TRUSTS AND ESTATES

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I. INTRODUCTION

The Michigan Court of Appeals rendered three published opinions involving trusts and estates during the *Survey* period.[1] One decision interpreted a class gift to determine whether descendants of deceased class members could share in the devise either under the language of the will itself or under Michigan's anti-lapse statute.[2] The other two decisions involved the law of trusts. The first trust law case decided whether parties to trust litigation could charge their legal fees to the trust and whether a trust beneficiary could demand partition of real property.[3] In a case of first impression in Michigan, the second trust law case addressed whether bank accounts titled "in trust for" an individual passes to such individual or whether such bank accounts pass via an express trust where the settlor assigned all of her assets to the trust by a general assignment.[4]

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1. The *Survey* period is from June 1, 2007 to May 31, 2008.
2. *In re* Estate of Raymond, 276 Mich. App. 22, 739 N.W.2d 889 (2007).
3. *In re* Temple Marital Trust, 278 Mich. App. 122, 748 N.W.2d 265 (2008).
4. *In re* Estate of Kostin, 278 Mich. App. 47, 748 N.W.2d 583 (2008).

II. WILLS

A. Survivorship Language in a Class Gift and Anti-Lapse

The court of appeals interpreted survivorship language of a class gift in *In re Estate of Raymond*.[5] In that case, Alice Raymond (Alice), and her husband, Claude Raymond (Claude), a childless couple, executed mirror image wills.[6] Upon her death, Alice devised her entire estate to Claude, and if Claude and predeceased her, to the following persons:

> A. Fifty (50%) per cent thereof to my brother [sic] and sisters that survive me share and share alike or to the survivor or survivors thereof.
>
> B. Fifty (50%) per cent thereof to the brothers and sisters of [Claude] that survive me, share and share alike or to the survivor or survivors thereof.[7]

Claude predeceased Alice.[8] Alice had eight siblings, two of whom survived her.[9] Claude also had eight siblings, three of whom survived Alice.[10] One of Alice's surviving siblings successfully petitioned the probate court to construe the will to provide for one-half to the Alice's two surviving siblings and the other half to the Claude's three surviving siblings.[11] Under this interpretation, no share would pass to the descendants of Alice's and Claude's predeceased siblings.[12] A group of descendants of Alice's and Claude's predeceased siblings (the "respondents") appealed to the Michigan Court of Appeals.[13]

The Michigan Court of Appeals broke the devises to Alice's siblings and Claude's siblings into two clauses, each of which the court addressed separately.[14] The first clause provided a devise to siblings "that survive me share and share alike."[15] The second clause stated "or to the survivor and survivors thereof."[16]

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5. 276 Mich. App. 22, 739 N.W.2d 889.
6. *Id.* at 24, 79 N.W.2d at 891.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Estate of Raymond*, 276 Mich. App. at 24-27, 739 N.W.2d at 891-92.
12. *Id.* at 27, 739 N.W.2d at 892.
13. *Id.*
14. *Id.* at 28, 739 N.W.2d at 893.
15. *Id.*
16. *Id.*

The court held that the "that survive me" portion of the first clause clearly limited the devise to the class of siblings alive at Alice's death.[17] Moreover, the court interpreted the "share and share alike" portion of the first clause to call for a per capita distribution to members of the class of siblings.[18] Under this per capita distribution, the court held that the devise was to go to the "surviving heads on the generational line."[19] That is, the surviving siblings take the devise with no share going to the descendants of deceased siblings.[20]

