

STATE OF MICHIGAN

IN THE 26<sup>TH</sup> CIRCUIT COURT FOR THE COUNTY OF ALPENA

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In the Matter of the DARRELL R. LANCEWICZ  
TRUST AGREEMENT

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File No 11-4001-AP  
HON. PHILIP E. RODGERS, JR.  
(By Assignment)

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Lancewicz Trust

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pc: Alpena County Probate Court

DECISION AND ORDER

The Appellant Billiann Edmonds, successor trustee of the Darrell R. Lancewicz Trust, filed an Application for Leave to Appeal an order of the Alpena County Probate Court dated March 21, 2001. The undersigned Judge has been assigned this matter by the State Court Administrative Office in an order dated March 31, 2011. The Appellant objects to a specific jury instruction and seeks a stay of the jury trial presently scheduled for April 5, 2011 in the Alpena County Probate Court. For reasons that will now be described, the Court grants leave to appeal, dispenses with oral argument, denies the request for a stay and orders that a jury instruction based upon Michigan Civil Jury Instruction 170.41 as amended be used.

The issue presented to this Court is very narrow. It relates to the specific jury instruction that deals with the mental capacity of a trust's settlor. The relevant jury instruction is found at M Civ JI 170.41. The instruction as amended to reflect the issues in this case is agreed upon in all aspects other than subparagraph (d).

The Alpena County Circuit Court in a prior appeal and before the amendment of 170.41 ordered the Probate Court to utilize an instruction which included subparagraph (d) as it was then worded, i.e., "the ability to know the manner in which the document disposed of his property."

The instruction as amended in June 2010 now provides as follows:

- (d) Had the ability to understand in a reasonable manner the general nature and effect of his act in signing the document.

The Appellant seeks a jury instruction consistent with the amendment.

The Probate Court denied this request based upon an order of the Circuit Court issued prior to the effective date of the amendment. Additionally, the Probate Court found that there was no need to use the modified instruction.

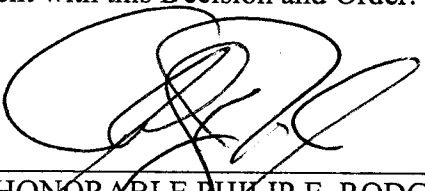
The use of model civil jury instructions in the trial of this action is governed by MCR 2.516(d)(2). There, the court rule provides as follows:

- (2) Pertinent portions of the instructions approved by the Committee on Model Civil Jury Instructions or its predecessor committee *must be given* in each action in which jury instructions are given if
  - (a) they are applicable,
  - (b) they accurately state the applicable law, and
  - (c) they are requested by a party.(Emphasis supplied.)

At this juncture, it is not for this court to determine whether utilization of the pre-amendment instruction would create harmless error. Rather, the instruction has been amended and approved by the Michigan Supreme Court. It is applicable, has been requested by a party and accurately states the law. Accordingly, it is mandatory that it be given.

For all the foregoing reasons, leave to appeal is granted, the request to stay the jury trial scheduled for April 5, 2011 is denied and the Probate Court is directed to use M Civ JI 170.41 as amended in June 2010 in the trial of this action. No costs or sanctions are assessed. This is a final order that resolves the sole issue on appeal. The matter is hereby remanded back to the Probate Court for further proceedings consistent with this Decision and Order.

IT IS SO ORDERED.

  
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HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge (By Assignment)

Dated: \_\_\_\_\_

3/21/11