

# 2025 CASE LAW UPDATE

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# TRUSTS – PROCEEDING TO CONTEST VALIDITY – LIMITATIONS PERIOD

*In re Elsie N. Sage Revocable Trust,  
Docket No 369992, 2025 WL 2109873  
(Mich Ct App Jul 28 2025) (unpublished)*

# FACTUAL BACKGROUND

- **Elsie = Single with 5 daughters.**
- **2012 = Elsie creates her Trust, which she restated in 2018, 2019 & 2021.**
- **In 2022, Elsie amended 2021 Restatement twice, then died**
- **Final Trust terms**
  - o **20% = Hastings Fire Department**
  - o **5% = 5 other fire departments**
  - o **25% = Daughter Joyce's supplemental needs trust**
  - o **10% = Daughter Janice**
  - o **10% = Daughter Jacquelyn**
  - o **4% = Daughter Lola**
  - o **1% = Daughter Cynthia**

# FACTUAL BACKGROUND

- **Assume you are serving as Trustee.**
- **You serve Notice of Trust on Daughters.**
- **Notice advises them of 6-month period to contest Trust validity.**
- **Notice does not include date of 2nd Amendment to 2021 Restatement.**
- **9 months after Notice of Trust = 3 Daughters petition to contest Trust validity.**
- **Hastings Fire Department moves to dismiss lawsuit; claim time-barred because not filed within 6 months.**

# LEGAL ANALYSIS

- **WAS YOUR NOTICE OF TRUST EFFECTIVE TO TRIGGER THE SHORTENED 6-MONTH STATUTE OF LIMITATIONS?**
- **Probate Court = Yes**
- **Mich Ct Appeals = No**
- **MCL 700.7604 provides that the statute of limitations to contest validity of Trust is either:**
  - o **2 years after settlor's death; or**
  - o **6 months after trustee sends contestant a notice containing certain information, including not only "the date of the trust instrument" but also "the date of any amendments known to the trustee."**
- **Trustee was aware of existence of 2nd Amendment to 2021 Restatement but failed to include its date in the Notice of Trust.**
- **Therefore, 6-month limitations period was not triggered because of defect in Notice.**
- **Lawsuit was filed within 2-year limitations period & therefore timely.**

# PROBATE LITIGATION – ATTORNEY FEES

*In re Karl Melnik Revocable Living Trust,*  
Docket No 371263, 2025 WL 23317239  
(Aug 11 2025 Mich Court App)  
(unpublished)

# FACTUAL/PROCEDURAL BACKGROUND

- **At Settlor's death, you commence serving as Trustee of Melnik Trust.**
- **Settlor's ex-girlfriend & her son petition to contest validity of Trust based on alleged mental incapacity.**
- **You as Trustee defend validity of Trust.**
- **Trust contest petition = Alleged that Settlor lacked capacity to amend Trust on 02/26/19 because of disabling cognitive illness.**

# FACTUAL/PROCEDURAL BACKGROUND

- **In lawsuit, discovery reveals:**
- **Petitioners never expressed concern re: Settlor's capacity during his lifetime.**
- **Petitioners had sued Settlor in Wisconsin after he broke up with GF and removed GF/son from his Trust.**
- **In Wisconsin litigation, no allegation of mental incapacity; Settlor deposed twice; Settlor's testimony reflected his understanding of his property and finances.**
- **In Wisconsin litigation, ex-GF admitted that Settlor had capacity to endorse checks over to her in 2018.**
- **In depositions, ex-GF & son could provide no examples of times when they were concerned about Settlor's capacity.**

# FACTUAL/PROCEDURAL BACKGROUND

- **Petitioners, recognizing weakness of their case, file motion to voluntarily dismiss their lawsuit.**
- **You tell your attorney you'd like the Petitioners to bear at least some of the Trust's legal costs.**
- **Are you as Trustee entitled to recover attorney fees from Petitioners?**