The court next construed "to the survivor or survivors thereof" language of the second clause.[21] In doing so, the court held that *In re Estate of Burruss*[22] and *In re Holtforth's Estate*[23] were controlling.[24] In *Estate of Burruss*, the decedent devised her estate to three specifically named daughters, "or to the survivor or survivors of them."[25] One of the daughters predeceased the decedent.[26] The children of the deceased daughter sought to take her share in her place.[27] The court in *Estate of Burruss* held that the use of the word "them" referred to the survivors among the three daughters and not their descendants.[28] Additionally, the court in *Estate of Burruss* analogized the term "survivor" to "rights of survivorship" in a joint tenancy.[29] In other words, if Alice had titled her property in joint tenancy with rights of survivorship with her siblings, then the descendant's of deceased siblings would not share in the property. The *Estate of Burruss* court noted that the drafter of the will could have easily incorporated the terms "their children," "their issue," or "their heirs" instead of the term "survivors."[30]

The court in *Holtforth's Estate* reached the same interpretation of a will that devised property to a class of children and "the survivor of them."[31] That is, the court in *Hortforth's Estate* held that only the surviving children were entitled to share in the devise, and not the

17. *Estate of Raymond*, 276 Mich. App. at 29, 739 N.W.2d at 893.
18. *Id.*
19. *Id.* at 29-30, 739 N.W.2d at 894.
20. *Id.* at 30, 739 N.W.2d at 894.
21. *Id.*
22. 152 Mich. App. 660, 394 N.W.2d 466 (1986).
23. 298 Mich. App. 708, 299 N.W. 776 (1941).
24. *Estate of Raymond*, 276 Mich. App. at 31-32, 739 N.W.2d at 895.
25. *Estate of Burruss*, 152 Mich. App. at 662, 394 N.W.2d at 467.
26. *Id.*
27. *Id.*
28. *Id.* at 663-64, 394 N.W.2d at 468.
29. *Id.* at 664, 394 N.W.2d at 468.
30. *Id.* at 664-65, 394 N.W.2d at 468.
31. *Holtforth's Estate*, 298 Mich. at 711, 299 N.W. at 776-77.

descendants of deceased children.[32] Reading *Burruss* and *Hortforth's Estate* together, the court held that the term "survivor" is not synonymous with the term descendant.[33] Instead, the court stated that "survivor" means "'[o]ne who outlives another,' as, for example, when one person out of two or more remains after the others die."[34]

The respondents tried to distinguish *Burruss* and *Holtforth's Estate* because the wills in those cases used the language "survivors of *them,*" whereas Alice's will used the language "survivors *thereof.*"[35] The court refused to make a distinction between the words "them" and "thereof" in this context, noting that "thereof" refers back to the surviving siblings just as the term "them" does.[36]

The respondents next argued that the second clause cannot limit the class gift to the surviving siblings, just as the first clause does.[37] Respondents argued that to do so would make the second clause redundant and without meaning.[38] As such, according to the respondents, the second clause is surplusage that violates the tenet of will construction that all words of a will are to be given a meaning.[39] While admitting that the second clause was "seemingly redundant" of the first clause, the court nonetheless held it was illogical to assume that the will drafter intended contradictory clauses within the same sentence.[40] According to the court, the second clause merely reinforced Alice's intent that was embodied in the first clause.[41]

Next, the respondents argued that an interpretation limiting the devise to surviving siblings would defeat Alice's intent to split her estate evenly between her family and Claude's family.[42] If Claude's siblings had all predeceased him, the respondents noted that Alice's family would take one-half under the will and the other half through intestacy, contrary to Alice's intent.[43] The court dismissed the respondent's argument as too hypothetical and refused to make a will interpretation based on speculation.[44]

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32. *Id.*
33. *Estate of Raymond*, 276 Mich. App. at 32, 739 N.W.2d at 895.
34. *Id.* (quoting BLACK'S LAW DICTIONARY 1486 (8th ed. 2004)).
35. *Id.*
36. *Id.*
37. *Id.* at 33, 739 N.W.2d at 895.
38. *Id.*
39. *Estate of Raymond*, 276 Mich. App. at 33, 739 N.W.2d at 895.
40. *Id.* at 33, 739 N.W.2d at 896.
41. *Id.*
42. *Id.* at 33-34, 739 N.W.2d at 896.
43. *Id.* at 34, 739 N.W.2d at 896.
44. *Id.*

