in circuit court which has jurisdiction to hear these types of claims. Plaintiffs asked the circuit court to determine the parties’ interest in the property and like *Rudell*, Plaintiffs asked the court to determine what interests they held under the two deeds Mr. Bussa executed as trustee of the Fitzpatrick trust before he died. Plaintiffs’ challenge to the deeds was based on the assertion a trust cannot hold property as a JTWROS. Because this conveyance is prohibited by law, Plaintiffs argued the two contested deeds were ineffective in conveying title as JTWROS and sought the adjudication of the parties’ interest in the property. There is no question. Plaintiffs’ complaint clearly stated a quiet title action that is within the domain of the circuit court’s jurisdiction, giving the court the authority to resolve the action.

**B. The Court of Appeals Properly Held Michigan Law Does Not Allow a Trust To Hold Real Property As a JTWROS**

Plaintiffs argued and the Court of Appeals properly held Michigan law does not allow a Trust to hold real property as a JTWROS. In making its ruling, the Court of Appeals analyzed the nature and properties of the two types of joint tenancy under common law. Having decided the

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<sup>4</sup> Similar to *Rudell*, *In re Geror*, 286 Mich App 132, 134; 779 NW2d 316 (2009) addressed the relationship between the probate court and circuit court subject matter jurisdiction. *Geror* addressed the concurrent jurisdiction of the probate court to hear and decide a contract proceeding involving a ward under the No-Fault Insurance Act. In *Geror*, the insurer, which lost in probate court, appealed and argued the probate court lacked jurisdiction because it involved a ward relating to a contract proceeding. The Court of Appeals disagreed and cited MCL 700.1303(1)(i), granting the probate court concurrent jurisdiction with the circuit court to decide contract claims.

common law does not permit a trust to hold property as a JTWR0S, the Court of Appeals next determined whether MCL 554.44 and MCL 554.45 abrogated Michigan's common law rule. The Court of Appeals properly held these statutes did not abrogate the common law and affirmed the trial court.

Plaintiffs' brief sets forth the substantial historical background of joint tenancy under common law, its rationale and the reason for the Michigan statute adopting a presumption of tenancy in common unless the conveyance provides otherwise. The Probate Section adopts by reference the historical background and analysis. Without repeating Plaintiffs' argument, the Probate Section wishes to highlight the following salient factors dispositive to the policy issue addressed by this Brief and the Probate Section's position that a trust (or trustee) cannot hold property as a JTWR0S because a trust is not a natural person capable of death. Nor is a trust an entity – it is a fiduciary relationship -- and therefore a trust cannot hold property at all. The trustee holds the property in trust for the benefit of the beneficiaries.

While the Probate Section agrees the Court of Appeals reached the right decision ruling a trust cannot hold property by JTWR0S, it disagrees with the Court of Appeals' starting premise and its resulting rationale. Its decision erroneously turned on the trust being an "artificial entity" ruling "a trustee is different than the trust itself." *Schaaf* published opinion at 8. The Court of Appeals then wrongfully concluded that "the powers of the Trustee are thus irrelevant for our purposes today." *Schaaf* published opinion at 8, fn 2. The Probate Section's position is that these rulings are contrary to existing Michigan law and if left unchecked by this Court, will cause uncertainty, establish bad precedent and create confusion. The issues and the problems raised by these rulings, including the failure to include trustees in the rule prohibiting a trust/trustee from owning property as a JTWR0S are discussed *infra* in Section II. C.3.

1. Michigan Common Law Did Not Permit a Trust to Own Property as a JTWROS

Michigan law recognizes several types of concurrent ownership in real property which includes joint tenancy. The Michigan Legislature recognized “joint tenancy” as an estate in land and provided “...its nature and properties shall continue to be as they are now established by law, except ...as...modified by ....this chapter.” MCL 554.43. The language of the statute is clear. It shows legislative intent for joint tenancy to retain its meaning under common law. MCL 554.44 provides a presumption of tenants in common, unless joint tenancy is expressed in the conveyance.