# LEGAL ANALYSIS

- **American rule of attorney fees = Both winner and loser bear their own attorney fees incurred in litigation, unless an exception applies.**
- **Exception available here? Yes.**
  - **MCR 1.109(E)(6) = Sanctions for signing pleading despite knowing that allegations are not well-grounded in fact.**
  - **MCL 600.2591 = Sanctions for bringing frivolous civil action (meaning no factual and/or legal merit).**
- **Probate Court awarded Trustee \$105,000 in attorney fees as sanctions under these exceptions.**
- **Affirmed by Michigan Court of Appeals.**

# OBSERVATION

- Recall this was Petitioners' motion for voluntary dismissal.
- Governed by MCR 2.504(A).
- Can't get dismissal "except by order of the court on terms and conditions the court deems proper." MCR 2.504(A)(2).
- That would have been another avenue for Trustee to seek attorney fees (without necessity of proving frivolous filing).

# TRUSTS: PRINCIPAL PLACE OF TRUST ADMINISTRATION

*Olszewski v Erdman as Co-Trustees of Kathy J Erdman Trust*, Docket No 369659, 2025 WL 1353923 (Mich Ct App May 8 2025) (unpublished)

# WHAT IS NECESSARY TO TRANSFER PRINCIPAL PLACE OF TRUST ADMINISTRATION FROM MICHIGAN TO ANOTHER STATE?

# FACTUAL BACKGROUND

- **Settlor = Created Rev Trust**
- **Trust = Subject to Michigan law; exempt from registration.**
- **Settlor was Trustee until her death.**
- **Settlor (then living in Wexford County, Mich.) died.**
- **Upon Settlor's death, her 2 daughters in Chicago nominated as Succ Co-Tees.**

# PROCEDURAL HISTORY

- **Gary (lived with Settlor) = Filed claim against Trust based on alleged contract with Settlor.**
- **Succ Co-Tees = Denied claim.**
- **Gary = Filed lawsuit against Succ Co-Tees in Wexford Court Probate Court.**
- **Succ Co-Tees = Moved to dismiss complaint based on improper venue, because Chicago now principal place of Trust administration.**
- **Gary = Argued that Trust administration had not been effectively transferred b/c Succ Co-Trustees did not comply with Michigan Trust Code procedure.**

# MICHIGAN TRUST CODE

- MCL 700.7108(3): The Trustee may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.
- MCL 700.7108(4): The Trustee shall notify the qualified trust beneficiaries in writing of a proposed transfer of a Trust's principal place of administration not less than 63 days before initiating the transfer. The notice of proposed transfer must include all of the following:
  - o The name of the jurisdiction to which the principal place of administration is to be transferred.
  - o The address and telephone number at the new location at which the trustee can be contacted.
  - o An explanation of the reasons for the proposed transfer.
  - o The date on which the proposed transfer is anticipated to occur.
  - o In a conspicuous manner, the date, not less than 63 days after the giving of the notice, by which a qualified trust beneficiary must notify the trustee in writing of an objection to the proposed transfer.
- MCL 700.7108(5): The authority of a trustee under this section to transfer a trust's principal place of administration without the approval of the court terminates if a qualified trust beneficiary notifies the trustee in writing of an objection to the proposed transfer on or before the date specified in the notice.

# PROCEDURAL HISTORY

- Probate Court = Despite absence of notice of transfer of principal place of administration, dismissed complaint for improper venue
- Assumed that xfer to Chicago occurred automatically, because that's where Co-Tees were located.
- Gary appealed.

# MICHIGAN COURT OF APPEALS

- MCA = As of Settlor's death: Wexford County, Michigan, was principal place of Trust administration.
- If Succ Co-Tees wanted to change to another state, needed to follow procedure from Mich Trust Code.
- Because didn't follow that procedure, place of administration had not been effectively transferred & remained in Wexford County.
- Therefore, Wexford County was a proper venue for Gary's lawsuit.
- Probate Court's ruling reversed.