Finally, the court addressed whether the anti-lapse statute[45] of the Estate of Protected Individuals Code (EPIC) applied.[46] Under the EPIC anti-lapse statute, the descendants of Alice's and Claude's deceased siblings would stand in their ancestors' place and share in the class gift, unless the court finds that Alice's intent was to the contrary.[47] Moreover, the EPIC anti-lapse statute provides that "words of survivorship, such as in a devise to an individual 'if he survives me' or in a devise to 'my surviving children,' are not, in the absence of additional evidence" sufficient to show a contrary intention on the testator's part.[48] The court held that the anti-lapse statute was inapplicable because the language of the will made three separate statements regarding survivorship, including "that survive me," "share and share alike," and "to the survivor or survivors thereof."[49] The court reasoned that these three separate statements were ample additional evidence to show Alice's intent was contrary to the anti-lapse statute.[50]

B. Drafting Class Gifts to Avoid Ambiguity

The poorly drafted devise in *Estate of Raymond* reminds practitioners to be careful in drafting class gifts to avoid ambiguities. In doing so, practitioners should not hesitate to explain in plain English what happens when a member of the class dies before the testator. For instance, if the testator in *Estate of Raymond* did not want descendants of her siblings to share in the devise, the drafting attorney could have easily added a sentence similar to the following: "If any of my siblings die before me, I do not want his or her descendants to take in his or her place." Additionally, the drafting attorney could have clarified that the anti-lapse statute was not applicable by adding the sentence: "The anti-lapse statute of any state shall not apply to this devise." Next, the drafting attorney could have spelled out an alternative devise if all of the testator's siblings died before her. For instance, the drafting attorney could have added the following sentence: "If none of my siblings survive

45. MICH. COMP. LAWS ANN. § 700.2603 (West 2007).

46. *Estate of Raymond*, 276 Mich. App. at 34, 739 N.W.2d at 896.

47. MICH. COMP. LAWS ANN. §§ 700.2602(1), 700.2603(1)(b) (West 2002). Under the anti-lapse statute, if the devisee predeceases the testator and is a descendant of testator's grandparent (a sibling would be a descendant of testator's grandparent) and the devise is in the form of a class gift, "a substitute gift is created in the surviving descendants of a deceased devisee." MICH. COMP. LAWS ANN. § 700.2603(1)(b) (West 2002).

48. MICH. COMP. LAWS ANN. § 700.2603(1)(b) (West 2002).

49. *Estate of Raymond*, 276 Mich. App. at 35, 739 N.W.2d at 896.

50. *Id.*

me, then the devise of favor of my siblings shall be devised to" another specified devisee.

On the other hand, if the testator in *Estate of Raymond* wanted descendants of deceased siblings to share in the class gift, the drafter could have spelled that out in plain English in the will. For instance, the drafter could have included the following sentence: "If any of siblings die before me, I wish the descendants of my deceased sibling to share in the devise by right of representation." Practitioners should note that "by right of representation" can be ambiguous, and the use of such phrase is presumed to create a "per capita at each generation" distribution under EPIC.[51] Therefore, the drafter should specifically define what "by right of representation" means in the will.

Under per capita at each generation representation, the descendants of the next generation taking by representation (i.e., the nieces and nephews in the case of *Estate of Raymond*) would be treated equally.[52] For example, if a deceased sibling leaves one surviving descendant and another deceased sibling leaves two surviving descendants, the shares that would have gone to the deceased siblings are combined and split equally between the three descendants.[53] By contrast, under a "per stirpes" distribution, the share that would have gone to a deceased sibling would go to that deceased sibling's descendants.[54] The share that would have gone to the deceased sibling with two descendants would be split between those two descendants.[55] In other words, members of the same generation can be treated differently under per stirpes, as one descendant can get one share and the other two descendants would receive one-half of a share.