It states:

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.

Michigan recognizes two types of joint tenancies. In one, the parties are granted the real property as joint tenants. In the other, joint tenancy is created by express words of survivorship in the granting instrument. *Schulz v Broyles*, 116 Mich 603,605; 74 NW 1012 (1898); *Mannausa v Mannausa*, 374 Mich 6, 8; 130 NW2d 900 (1964).

Joint tenancy at common law was characterized by the four unities of interest, title, time and possession. Cameron’s Michigan Real Property Law, Vol. 1 §9.2, p. 310 (2005). Each joint tenant shares in possession of the entire estate and each is entitled to an undivided share of the whole. *Id* at §§9.8, p. 320. The salient characteristic of joint tenancy then and now is that when one tenant dies, the deceased tenant’s interest in the property passes directly to the surviving tenant. *Albro v Allen*, 434 Mich 271, 274-275; 454 NW2d 85 (1990). The joint tenant in an ordinary joint tenancy can destroy the right of survivorship through transfer. That right is indestructible where

the granting instrument expressly states “with right of survivorship” or “with full rights of survivorship.” *Albro, supra*, 434 Mich at 275-276.

MCL 565.49, MSA 26.565 abolished the requirements of unities of time and title, but importantly retained the unity of interest. *Albro, supra*, 434 Mich at 274 and n 1. At common law, co-trustees of a single trust could own property as JTWROS with one another. *Fox v Greene*, 289 Mich 179, 183; 286 NW 203 (1939). In that case, the four unities, including the unity of interest requirement, were satisfied because both co-trustees of the trust held title in their representative capacity, and their interests were identical in quality. Co-trustees of the same trust each held legal title for the benefit of the beneficiaries who held equitable title. *Apollinari v Johnson*, 104 Mich App 673, 675; 305 NW2d 565 (1981); *Oakland Co v Mack*, 243 Mich 279, 296; 220 NW 801 (1928). This made practical sense too and allowed the terms of the trust to be carried out upon one trustee’s death.<sup>5</sup>

At its core, the defining characteristic of JTWROS is the right of survivorship as to the entire property upon the death of the other co-owner. *Ballard v Wilson*, 364 Mich 479, 483; 110 NW2d 751 (1961) (overruled by *Albro, supra*, 434 Mich at 28 on a separate issue). Born out of this characteristic was the common law requirement that “none but natural persons can take in joint tenancy.” *Telfair v Howe, supra*, 3 Rich Eq at 243; *see also Simons v Bollinger*, 154 Ind 83, 84; 56 NE 23 (1900) (“A joint tenancy must be vested in any number of natural persons, more than one.”). For our analysis, we start with the fundamental element of joint tenancy as the right of survivorship. The Michigan Legislature adopted the meaning of joint tenancy as “established by law.” MCL 554.43. A joint tenancy “established by law” must be vested in natural persons.

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<sup>5</sup> This rule still holds true today and is utilized by probate and estate planning practitioners. Think of the family trust where the husband and wife are co-trustees of the family trust.

*Telfair, supra*. A trust created under Michigan law is not a natural person capable of dying. Trusts only cease to exist when terminated voluntarily, through revocation, judicial proceeding, order of the court, or upon expiration of the trust under the terms of the document. MCL 700.7410. Trusts can easily, and typically are set up to outlive any natural person and still comply with the rule against perpetuities. MCL 554.51. It is this artificial agelessness that disqualifies trusts from enjoying the same rights as natural persons in owning property as a JTWROS.

