

EXAMINERS' ANALYSIS OF QUESTION NO. 2

(1) A "trust" is the right to the beneficial enjoyment of property to which another holds legal title. The property is held by the *trustee* at the request of the *settlor* for the benefit of a third party (the *beneficiary*). Black's Law Dictionary, 8th Edition.

In order to establish a valid trust, the trust must comply with the requirements contained in the Michigan Trust Code, MCL 700.7101, et seq. Among the five methods of creating a trust in Michigan, one is the transfer of property to another person as trustee during the settlor's lifetime or by disposition taking effect upon the settlor's death. See MCL 700.7401(1)(a). In this regard, the facts indicate that Dennis transferred \$50,000 to another person as trustee (his sister, Carolyn) during Dennis's lifetime. Thus, MCL 700.7401(1)(a) is satisfied.

No matter which method of creating a trust is chosen, a trust is validly created only if five statutory requirements are met: (1) the settlor has the capacity to create a trust; (2) the settlor indicates an intention to create the trust; (3) the trust either has a definite beneficiary, is a charitable trust, is a trust for a non-charitable purpose, or is a pet care trust; (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary. See MCL 700.7402(1)(a)-(e). The requirements in section 7402(1)(a)-(e) also appear to be met. The facts assume that Dennis had the capacity to create a trust, and Dennis clearly articulated his intention to create a trust. Moreover, the trust has a definite beneficiary - the twin Dennis put his arm around in front of 200 attendees. Additionally and according to the facts, Carolyn had a duty to manage the trust assets wisely. Lastly, the same person was not the sole trustee and sole beneficiary.

The Michigan Trust Code specifically permits the creation of an oral trust. MCL 700.7407 states that "[e]xcept as required by a statute other than this article, a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established *only by clear and convincing evidence*." (Emphasis added). Dennis's statement, announced to all of the attendees at the graduation party, would more than likely satisfy a "clear and convincing" standard of

proof, and therefore it appears that a valid oral trust was created in June 2010.

(2) MCL 700.7415 provides that "[t]he court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement."

Thus, if Dennis's intent and the terms of the trust were affected by a mistake of fact or a mistake of law, Michigan law provides a mechanism to reform the terms of a trust, even if those terms are otherwise clear and unambiguous. A **mistake of fact** is a misunderstanding, misapprehension, error, fault, or ignorance of a material fact or a belief that a certain fact exists when in fact it does not exist. *Montgomery Ward & Co v Williams*, 330 Mich 275, 279 (1951).

In this case, a plausible argument could be made that Dennis's intent and the terms of the trust were indeed affected by a mistake of fact - that he intended to name Lana as the beneficiary, but mistook Millie for Lana. Generally, the party seeking reformation bears the burden of proving it. *Lyons v Chafey*, 219 Mich 493 (1922). Thus, the burden would be on Lana to prove the mistake of fact by clear and convincing evidence.