If the testator would prefer a per capita at each generation distribution, the drafter can incorporate the definition of such term from EPIC. For instance, the drafter could include the following sentence: "The term 'by right of representation' shall have the meaning given to it in Section 2718(1) the Estates and Protected Individuals Code, as in effect on the date this will is executed." Alternatively, the drafting attorney can simply copy the language from EPIC defining "per capita at each generation" and use to define the term in the will.

If the testator would prefer a "per stirpes" distribution, the drafting attorney would substitute "per stirpes" in the place of "by right of representation." Again, the drafting attorney can simply incorporate the

51. MICH. COMP. LAWS ANN. § 700.2718(1) (West 2008).
52. *Id.*
53. *Id.*
54. MICH. COMP. LAWS ANN. § 700.2718(2) (West 2008).
55. *Id.*

definition of per stirpes from EPIC. For instance, the drafting attorney could include the following sentence: "The term 'per stirpes' shall have the meaning given to it in Section 2718(2) the Estates and Protected Individuals Code, as in effect on the date this will is executed." Alternatively, the drafter can simply copy the language of Section 2718(2) and use it as the definition of per stirpes in the will.

As *Estate of Raymond* demonstrates, too little explanation and too much legalese can lead to ambiguity. Practitioners can easily incorporate plain English to explain the testator's intent in the will. By doing so, future litigation between family members can be avoided.

III. TRUSTS

A. Legal Fees Charged to Trust and Partition of Real Property

In *In re Temple Marital Trust*,[56] the petitioner and his two brothers (the respondents) were beneficiaries of a joint trust created by their parents.[57] The joint trust provided that two parcels of the parents' farmland would be distributed equally to the petitioner, respondents, and a fourth brother (since deceased) after the parents' deaths.[58] After the mother died, the father executed an amendment to the "trust that distributed one parcel" to one son, respondent Dean Temple, and the other to respondent, Ralph Temple ("Ralph").[59] Ralph verbally assured the father that he would divide the parcel distributed to him with the petitioner.[60] The father preferred this arrangement because he did want the petitioner and Dean having direct dealings due to a longstanding feud between them.[61]

When the father died, Ralph and petitioner could not agree upon an equitable division of the parcel distributed to Ralph.[62] Thus, petitioner petitioned the probate court to have the joint trust the controlling document, arguing that the father had no right to amend the joint trust after the mother's death.[63] The probate court denied the petitioner's petition.[64] On appeal, the Michigan Court of Appeals, in an unpublished opinion, reversed the probate court, holding that the language of the joint

56. 278 Mich. App. 122, 748 N.W.2d 265 (2008).
57. *Id.* at 124, 748 N.W.2d at 267.
58. *Id.*
59. *Id.* at 124-25, 748 N.W.2d at 267.
60. *Id.* at 125, 748 N.W.2d at 267.
61. *Id.*
62. *Temple Marital Trust*, 278 Mich. App. at 125, 748 N.W.2d at 267.
63. *Id.*
64. *Id.*

trust provided that the trust could only be amended by both the mother and father.[65] In other words, the joint trust became irrevocable upon the mother's death. Accordingly, the father's amendment to trust had no effect, and the court of appeals remanded the case to the probate court for further proceedings.

On remand, petitioner and respondents sought to have their respective attorneys' fees paid from the trust.[66] Each party challenged the payment of the others' attorneys' fees from the trust.[67] Additionally, the petitioner sought to have the two parcels partitioned.[68] In contrast, the respondents sought the court's approval to sell the two parcels and distribute the proceeds equally among the beneficiaries.[69] The probate court denied the petitioner's motion for attorneys' fees and refused to partition the parcels.[70] The probate court granted respondents' motion for attorneys' fees and the sale of the two parcels.[71] Petitioner appealed to the Michigan Court of Appeals.