2. MCL 554.44 Does Not Abrogate Michigan's Common Law

The Probate Section agrees with the Court of Appeals that the common law was not abrogated by MCL 554.44 based on the following principles of law. This statute, MCL 554.44, makes an exception to “grants in trust” from the default presumption of tenancy in common. MCL 554.43. Even though MCL 554.44 makes an exception for grants in trust from the default presumption, it does not alter the requirements of joint tenancy under the law. First, it is presumed that Michigan’s Legislature is aware of the relevant common law when drafting legislation. *Wold Architects & Eng’rs v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). The common law remains in full force and effect until modified. *Id.* Should the Legislature abrogate common law, it “...should speak in no uncertain terms.” *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). When a statute deals with the same subject matter and uses a common law term, the court follows the principle that there is no clear legislative intent to alter the common law. In such a case, the court interprets the statute as having the same meaning as under the common law. *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006). Under these rules of construction, abrogation requires a high threshold which, contrary to the Court of Appeals’ Dissent’s opinion by Judge Riordan (the “Dissent”), has not been met in this case.

The Legislature’s intent is squarely established by the words in the statute. It provides that joint tenancy retains its meaning under common law. MCL 554.43 states: “...the nature and properties of ...joint tenancy as an estate in land...shall continue to be such as are now established by law...” The fact that MCL 554.45 makes an exception to “grants in trust” from the presumption does not abolish the requirements of joint tenancy under the law. Joint tenancy is a term of art that acquired a “peculiar and appropriate meaning in the law. *Albro, supra*, 434 Mich at 274-275. It depended upon life, death and survivorship, only applicable to natural persons. *Id.*

MCL 8.3a provides that courts must apply established common law meanings for terms possessing them:

**All words and phrases shall be construed and understood according to the common and approved usage of the language;** but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

This statute reinforces the conclusion that joint tenancy retains its “peculiar and appropriate meaning in the law” and that the Dissent’s focus on the definition of “persons” in MCL 554.44 should not override the established meaning of “joint tenancy.” MCL 554.43.

The Dissent ignores these rules of construction to find in favor of abrogation of the common law. It wrongly interprets the word “person” in MCL 554.44 by relying on the general definitions in MCL 8.31 which state “[t]he word ‘person’ may extend and be applied to bodies politic and corporate, as well as to individuals.” Turning to Black’s Law Dictionary’s definition of “person” to include a human being and an entity, it concludes a trust, being an entity, is a ‘person’ under MCL 8.31. Relying on these definitions, the Dissent argues a trust was a ‘person’ contemplated by MCL 554.44. It opines that support for this position is found in MCL 554.45. The Dissent reasons if a trust is a person for purposes of MCL 554.44, and MCL 554.45 makes an

exception for “grants made in trust” from the general presumption of tenancy in common, then the Legislature intended for MCL 554.44 and MCL 554.45 to abrogate common law and permit a trust to hold property by JTWROS.

There are several problems with this interpretation. First, the Dissent ignores that joint tenancy must be interpreted in accordance with its common law meaning. Under common law, a trust could not own real property by JTWROS. *Telfair, supra; Albro, supra*. Expanding the definition of “person” to include a trust undermines the essential element of joint tenancy - - survivorship. A trust does not live and die like a natural person. It also ignores the unity of interest requirement which remains in force today as a necessary element to form a joint tenancy, because a trustee cannot share the same unity of interests with other persons. A trustee only holds naked legal title. *Eng’r Soc of Detroit v City of Detroit*, 308 Mich 539, 550; 14 NW2d 79 (1944); *Apollinari*, 104 Mich App at 675. A person in their individual capacity holds both legal and equitable title. *Id.*

Second, its reliance on the general definitions in MCL 8.31 and Black’s Law Dictionary is also error. Black’s Law Dictionary defines “person” to include a human being and an entity. The Court of Appeals uses this definition of “entity” to include trusts (so too does the Dissent). The Probate Section disagrees that a trust is an “entity” and such a conclusion is error. (See *infra* Sec. II.C.3). Further such an expansion runs contrary to the rule that provides a court should assume an omission was intentional. *Houghton Lake Area Tourism & Convention Bureau v Wood*, 255 Mich App 127, 149; 662 NW2d 758 (2003). If the Legislature wanted to include trusts in the definition of “person” it would have said so. “The Legislature is presumed to be familiar with the common law, and established rules of common law will not be abolished by implication.” *Id.* In this case, the provision in the statute is not ambiguous, and it retains the common law meaning of joint

tenancy. The omission of “trust” in the examples included in MCL 8.31 should be viewed as intentional. To find otherwise violates the high threshold required to support the abrogation of common law.