# TRUSTS – REFORMATION AND/OR MODIFICATION

*In re Charles C. Kalbach & Betty J Kalbach Trust*, Docket No 367392, 2025 WL 1400616 (Mich Ct App May 14, 2025) (unpublished)

# FACTUAL BACKGROUND

- **Parents' Joint Trust named 2 of 5 children as sole remainder benes.**
- **Reserved power to amend while both alive.**
- **Primary asset: Real property.**
- **At death of Husband, Wife lacked power of appointment over Property.**
- **Wife nonetheless tried unsuccessfully to deed Property to 2 favored children as JTWROS.**
- **After death of Wife, no distributions made prior to death of Son Bene, who was not entitled to any distributions after he died, under Trust terms.**
- **No distributions made prior to death of Daughter Bene, who was not entitled to any distributions after she died, under Trust terms.**
- **Poorly drafted Trust did not address what happened in that scenario.**

# PROBATE COURT & APPELLATE DECISIONS

- Successor Trustee petitioned the Probate Court for instructions.
- Relying heavily on unsuccessful Deed, Probate Court reformed Trust to provide that Property went to Estate of Daughter Bene.
- 3 disinherited kids appealed.
- MCA: Probate Court erred by reforming Trust, because no evidence of any mistake by Settlers.
- But error harmless, because appropriate to modify Trust to address unanticipated circumstances (failure of benes) in order to give effect to Settlers' intentions (as expressed in Deed).

# COMMENTARY

- MCA got it wrong.
- Joint Trust that could only be amended while both Settlers living.
- Deed irrelevant because it only reflected intent of Wife, not Husband.
- Apparently no evidence as to Husband's intent for this situation.
- Therefore, no basis to modify Trust.
- Trust failed to dispose of assets under existing circumstances.
- Therefore, assets should have reverted to Settlers (1/2 to each estate) to pass out to the heirs.

# CAN A SUICIDE NOTE BE GIVEN EFFECT AS A WILL?

- Yes, under MCL 700.2503 (“Writings intended as wills, etc.”).
- Well-established principle.
- Being suicidal & acting on it is not evidence of testamentary incapacity.
- I had one of these recently.
- Probate Court ruled:
  - o Note left in apartment that decedent shared with GF was addressed to GF (name not mentioned in note).
  - o “I want you to have the money that’s coming to me” effectively devised decedent’s rights in annuity arising from settlement of wrongful death claim re: decedent’s predeceased father.
  - o “Just give some money to Uncle Ted for his house projects” was an effective specific devise of cash; GF and Uncle couldn’t agree on number, so GF petitioned Probate Court to approve \$25,000, which it did.

# UNDER MICHIGAN LAW, IS IT VALID FOR SETTLOR TO DISINHERIT SPOUSE FROM ANY INTEREST IN TRUST?

- Yes, in the absence of actual fraud.
- First recognized by Mich Ct App in 1994, in *Soltis v First of America Bank-Muskegon*, 203 Mich App 435.
- Settlor Dora originally named husband Richard as bene of Trust; later amended Trust to eliminate Richard (independently wealthy) as bene, in favor of son from prior marriage.
- On Richard's action to invalidate Trust amendment, Dora's purposes for Trust were found valid (planning for incapacity; providing for her son; protecting assets from attachment by husband's creditor).
- Richard argued that amended Trust defeated his spousal right to elect against Dora's Will.
- Mich Ct App: "The Legislature could have provided for an augmented estate in the spousal election statute, but it chose not to do so."
- In other words, surviving spouse's right to elect against Will is limited to assets in probate estate & does not extend to assets in decedent spouse's Trust.
- "Absent any showing of fraud upon Richard's marital rights, we must conclude that Dora's assets in her Trust do not fall within the spousal election provision."

# USING TRUST TO DISINHERIT SPOUSE

- Soltis recently reaffirmed in *In re E Earl Lyden Trust*, \_\_\_ NW3d \_\_\_; 2024 WL 1469932 (Mich App 2024), where Warner represented Trustee to defend Trust.
- Settlor Earl originally named spouse Denise as bene of Trust; after Denise filed for divorce, Earl amended Trust to eliminate Denise (not independently wealthy) as bene, in favor of son from prior marriage.
- Denise argued that Michigan should adopt new cause of action, “fraud on the marital share,” recognized by other states; essentially, those states recognize surviving spouse’s rights in all assets of decedent spouse, not just probate assets.
- Mich Ct App rejected Denise’s claim: Michigan already makes it unlawful for one spouse to defraud other spouse as to marital rights (see Soltis), and no proof here that Earl defrauded Denise.
- Mich Supr Ct declined to hear case in 12 NW3d 621 (Mich 2024).