On appeal, the petitioner argued that the probate court erred in allowing the respondents' attorneys' fees to be paid from the trust.[72] Specifically, the petitioner challenged those attorneys' fees incurred to represent Dean as successor trustee of the joint trust and those attorneys' fees incurred to represent Ralph as successor trustee under the invalid amendment to the trust.[73] The petitioner contended that the respondents were litigating their own personal interests, and not the interests of the trust.[74] Moreover, the petitioner argued that the attorneys' fees incurred to advise Ralph as successor trustee of the amendment to trust were not reasonable because the amendment was invalid and Ralph never actually served in a fiduciary capacity.[75]

The Michigan Court of Appeals upheld the probate court's approval of the respondents' attorneys' fees, but noted that the probate court did

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65. *In re* Temple Marital Trust, No. 261000, 2005 WL 1880375 (Mich. Ct. App. Aug. 9, 2005).

66. *Temple Marital Trust*, 278 Mich. App. at 125, 748 N.W.2d at 267. The petitioner incurred attorneys' fees of $118,312.45 and an appraisal fee of $2,500 for a valuation done on the parcels. *Id.* In contrast, respondents incurred attorneys' fees of $29,109.83. *Id.*

67. *Id.*

68. *Id.* at 126, 748 N.W.2d at 268.

69. *Id.* at 125-26, 748 N.W.2d at 267-68.

70. *Id.* at 126, 748 N.W.2d at 268.

71. *Id.*

72. *Temple Marital Trust*, 278 Mich. App. at 129, 748 N.W.2d at 269.

73. *Id.*

74. *Id.*

75. *Id.*

so for the wrong reasons.[76] The probate court awarded payment of the attorney fees pursuant to a Michigan court rule and case law.[77] The court of appeals noted that the Michigan court rule and case law cited by the probate court are inapplicable because they only apply to personal representatives and decedent's estates, not trustees and trusts.[78] Nonetheless, the court of appeals found authority in EPIC and the trust instrument itself for payment of respondents' attorneys' fees from the trust.[79] Specifically, the court noted that EPIC gives the trustee the power to defend against claims against the trust, to retain counsel, and to pay reasonable attorneys' fees from the trust.[80] Moreover, the trust instrument gave the trustee the power to employ the services of an attorney.[81]

The court next addressed petitioner's contention that the attorneys' fees incurred to advise Ralph as successor trustee of the amendment to trust could not be paid from the trust because the amendment was invalid.[82] Thus, according to the petitioner, Ralph never had the power of a trustee and could not employ counsel to advise him on the administration of the trust.[83] The court rejected the petitioner's argument by stating, "[g]iven that each respondent was potentially the successor trustee of the trust in question, it was appropriate for both respondents to have counsel. That way, regardless of the outcome regarding the validity of the trust amendment, the true successor trustee was represented."[84] Furthermore, the court noted that Ralph acted prudently and reasonably and should not be "subject to surcharge simply because the litigation ended unfavorably to respondents' position."[85]

Petitioner next argued that the respondents failed to prove that their attorneys' fees were reasonable.[86] The court noted that EPIC is silent on the allocation of burden of proof on the reasonableness of attorneys' fees.[87] The court balked at answering the issue of burden of proof by finding that the probate court thoroughly examined whether the fees were

76. *Id.*
77. *Id.* at 130, 748 N.W.2d at 270.
78. *Temple Marital Trust*, 278 Mich. App. at 130, 748 N.W.2d at 270.
79. *Id.* at 131-34, 748 N.W.2d at 270-72.
80. *Id.* at 131-32, 748 N.W.2d at 270-71.
81. *Id.* at 132-33, 748 N.W.2d at 271-72.
82. *Id.* at 133-34, 748 N.W.2d at 272.
83. *Id.* at 134, 748 N.W.2d at 272.
84. *Temple Marital Trust*, 278 Mich. App. at 134-35, 748 N.W.2d at 272.
85. *Id.* at 134, 748 N.W.2d at 272.
86. *Id.* at 137, 748 N.W.2d at 273.
87. *Id.* at 137, 748 N.W.2d at 274.