3. MCL 554.44 and MCL 554.45 Are Interpretative Statutes Not Designed To Abrogate Common Law.

The Dissent erroneously relies on MCL 554.45 which makes an exception of “grants in trust” from the default presumption of tenancy in common to conclude trusts can hold property by JTWROS. But neither statute, MCL 554.44 nor MCL 554.45, were intended to expand or contract the common law requirements for JTWROS. These statutes do not present a legislative intent to redefine the requirements of JTWROS. When read harmoniously with Michigan’s common law, MCL 554.44 provides a default presumption in favor of tenancy in common unless the granting document expressly declares the conveyance to be in joint tenancy. It provides:

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.

MCL 554.45 provides:

The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife.

Under both these statutes, joint tenancy, as a term of art, retains its common law meaning. Nothing in these statutes suggests the legislative intent was to codify JTWROS. Compare for example the statutory construction of Article 3 of the Uniform Commercial Code (“UCC”). Article 3 of the UCC abrogated the common law doctrine of accord and satisfaction. *Hoerstman Gen Contracting v Hahn*, 474 Mich 66; 711 NW2d 340 (2006). In *Hoerstman*, this Court concluded that the common law was completely abrogated because the statutory scheme was “comprehensive”, “intended to apply to nearly every situation involving negotiable instruments”

and “completely covers the details of accord and satisfaction.” *Id.* at 74. Here we have a statute that specifically states that the “...nature and properties of” joint tenancy as an estate in land “shall continue to be such as are now established by law...” MCL 554.43.

MCL 554.44 states only that a tenancy in common shall be presumed unless a joint tenancy is indicated. The requirements of JTWROS remain and are a condition precedent to the presumption set forth in MCL 554.44 irrespective of what is placed in the deed. The unity of interest requirement remains, even if other unities have been eroded. *Albro, supra*, 434 Mich at 274. Because a trust owning property as a JTWROS is prohibited by common law, MCL 554.45 should not be interpreted as an end around way to abrogate common law. A trustee of a trust will not have the same unity of interest holding the property in trust as a JTWROS because the trust/trustee only holds legal title, whereas individuals who own property hold both legal and equitable title. *Apollinari, supra*, 104 Mich App at 675.

4. MCL 565.48 Reinforces the Legislature’s Intent that Joint Tenancy is Limited to Persons who Can Have Death Certificates.

MCL 565.48 supports the proposition that the Legislature intended for joint tenancy to apply to those who can die and not to trusts or “bodies politic and corporate”. MCL 8.31 or trusts that do not die. MCL 565.48 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. (Emphasis added)**

This statute requires a surviving joint tenant to record a “death certificate or other proof of death” to transfer land. This statute demonstrates the Legislature’s intent to have joint tenancy retain its common law meaning and be limited to natural persons. It undermines the Dissent’s false equivalency of termination or revocation of a trust with death. Adopting the Dissent’s position that a trust can simply dissolve and like a natural person hold property as a JTWROS conflicts with the requirements of MCL 565.48. MCL 565.48 prohibits the recording of such an instrument to transfer property held by a JTWROS because the dissolution of a trust is not evidenced by a death certificate or proof of death. Instead, the trust would have to execute another deed to the surviving joint tenant which is contrary to the concept of JTWROS.

Finally, the requirement to record an instrument evidencing a dissolution or termination of trust as proposed by the Dissent is inconsistent with the streamlined process for transferring property by JTWROS, where the property automatically transfers to the survivor upon the filing of the death certificate. Recording any other instrument such as a dissolution or termination of trust not only runs contrary to the statute’s explicit language, it alters the streamlined process for transferring property to the joint tenant survivor contemplated by the Legislature under the statute. It does not support the Dissent’s position that a trust or trustee can own property JTWROS.