# WHAT TYPE OF FRAUD WOULD RENDER A TRUST (DISINHERITING SPOUSE) INVALID?

- Fraud focuses on misrepresentations of material fact (not promises).
- Soltis & Lyden say there would have to be evidence that decedent spouse defrauded surviving spouse as to marital rights.
- Marital rights, in this context, refers to the surviving spouse's right to elect against the Will by taking certain portion of probate assets.
- My opinion: To prove fraud on marital rights (elective share of probate assets), decedent spouse would have to misrepresent that certain assets were in his probate estate and conceal that such assets were actually in Trust.

# POWER OF SURVIVING CO-SETTLOR UNDER A JOINT TRUST

- Perhaps the most common probate litigation claim: Surviving Co-Settlor improperly amended Joint Trust after death of first Co-Settlor so as to reduce/eliminate share of deceased Co-Settlor's children; is amendment valid?
- These cases often involve poorly drafted Trust Agreements.
- A poorly drafted Trust can include terms that cut both ways on surviving Co-Settlor's power to amend.
- Because of subjectivity involved, appearances matter.
- If survivors of amending Co-Settlor bring the question to the Probate Court, more likely to have amendment upheld.
- If survivors have to be hauled into Court by the other side, more likely to have amendment set aside.
- Before agreeing to serve as Tee of Joint Trust previously amended by surviving Co-Settlor, carefully consider validity of amendment and consider petitioning Probate Court for instructions.

# CONSIDERATIONS WHEN SERVING AS TRUSTEE OF JUDICIALLY CREATED TRUST

- Hector suffers stroke & becomes disabled.
  - Sister appointed as his Guardian.
  - Hector receives \$2 million settlement in med mal lawsuit.
  - Circuit Court orders that settlement funds must be distributed to newly created Special Needs Trust for Hector's benefit.
  - Guardian's attorney asks GL to serve as Tee of SNT to be created.
- What paperwork will you want to review before accepting nomination?

# REVIEW OF CIRCUIT COURT'S ORDER

- Circuit Court stated in its Order that the person serving as Hector's Guardian (Sister) was receiving no funds, individually, from the settlement.
- Assume GL accepts the appointment (subject to GL's right to review draft SNT).

# REVIEW OF DRAFT SPECIAL NEEDS TRUST

- Sister-Guardian hires attorney to draft SNT & petition Probate Court to approve SNT.
- GL given opportunity to review SNT before it is filed with Probate Court.
- Residuary Clause: “Any funds remaining at Hector’s death after reimbursement to the state for medical assistance shall be distributed to Sister, unless Hector leaves a Will directing otherwise.”
- What questions/comments do you have for drafting Attorney at this point?

# QUESTIONS/COMMENTS FOR DRAFTING ATTORNEY

- Does the Residuary Clause reflect Hector's directions/intentions, and if so, does Hector possess testamentary capacity?
  - o Honest answer: No, doesn't reflect his directions.
- Isn't the Residuary Clause (benefiting Sister) inconsistent with Circuit Court's Order, saying that "the person serving as Hector's Guardian (Sister) was receiving no funds, individually, from the settlement"?
  - o Honest answer: Yes, inconsistent with Order.
- GL only stays on board if Attorney fixes Residuary Clause.

# REVIEW OF PETITION TO PROBATE COURT

- GL given opportunity to review Petition to Probate Court and related papers.
- The Proof of Service lists Sister-Guardian, GL, and Hector.
- From your due diligence, you know that Hector has children.
- You ask Attorney: “Shouldn’t Hector’s children be included on the POS?”
- MCL 700.5311(1)(a): Notice of hearing in protective proceeding must be provided to “the ward or the individual alleged to be incapacitated and that individual’s spouse, parents, and adult children.”