reasonable.[88] Therefore, whether the burden of proof was on the respondents or not, the court felt that there was sufficient evidence to show reasonableness without having to decide the issue of burden of proof.[89]

Petitioner next argued that the probate court erred in disallowing payment of his attorneys' fees from the trust.[90] The court of appeals disagreed, noting that the petitioner has the burden of overcoming the "American rule" of litigation "by which a litigant is responsible for his own attorneys' fees in the absence of an express statute, court rule, or judicial exception."[91] Petitioner tried to rely on *Becht v. Miller*,[92] wherein the court awarded attorneys' fees to a devisee of a will who successfully litigated that certain bonds were subject to distribution by the will.[93] The court noted, however, that *Becht* was distinguishable from petitioner's case. In *Becht*, the litigation benefited the estate as a whole because certain bonds were returned to the estate so that they could pass via the will.[94] In contrast, petitioner's case did not preserve or enhance the value of the trust.[95] Thus, petitioner's case was solely to litigate his interests, and thus, payment of his attorneys' fees from trust was not warranted.

Lastly, the court addressed the petitioner's claim that the parcels be partitioned.[96] Petitioner relied on *Henkel v. Henkel*[97] to argue that partition is mandatory.[98] The court easily distinguished *Henkel* by noting that *Henkel* provides for mandatory partition of real property held in joint tenancy or tenancy in common.[99] In this case, the parcels were held in trust. Furthermore, the court found no practical way to partition the parcels in a way to create an equal division.[100] The court noted that the parcels were bisected by a river and that partition would cause some partitioned parcels to have a greater portion of tillable farm land than other partitioned parcels.[101]

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88. *Id.* at 137-38, 748 N.W.2d at 274.
89. *Id.*
90. *Temple Marital Trust*, 278 Mich. App. at 139, 748 N.W.2d at 274-75.
91. *Id.* at 139, 748 N.W.2d at 275.
92. 279 Mich. 629, 273 N.W. 294 (1937).
93. *Temple Marital Trust*, 278 Mich. App. at 140, 748 N.W.2d at 275.
94. *Id.* at 140-41, 478 N.W.2d at 275.
95. *Id.* at 140, 478 N.W.2d at 275.
96. *Id.* at 141, 478 N.W.2d at 276.
97. 282 Mich. 473, 276 N.W. 522 (1937).
98. *Temple Marital Trust*, 278 Mich. App. 142-43, 748 N.W.2d at 276.
99. *Id.* at 142-43, 748 N.W.2d at 276-77.
100. *Id.* at 144, 748 N.W.2d at 277.
101. *Id.*

B. Express Trusts and Totten Trusts

The Michigan Court of Appeals addressed the interplay between express trusts and Totten trusts[102] in *In re Estate of Kostin.*[103] In *Kostin,* the decedent executed a will in 1989 that named her niece, Oleta Williams, the principal devisee, and left one dollar to her daughter, Camille Kent.[104] The decedent executed a second will on November 18 of an unknown year (allegedly between 1994 and 1997) that named Kent as the principal devisee.[105] In 1997, the decedent executed a handwritten revocable trust naming herself as initial trustee and Williams as the successor trustee.[106] Upon decedent's death, the trust named Williams the principal beneficiary.[107] Additionally, the decedent "executed a general assignment of her all assets, then owned and thereafter acquired, to the trust."[108]

The decedent owned several bank accounts. In September, 2002, the decedent titled all but two of these bank accounts "in trust for" (ITF) Kent.[109] Accordingly, when the decedent died in August 2004, two of the decedent's bank accounts were titled solely in her name and the others were titled ITF Kent.[110]

Kent contended that the November 18th will was controlling.[111] Williams claimed that the 1989 will was controlling and argued that she succeeded to ownership of all bank accounts as successor trustee of the trust.[112] The probate court ruled that the two bank accounts left solely in