Taken together, these statutes evidence the Legislature’s intent that joint tenancy is limited to “persons” who may at some point die, and whose death would be recorded in a death certificate. MCL 554.43, MCL 554.44, and MCL 554.45 were not designed to abrogate common law but, instead, provide presumptive and interpretive guidance as to the interpretation of the rights of two or more parties who hold interests in property.

C. **The Court Of Appeals Reached The Right Conclusion But Its Rationale Is Flawed Because The Trust Is Not A Separate Entity, But A Fiduciary Relationship; The Trustee Is Not Different From The Trust Itself; And The Powers Of The Trustee Are Relevant Because Matters Related To Trust Property Must Be Carried Out By The Trustee.**

The Court of Appeals begins its analysis by properly relying on *Albro* and posits joint tenants are parties holding joint life estates with dual contingent remainders. *Schaaf* published opinion at 8. The Court adopts the definition of “life estate” in Black’s Law Dictionary which is defined as “[a]n estate held only for the duration of a specified person’s life.” The Probate Section agrees with the Court that the key word in the definition is life. With a person’s life comes death. It also agrees that joint tenancy is limited to natural persons with a measuring life span. This element is critical to the Probate Section’s analysis and the Court of Appeals’ ultimate ruling.

The problem arises, however, with the Court of Appeals’ rationale, which is flawed. First, the Court of Appeals errs by making statements that run contrary to established law and contrary to how trusts are formed, administered and operated. As a result, it limits its ruling when it should have expanded it to include both trusts and trustees. This Court has the opportunity to correct these findings to ensure the ruling comports with existing law and provides certainty for practitioners and future litigants.

The Court of Appeals begins with the premise that the trust does not and cannot die and then wrongfully concludes it is an artificial “entity” (a view also endorsed by the Dissent). Having found the trust to be an artificial entity, the Court addresses the survivorship requirement of joint tenancy, and holds that the trust is “not a natural person, has no actual residential needs, cannot occupy real property and does not die.” *Schaaf* published opinion at 8. The Court concludes since the trust is an entity, the trustee is different from the trust and the powers of the trustee are

thus irrelevant for our purposes. *Schaaf* published opinion at 8, fn 2. These findings, in the view of the Probate Section, are error and should be addressed and rectified by this Court.

The Probate Section disagrees with the Court of Appeals' initial premise that a trust is an "entity". In so doing, the entire analysis is skewed from the beginning. Declaring the trust an entity ignores the body of law dealing with the nature of a trust, how a trust is created and how it operates. That body of law includes the Michigan Trust Code, Michigan common law pertaining to trusts and the terms applicable to each trust.

The Court of Appeals' holding that the "trustee is different from the trust" and that "the powers of the trustee are thus irrelevant for our purposes" is also problematic. It again ignores the Michigan Trust Code, the entire body of case law and the practical nature of how trusts are administered. There is no reason for this Court to adopt the Court of Appeals' rationale that the trust is an "entity" to conclude a trust/trustee cannot own property as a JTWR0S. There is no reason to uphold the Court of Appeals' conclusion that trustees are different from trusts and that the trustee's powers are irrelevant. Importantly, this Court should reject these rulings because they are not accurate and are contrary to Michigan law. A trust acts through its trustee. MCL 700.7816. A trustee's power and authority are ultimately critical to the administration of trusts. The Probate Section is troubled by the Court of Appeals' premise that the trust is an "entity," and its related rulings and rationale that the trust and trustee are different and that the trustee's powers are not relevant for adjudication of the issue. Unless this Court clarifies the Court of Appeals' decision, these rules of law will result in confusion and negative effects on Michigan case law, and will set bad precedent for future trust administration and litigation.

