

MEMORANDUM

To: Probate Council
From: Andrew W. Mayoras
Subject: 2021/2022 Amicus Chair Report
Date: October 12, 2022

Update on amicus case activity from the last year:

1. Schaaf v Forbes

In 2019, the Court of Appeals faced two issues in this case: (1) whether a trust can own real estate as a joint tenant with rights of survivorship (“JTRWOS”), and (2) whether a circuit court had subject-matter jurisdiction to consider rights of a trust as to real estate. The Court of Appeals issued a 2-1 opinion holding that a trust can hold real estate as a JTWROS and remanded the jurisdictional issue to circuit court, which had not yet addressed that argument (because it was raised on appeal for the first time).

The Probate Section was asked to file an amicus brief in support of the Appellant, and we voted to authorize a brief on the first issue only to clarify that a trust cannot hold real estate as JTWROS. We declined to take a position on the jurisdictional issue.

The Supreme Court granted leave and vacated the Court of Appeals opinion. It directed the Court of Appeals to first consider the jurisdictional issue before addressing the merits.

On July 1, 2021, the Court of Appeals issued a published opinion holding that a circuit court does have subject-matter jurisdiction over some cases that involve trusts, because not all matters that “concern” trusts are required to be adjudicated only in probate court. Instead, exclusive jurisdiction is limited to “whole causes of action fundamentally arising from issues concerning the distribution of trusts, or the rights and duties of affected persons,” such a challenge to a trust instrument. It also reversed its prior holding and held that trusts cannot hold real estate as JTWROS, relying on similar arguments that the Probate Section’s amicus brief advanced in the Supreme Court.

On March 23, 2022, the Supreme Court again granted leave and invited our Section to file a brief. We voted in favor of doing so, and our brief was filed on September 7, 2022. We argued that the Circuit Court does have subject matter jurisdiction and that the Court of Appeals properly held that a trust cannot hold property JTWROS, but the Court of Appeals reasoning was flawed because a trust is not a separate legal entity and cannot hold property at all. The Supreme Court has not yet issued a second ruling.

2. *In re Estate of Hermann A. Von Greiff*

The Court of Appeals issued a published, split decision interpreting the statute on whether a spouse is “willfully absent” pursuant to MCL 700.2801 so as to cause a forfeiture of certain inheritance rights. The appellate opinion created a judicial exception to the statute for the time period while a divorce action is pending, ruling that divorcing spouses can never be considered to be willfully absent under the statute.

After an invitation from the Supreme Court, the Council voted in favor of an amicus brief supporting the Appellant’s position that the time period during which a divorce is pending does indeed count for the “willfully absent” statute. The Probate Section’s amicus brief argued in large part that the Supreme Court’s ruling in *In re Estate of Erwin*, 503 Mich 1 (2018) already sufficiently addresses the situation and the new judicial exception created by Court of Appeals is inconsistent with the statute and legislative history.

On June 10, 2022, the Supreme Court issued its Opinion affirming the Court of Appeals and clarified the standard for “willfully absent” during a divorce proceeding is different than other marriages. There is a presumption that a divorcing spouse is not “willfully absent” and communications between divorce counsel should be considered in analyzing absence. But the Supreme Court did not support the Court of Appeal’s blanket rule that a divorce spouse can never be considered “willfully absent.” Two justices dissented and argued that this created a new judicial exception to the statute.

3. *Joseph & Sally Grablick Trust*

On December 16, 2021, the Court of Appeals issued a published decision that addressed the term relationship by “affinity” under MCL 700.2806(e) in the context of whether a divorce results in a revocation of a disposition or appointment in a governing instrument as to a relative of the divorced individual. Appellant contends that the Court of Appeals erred because a step-child can still maintain a relationship by affinity if he or she had a sufficiently close relationship with the decedent after the divorce.

The Supreme Court issued an order on June 2, 2022 inviting our Section to file a brief. We voted to file a brief and advocate to affirm the Court of Appeals, because a relationship by affinity is not an open-ended invitation to permit claims that certain family members were close enough to a relative’s former spouse to overcome the statutory revocation by divorce. Our Section’s brief is due later this month. The Family Law Section takes the same position that we do and has asked to see our brief so that it can file a concurring brief with ours.

4. *Patricia Ilitch v Atanas Ilitch*

Our Section voted electronically this summer, following discussions by email, to grant an emergency application for our Section to file an amicus brief in a discovery dispute in a divorce case, which related to records of certain family trusts created by one of the divorcing spouse’s parents and which contained discretionary trust language. The divorce court allowed certain discovery and leave

was sought in the Court of Appeals to seek reversal of the order on an interlocutory basis. Our Section filed a Motion seeking leave to file an amicus brief on July 25, 2022 to advocate that the discovery should not have been allowed. The application for leave to appeal was denied a few days later because the Court of Appeals decided not to engage in immediate appellate review. Our Section's motion was also denied.

5. *JP Morgan Chase v. Winget*

In this complicated federal court case addressing primarily debtor-creditor rights, our Section was asked – for the third time – to file an amicus brief to support the Appellant/Debtor. The case involves whether a creditor can collect assets from the debtor's revocable living trust where the debtor signed a limited personal guaranty but agreed that his trust had an unlimited guaranty. The facts and proceedings are very complicated and unusual, and primarily for that reason, we voted for the third time (through an electronic vote after discussions by email held this summer) not to file an amicus brief.

While many were troubled by the prior ruling in the case that a trust is a distinct legal entity from the debtor, the flaws of which were pointed out in a recent dissenting opinion in the case from the 6th Circuit Court of Appeals, the procedural posture of the case and unlikely impact of that ruling beyond the unusual facts of the case prompted a slight majority against filing a brief.

As the votes were still being tabulated, we were notified that the motion to seek reconsideration of the ruling was denied, making the amicus submission moot.

6. *Carlsen Estate*

On December 16, 2021, the Court of Appeals issued a published opinion addressing when a post-death, non-contractual creditor claim “arises” for purposes of the limitations period under MCL 700.3803(2)(b). The personal representatives of the Estate of a deceased child filed a medical malpractice action, which resulted in a jury verdict in favor of the defense. The defendant then filed a claim for statutory costs and fees as the prevailing party, which were substantial. The Estate argued that the claim had to be presented when the defendant first realized that it might someday be entitled to prevailing party costs, not after it became a prevailing party, so it was time-barred.

The Court of Appeals determined that the claim arose when there was “a factual basis that is susceptible to proof.” It applied that standard to the contingent claim for costs arising after the jury verdict and determined that prior to that verdict, the defendant's potential claim did not meet this standard. As such, it ruled that the claim was timely presented.

On September 16, 2022, the Supreme Court granted supplemental briefing in response to the Estate's application for leave to appeal and in doing so, invited our section to file an amicus brief.

The amicus committee held a thorough and interesting discussion of the issues and recommended in favor of filing the amicus brief to support the Court of Appeals ruling. We were just informed that the parties reached a settlement and the application was withdrawn.