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102. Totten trusts are named for trusts first approved in *In re Totten. See In re* Totten, 71 N.E. 748 (N.Y. 1904). A "Totten" trust is a purported trust whereby an owner of a bank account provides a written declaration to the bank that he or she is the trustee of the account for another person. *See* RESTATEMENT (THIRD) OF TRUSTS, § 26 (2003). However, the owner of the account reserves the right to withdraw or otherwise revoke the trust during his or her lifetime. *Id.* A Totten trust works in the same way as a "payable on death" (POD) and "transfer on death" (TOD) designations. *See* GEORGE GLEASON BOGERT ET. AL., THE LAW OF TRUSTS AND TRUSTEES, § 47 (3d. rev. 2008). That is, a Totten trust is a means of leaving an account to another upon death without the need for a will and without the disadvantages of a joint tenancy (i.e., requiring a present gift of property thereby losing the right to revoke). *Id.*

103. 278 Mich. App. 47, 748 N.W.2d 583 (2008).

104. *Id.* at 49, 748 N.W.2d at 587.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Estate of Kostin,* 278 Mich. App. at 50, 748 N.W.2d at 587.

110. *Id.*

111. *Id.*

112. *Id.*

the decedent's name passed to Williams via the trust.[113] The probate court found that the decedent intended five of the bank accounts titled ITF Kent to go to Williams, and the others to Kent, and awarded the accounts accordingly.[114]

On appeal, Kent argued that one of the accounts titled solely in the decedent's name should not pass via the trust.[115] The decedent's trust instrument stated that "[t]he sale or other disposition of the whole or any part of a Trust asset shall constitute as to such whole or part a revocation of this trust."[116] Apparently, Kent argued that this account was titled ITF Kent at one time, then changed to the decedent's name only.[117] The court questioned whether this factual allegation was true.[118] But even if such factual allegation was true, the court ruled that it would not cause revocation under the trust.[119] Because the decedent retained control over the account until her death, the court held that there was no "sale or other disposition" of the account in question.[120] Therefore, the court upheld that probate court's ruling that the accounts titled solely in the decedent's name passed to Williams via the trust.[121]

Kent next argued that the probate court erred in awarding five of the accounts titled ITF Kent to Williams.[122] In addressing this issue, the court ruled that the ITF bank accounts were Totten trusts, which are specifically authorized by Michigan statute.[123] The court also noted that a Michigan statute[124] specifically authorizes the use of express trusts,

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113. *Id.*

114. *Id.*

115. *Estate of Kostin*, 278 Mich. App. at 53, 748 N.W.2d at 589. The court did not discuss Kent's reasons for not making the same argument for the other account titled solely in the decedent's name at death.

116. *Id.* at 53-54, 748 N.W.2d at 589.

117. *Id.* at 54, 748 N.W.2d at 589.

118. *Id.*

119. *Id.* at 54, 748 N.W.2d at 589-90.

120. *Id.* at 54-55, 748 N.W. at 589-90.

121. *Estate of Kostin*, 278 Mich. App. at 54-55, 748 N.W.2d at 590.

122. *Id.* at 55, 748 N.W.2d at 590.

123. *Id.* at 55, 748 N.W.2d at 590 (citing MICH. COMP. LAWS ANN. § 487.702(1) (West 2008)). The Michigan statute approving Totten trust states, in relevant part:

> If a deposit of money shall be made in a bank or trust company by a person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, if the trustee dies, or if there is more than 1 trustee, all of the trustees have died, the deposited money, together with the dividends or interest on the money, shall be paid to the person for whom the deposit was made.

MICH. COMP. LAWS ANN. § 487.702(1) (West 2008).