1. The Trust is not an Entity; It Is a Fiduciary Relationship Between The Settlor, Trustee and The Beneficiary

The Probate Section disputes that the trust is an “entity” and notes the Court of Appeals cites no authority to support this proposition. A trust is not an ‘artificial entity’ in the same sense as a corporation, limited liability company (LLC) or partnership. A trust is “...a fiduciary relationship between multiple people.” *Americold Realty Trust v Conagra Foods, Inc*, 577 US 378, 383; 136 S Ct 1012 (2016). Such a relationship was not a “thing” that could be hauled into Court; legal proceedings involving a trust were brought by or against the trustees in their own name. *Id.*

This Court has also held a trust is a fiduciary relationship between the trustee and beneficiary. *In re Karmey Estate*, 468 Mich 68, 74; 658 NW 2d 796 (2003). The trust is not a stand-alone entity akin to a corporation or LLC. It is an agreement between the Settlor and the trustee, with the powers and authority of the trustee determined by the terms of the trust and under the Michigan Trust Code. MCL 700.7101, et. seq., MCL 700.7401. There is nothing in EPIC or the Michigan Trust Code that declares a trust to be an entity separate and distinct from the terms of the trust or the powers of the trustee. In fact, such a concept is contrary to the reality of how trusts operate, how trusts own property and how they are administered.

“To the extent one tacitly recognizes a trust as a legal ‘entity’ it consists of the trust estate and the associated fiduciary relationship between the trustee and the beneficiaries...” (i.e. the duties or liabilities of a trustee to the trust) “...which distinguishes between the trustee personally or as an individual and the trustee in her fiduciary capacity.” Restatement (Third) of Trusts, § 2 (2007). Such an understanding is an essential element of trust law and sets it apart from other legal or artificial entities. In some contexts, a trust can be viewed as an “organization” as that term is used in EPIC, but the context is critical. MCL 700.1106(i). The term “organization” has

very limited and specific applicability in EPIC; there are no provisions in EPIC or the Michigan Trust Code which declare a trust to be an entity separate and distinct from the terms of the trust or the powers of the trustee.

By declaring the trust an “artificial entity”, the Court of Appeals created confusion in the law. The Court of Appeals erred because it either ignored or failed to distinguish the trust from an LLC or corporate entity, and recognizing the nature of a trust. Unlike an LLC or corporate entity, a trust is defined as a fiduciary relationship between the settlor, the trustee and the beneficiaries. *Americold, supra*. If the Court of Appeals’ ruling stands, it creates problems for probate litigants and practitioners. For example, now trusts cannot be sued or file court actions. Trustees of trusts are named as parties to litigation. MCL 700.7817(x). If a trust is a legal entity without regard to the trustee or their powers, will a trust now become a party to a lawsuit? This Court has the opportunity to correct the unintended consequence caused by the Court of Appeals’ rulings. If let stand, issues related to privilege may be called into question in light of the Court of Appeals’ ruling. If the trust is now an “entity” who is the client? MCR 5.117(A) states that “[a]n attorney filing an appearance on behalf of a fiduciary shall represent the fiduciary.” What happens to communications between the trustee as the head of the “trust entity” and the attorney? Are these communications privileged?

2. The Trust Is Not a Distinct Entity Separate From The Trustee Or The Trustee’s Powers

Similarly, the Court of Appeals erred by finding a trust and trustee are “different”. A trust is administered by and acts through its trustee. MCL 700.7801, MCL 700.7816. For example, the trust is not an entity that owns property. The Michigan Trust Code provides that property must be transferred to the trustee who acts on behalf of the trust. MCL 700.7401(1)(a); MCL 700.7401(2). The trustee owns property pursuant to the terms of the trust. The trustee owns legal

title to the real property which is held for the benefit of the beneficiaries, who hold equitable title. MCL 700.7803; *Apollinari, supra*, 104 Mich App at 675.<sup>6</sup>

