

Application for Consideration

If you believe that you have a case that warrants involvement of the Probate and Estate Planning Section of the State Bar of Michigan (“Section”), based upon the Section’s Policy Regarding Consideration of Amicus Curiae Matters, please complete this form and submit it to the Chair of the Amicus Curiae Committee, along with all relevant pleadings of the parties involved in the case, and all court orders and opinions rendered.

Date: January 29, 2016

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Name of Case: In re Rhea Brody Trust, Oakland County Probate Court.

Parties Involved: Rhea Brody (settlor), Robert Brody (husband and trustee), Cathy Deutchman (daughter and Petitioner), Jay Brody (son), Gerald Brody (son).

Current Status: The Settlor is alive, but arguably incapacitated due to dementia. The Petitioner is a contingent beneficiary of the Trust, claiming the Trustee (her father) breached his fiduciary duty as the Trustee by (1) acting as a manager of an LLC negotiating the sale of a partial interest in an LLC which was 62.5% owned by an LLC owned 98% by the Trust and (2) entering into an option with her brother Jay to purchase the Trust’s closely held real estate assets upon death. (The LLC membership interest sold by the manager was to other family members of the LLC.

The Petitioner was not an owner of any membership interest in the LLC). The Trust provides it can be revoked or amended by her attorney-in-fact under a durable power if the Settlor becomes incapacitated. Her husband, Robert, holds the durable power. The Trustee filed a motion to dismiss the Petition because the Court lacked jurisdiction and the Petitioner lacked standing, since the Court does not have jurisdiction over a trust until it is irrevocable and a contingent beneficiary does not have standing because she can be removed as a beneficiary while the trust is revocable. In this case, even though the Settlor was arguably incapacitated, her Trust expressly stated it could be revoked or amended by her attorney-in-fact under the durable power. The Probate Court denied the motion for lack of standing. The Court of Appeals denied the application for leave to appeal on December 10, 2015 and a motion for reconsideration has been filed but not decided. Assuming the motion for reconsideration is denied, we intend to file an application for leave to the Supreme Court. Subsequently, the Probate Court granted Petitioner's motion for partial summary disposition removing the Trustee and holding the sale of the attenuated Trust-related asset and the option to purchase the Trust assets upon death by Jay Brody (the son and brother) were invalid. A claim of appeal by right has been filed from that decision. We believe we are entitled to address the standing issue in this separate appeal also.

Deadlines: The Brief in the Court of Appeals is due March 2 on the claim of appeal by right from the partial summary disposition. The Application for leave in the Supreme Court is due 42 days after the Court of Appeals decides the motion for reconsideration with respect to standing.

Issue #1: Standing. Rhea Brody, 85 years old, is arguably incapacitated due to dementia. Her Trust states if she becomes disabled, her husband, under his durable power of attorney, may,

among other things, amend, revoke or restate her Trust. If a trust is revocable under these circumstances, does the Probate Court have jurisdiction and does a contingent beneficiary, such as Petitioner, have standing? 11 Uniform Trust Code states have held the petitioner lacks standing. A copy of the Trustee's Application for Leave to Appeal in the Court of Appeals is attached. It includes the Probate Court's ruling.

Michigan Statute(s) or Court Rule(s) at Issue: Multiple sections of the Michigan Trust Code, including MCL 700.7103(h) (definition of "revocable"), 700.7602(5) (agent under a durable power includes power to revoke or amend), and 700.7603(1) (trustee owes duty only to settlor when trust is revocable).

Common Law Issues/Cases at Issue: There is no case law on this issue in Michigan; it is an issue of first impression. However, at least 11 other Uniform Trust Code states have considered the issue and held that a beneficiary does not have standing, contrary to the ruling of the Probate Court in this case. We are unaware of any case consistent with the ruling of the Probate Court. _

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? This is a fundamental issue of intent and control. At the most fundamental level, a person generally desires to control their property until death, then use a trust as an instrument to pass their property to minimize taxes and avoid probate. This ruling stands for the proposition that a contingent trust beneficiary may intervene into the affairs of the settlor while the settlor is alive and, if incapacitated, to nullify the durable power. Such a ruling should cause

practitioners to reconsider who is named as a beneficiary or even if a trust is the proper vehicle for estate planning.

Issue #2. Valuation Of Closely Held Business Interests. The Probate Court reformed a contract in which Jay Brody, and his children, Stuart Brody and Rachel Brody, were the purchasers. The contract involved the sale of a partial interest in an LLC which was 62.5% owned by an LLC owned 98% by the trust referred to in issue 1. The reformation removed the discounts for lack of marketability and lack of control. The Court held as a matter of law that the Trustee violated his fiduciary duty by using discounts as normally applied in valuing LLC interests in the determination of fair market value of the asset being sold.

Why do you believe that this case requires the involvement of the Probate and Estate Planning Section? It is common practice to use discounts in determining the fair market value of closely held business interests generally and estate planning in particular. The Operating Agreement of the LLC membership interest sold required the negotiation of discounts between selling and purchasing members for lack of marketability and lack of control. The trustee followed the requirements of the Operating Agreement. The membership interest was sold and the trustee was removed for his failure to sell without the use of discounts. This ruling is contrary to the normal determination methods of fair market value and changes the current method and practice of valuing closely held business interests sold by a fiduciary.

Do you believe that a decision in this case will substantially impact this Section's attorneys and their clients? If so, how? Yes. See above.