

EXAMINERS' ANALYSIS OF QUESTION NO. 9

Establishment: In order to establish a trust (a prerequisite to its funding), all of the following must apply: (a) the settlor has capacity to create a trust; (b) the settlor indicates an intention to create the trust; (c) the trust has a definite beneficiary or is a charitable trust, has a non-charitable purpose, or is for the care of an animal; (d) the trustee has duties to perform; and (e) the same person is not the sole trustee and sole beneficiary. MCL 700.7402(1). Here, all are satisfied. There is no indication that Hope did not have capacity as settlor; her signature and label "My Trust" indicates intent to create the trust; there are definite beneficiaries; Erin has duties to perform as trustee in distributing the assets; and Erin is the sole trustee, but has a co-beneficiary in April. Accordingly, the trust was validly established.

Funding: A will may fund a trust. One of the ways that a will may validly devise property to the trustee of a trust is at the testator's death, so long as the trust is identified in the testator's will and the trust terms are set forth in a written instrument other than the will. MCL 700.2511(1)(b); MCL 700.7401(1)(a). In this case, the trust was specifically identified in the will, and the trust document was attached to the will and labeled a trust. Additionally, its terms were included in that separate trust document. Moreover, it does not matter that the trust predated its funding because a trust can be executed before, concurrently with, or after the execution of the will which funds it. MCL 700.2511(1)(b). Finally, a trust does not need any property prior to its funding by operation of the death of the settlor. MCL 700.2511(1)(b); MCL 700.7401(2). Thus, the trust was properly funded by Hope's will.

Terror Clause: In Michigan, "terror" clauses (also known as "*in terrorem*" clauses or "no-contest" clauses) are generally valid and enforceable. *Schiffer v Brenton*, 247 Mich 512, 520 (1929); *In re Perry Trust*, 299 Mich App 525, 530 (2013). Terror clauses must be strictly construed. *Id.*; *Saier v Saier*, 366 Mich 515, 520 (1962). Thus, a terror clause that expressly forbids unsuccessful challenges to "any provision" of a trust will apply to a very broad class of challenges. April's

objection to her sister's appointment as trustee certainly qualifies as a challenge to that provision of the trust.

However, the terror clause here was unenforceable. Under MCL 700.7113, "[a] provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust *shall not be given effect if probable cause exists for instituting a proceeding contesting the trust*" (Emphasis added). Based upon the evidence that Erin was exploiting her position as trustee in order to misappropriate assets, probable cause to contest the trust existed under MCL 700.7706(2)(a), which permits removal of the trustee for "a serious breach of trust."