By holding the trust distinct from the trustee, the Court of Appeals also ignores or undermines MCL 700.7816, which enumerates the general powers of trustees. In addition to the powers conferred by the terms of the trust, MCL 700.7816(1)(a) also provides that a trustee without Court authorization may exercise all of the following: “(i) All powers over the trust property that an unmarried competent owner has over individually owned property...” The Court of Appeals’ focus on the concept of the trust as an “artificial entity” undermines the understanding of how trusts operate (through their trustees as provided under the trust agreement and under the Michigan Trust Code and common law). Focus on the entity concept and holding the trustee and trustee different, overrides the Michigan Trust code regarding the powers of the trustee. Matters related to “trust property” must be carried out by a trustee. MCL 700.7816 (general powers of trustee); MCL 700.7816(i) (powers over trust property); MCL 700.7817 (specific powers of trustee); MCL 700.7817(g) (general enumerated powers related to property); MCL 700.7818 (specific powers, environmental matters); MCL 700.7818(c) (environmental powers related to property); MCL 700.7819 (specific powers tax matters); MCL 700.7819(b) (tax powers related to property). This Court should expand the Court of Appeals’ decision to hold trusts and trustees cannot hold trust property as a JTWROS to accurately reflect existing case law and the nature of a trust and the fiduciary relationship of the trustee to the trust and its beneficiaries.

Another concern with the Court of Appeals’ opinion is its declaration that:

A trust, not being a natural person, has no actual residential needs, cannot occupy real property, and does not die. *Schaaf published opinion, at 8.*

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<sup>6</sup> This is why it is critical that this ruling be expanded to include trustees, even though in practice, practitioners use trust and trustee interchangeably. That, however, is not legally accurate. {01754191.DOCX;4 }

The Court of Appeals notes that a trust has no actual residential needs and cannot “occupy” real property. But that is not true for beneficiaries’ of the trust. Estate planning practitioners routinely give beneficiaries a “right of occupancy” in trust property, including the right to use and occupy such property as the beneficiary’s principal place of residence. Through such rights practitioners have been able to clearly show who is the “sole beneficiary” (and thus avoid uncapping). Should the Court of Appeals’ declaration stand without clarification, that estate planning tool may be thrown into question and may prevent practitioners from doing this in the future, significantly restricting trust planning. It could also wreak havoc with current estate planning documents that have heretofore successfully adopted this strategy. All of this is now called into question, and would require modification of existing estate plans unless this Court corrects the Court of Appeals.

Another issue that may be raised by leaving the rationale unclarified is what happens when the trustee dies. Now if the individual trustee dies, the terms of the trust determine what happens next with regard to property owned by the trustee in the trust. This requires an analysis of the ownership when the sole trustee dies, which is controlled both by the terms of the trust and the Michigan Trust Code. MCL 700.7704. None of that may be permitted under the existing Court of Appeals’ analysis should the ruling that the trust is an entity remain in place.

### ***III. RELIEF SOUGHT***

As *amici*, the Probate Section supports the rule of law that a trust cannot hold property as a JTWR0S for the reasons set forth herein and as expressed by Plaintiffs in their brief. Consequently, the Probate Section respectfully requests that this Court enter an order and affirm the Court of Appeals’ ruling that a trust may not hold title to real property as a JTWR0S when the trust itself is the measuring life for purposes of the trust/trustee’s interest in the property. This rule

leaves in place the ability of a trust/trustee to hold title to real property in trust as a JTWR0S if a natural person's life is specified in the deed as the measuring life for the trust/trustee's interest in the property. The rationale used by the Court of Appeals in reaching its decision, however, creates an intolerable state of practice for estate planning practitioners. It upends the nature of trusts, the relationship of trustees to the trust, ignores the Michigan Trust Code, and well-settled common law when it holds a trust is an entity, that the trustee and trust are different and that a trustee's powers are irrelevant. The Probate Section, therefore, requests that this Court reject the Court of Appeals' premise that a trust is an "artificial entity" and that it reject footnote 2 in the *Schaaf* published opinion which suggests that a trustee of a trust is distinct from the trust itself and not subject to the rule. To that end, the Probate Section requests that this Court expand the Court of Appeals' holding to apply to trusts and trustees equally - - a trust/trustee cannot hold property as a JTWR0S.

Finally, the Probate Section offers no opinion on whether the deeds were valid. The description of the deeds in the Court of Appeals' decision was not specific enough to answer this question.

Respectfully submitted,

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