124. MICH. COMP. LAWS ANN. § 555.11 (West 2008). The Michigan statute approving express trusts states, in relevant part that "[e]xpress trusts may be created for . . . the

such as the one the decedent executed.[125] In this case, the accounts funded to the trust via general assignment were later titled ITF Kent. Therefore, the court saw the issue of whether the Michigan statute authorizing ITF accounts or the Michigan statute authorizing express trusts controls.[126] In other words, if the Michigan statute authorizing ITF accounts trumps the Michigan statute on express trusts, then the accounts should be awarded to Kent. Conversely, if the Michigan statute on express trusts trumps the Michigan statute authorizing ITF accounts, the accounts should pass to Williams via the trust. The court noted that this was "an issue of first impression in Michigan."[127]

The court looked to the language of the statute authorizing ITF accounts, which provided that ITF accounts "shall be paid to the person for whom the deposit was made."[128] The court found the word "shall" in the statute to be controlling.[129] In other words, the statute was written in such a way that it controls even if the property in question was already funded to an express trust.[130] Furthermore, the court cited the tenet of statutory construction that the more specific statute controls where two statutes conflict.[131] In this case, the statute authorizing ITF was more specific on this issue of ownership of the accounts. Lastly, the court also found that by retitling the account ITF Kent, the decedent had revoked the express trust with respect to such assets.[132] As noted previously, the trust instrument provided that the trust was revoked upon "sale or other disposition" of asset.[133] In this case, the transfer to an ITF account was tantamount to a gift, which the court held was a disposition within the meaning of the trust instrument.[134] Therefore, the court reversed the probate court and awarded all ITF Kent accounts to Kent.[135]

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beneficial interest of any person or persons where such trust is fully expressed and clearly defined upon the face of the instrument creating it subject to the limitations as to time prescribed in this title." *Id.*

125. *Estate of Kostin*, 278 Mich. App. at 56, 748 N.W.2d at 590.
126. *Id.*
127. *Id.*
128. *Id.* at 57, 748 N.W.2d at 591.
129. *Id.*
130. *Id.*
131. *Estate of Kostin*, 278 Mich. App. at 57-58, 748 N.W.2d at 591.
132. *Id.* at 58, 748 N.W.2d at 591.
133. *Id.*
134. *Id.* at 58, 748 N.W.2d at 591-92.
135. *Id.* at 58-59, 748 N.W.2d at 592.

C. Discussion of Trust Cases

Kostin is significant because it shows that, contrary to common belief, bank accounts can be funded to a trust by declaration of trust or general assignment where the settlor is the trustee. In other words, *Kostin* correctly adopts the common law principle that a settlor can create a "self-trusteed" trust without a transfer to trust or retitling of assets.[136] The *Kostin* ruling is consistent with rulings from other states.[137]

Of course, relying solely on a declaration of trust or general assignment to create a trust is not advisable. In such case, banks are unlikely to honor the successor trustee's legal title without a probate court order. Thus, sole reliance on a declaration of trust or general assignment may defeat one of the settlor's purposes in creating the trust in the first place—the avoidance of probate. Consequently, the transfer of the settlor's assets to the trust is always preferable. Nevertheless, in situations where the beneficiaries of the trust differ from those who would take by will or intestacy, a practitioner can use the principle from *Kostin* to ensure those trust beneficiaries ultimately receive the settlor's assets.

136. *See* RESTATEMENT (SECOND) OF TRUSTS, § 17(a), cmt. a (1959). However, where the settlor is not the trustee, a transfer of the asset to the trust is required. *Id.* at § 17(b).

137. *See, e.g., In re* Estate of Heggstad, 20 Cal. Rptr. 2d 433 (Cal. Ct. App. 1993); Brevard County v. Ramsey, 658 So.2d 1190 (Fla. 1995); Taliaferro v. Taliaferro, 921 P.2d 803 (Kan. 1996); Hatch v. Lallo, No. 20642, 2002 WL 462862 (Ohio Ct. App. Mar. 27, 2002). A settlor can create a "self-trusteed" trust to hold real property without a deed transferring the real property, so long as the declaration of trust is written. *See, e.g., Estate of Heggstad*, 20 Cal. Rptr. 2d at 435; *Ramsey*, 658 So.2d at 1194.