# WHAT HAPPENED IN ACTUAL CASE

- *In re Hector M Hernandez Supplemental Needs Trust*, \_\_\_ NW3d \_\_\_; 2024 WL 4486764 (Mich App 2024).
- Sister-Guardian & her Attorney did not get an independent fiduciary like GL involved.
- Instead, Sister's Attorney served as Trustee.
- SNT, including Residuary Clause for Sister, approved by Probate Court.
- Hector's children not added to Proof of Service so received no notice of creation of SNT.
- Fortunately, at Hector's death, children got wind of Probate Court proceeding to distribute Residue to Sister.
- Children objected; defects in proceeding were belatedly discovered; Residuary Clause was invalidated; Trust assets went to Hector's Estate, of which his children were heirs.

# TAKEAWAYS OF HERNANDEZ CASE

- Case illustrates
  - o The importance of doing your due diligence (history of Court proceedings before GL involved; terms of Court Orders; identity of interested persons).
  - o The importance of reviewing work by outside attorneys.
  - o The value served by an independent fiduciary & how the absence of an independent fiduciary can be used as an opportunity for self-dealing.

# WAIVER OF RIGHTS UNDER DIVORCE JUDGMENT OR PRENUP

- Another very common issue.
- Spouse or ex-spouse has waived all rights in Asset X under Prenup or Judgment of Divorce.
- Yet at death of other spouse/ex-spouse, Asset X nonetheless becomes properly payable to surviving spouse/ex-spouse.
- Example: Surviving ex-spouse waived all rights in decedent ex-spouse's pension under JOD, but under ERISA, pension is payable to survivor because decedent never updated bene designation, so ex-spouse remains designated as bene at decedent's death.
- Well-established line of case law: Even though asset may be properly payable to survivor, survivor is not entitled to keep it, given prior waiver, and must turn it over to decedent's estate.
- Consider getting Court Order saying so before asset is paid out.

# COMPLEX CREDITOR CLAIMS

- A creditor of a decedent initially has the right to pursue the claim against the decedent's probate estate. See Estates and Protected Individuals Code, MCL 700.1101 et seq., at Article III ("Probate of Wills and Administration"), Part 8 ("Creditors' Claims").
- If the creditor's claim is enforceable but the assets of decedent's probate estate are inadequate to fully satisfy the claim, then the creditor turns next to the assets of the decedent's revocable trust. MCL 700.7605(1).
- If the assets of decedent's revocable trust are inadequate to fully satisfy the claim, then the creditor turns next to nonexempt non-probate and non-trust assets. See MCL 556.123.
- Whether the targeted non-probate/non-trust asset is exempt or nonexempt from creditor claims is a frequent topic of litigation.

# CASE STUDY 1

- Under couple's Prenup, husband promised to make gift of \$1 million to wife under his estate planning documents.
- At husband's death, there was no \$1 million gift in his EP.
- Moreover, Estate and Trust were largely insolvent.
- But husband had made non-probate/non-trust transfers at death of more than \$1 million to Son from prior marriage, through naming Son as bene of:
  - Life insurance policy; and
  - IRA.
- Wife pursued recovery of life insurance and IRA.
- Son moved to dismiss, claiming that the assets were exempt from creditor claims.

# CASE STUDY 1

- Was insurance exempt from creditor claim? Yes.
- MCL 500.2207(1): “It shall be lawful ... for any father to insure his life for the benefit of his children ... and in case that any money shall become payable under the insurance, the same shall be payable to the person ... for whose benefit the insurance was procured... free from all claims of the representatives of such ... father, or of any of his creditors...”
- Was IRA exempt from creditor claims? No.
- Son cited MCL 600.6023(1)(j): “The following property of a judgment debtor ... is exempt from levy and sale under an execution: An individual retirement account...”
- Statute not applicable; neither Decedent nor Son was a judgment debtor; so the IRA was not exempt from Wife’s claim for declaratory relief that IRA was liable for her claim.

# Questions?

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