STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the ESTATE of ALBERT O. SWARTZENBERG, Deceased.

UNPUBLISHED
June 24, 1997

DENISE A. SWARTZENBERG,

Appellant,

v

No. 196677
Wayne Probate Court
LC No. 95-546752

JANE E. SWARTZENBERG, Independent Personal Representative of the Estate of ALBERT O. SWARTZENBERG, Deceased, LINDA DUQUETTE, CAROL BOSKO and JANICE KENNEDY,

Appellees.

Before: Smolenski, P.J., and Kelly and Gribbs, JJ.

PER CURIAM.

Denise A. Swartzenberg ("Denise"), appeals as of right from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) to Jane E. Swartzenberg ("Jane"), independent personal representative of the estate of Albert O. Swartzenberg ("Albert"), deceased. We affirm.

The testator, Albert, died on March 17, 1995, at the age of seventy-seven, from injuries which were the result of an automobile accident. Albert had previously prepared a will which was executed on February 11, 1966. At the time of his death, Albert had been married for fifty-seven years to Jane, the surviving spouse and independent personal representative in this case. Additionally, Albert and Jane had four children, all of whom were alive at the time when Albert wrote his will. Denise, born in 1955, is the youngest of Albert's and Jane's children.

Following Albert's death, his will was admitted to probate. Pursuant to the will, Albert's entire property and estate was left to Jane. On September 5, 1995, Denise filed a claim against Albert's estate with the Wayne County Probate Court and requested the sum of $2,000,000. Denise claimed that she was totally and permanently disabled due to emotional and physical handicaps. Additionally, Denise claimed that because Albert had assumed a parental duty to support her, his estate was obligated to continue to support her. Subsequently, Denise requested that the court dismiss her claim and enter an order terminating her attorney's involvement. The trial court granted Denise's request.

On November 10, 1995, Denise, acting in propria persona, filed a complaint against the estate claiming that Albert had assumed a duty to support her, and that the estate was contractually obligated to continue her support in accordance with the expressed intent of Albert. Denise again requested an amount in the sum of $2,000,000. Subsequently, on April 8, 1996, Denise filed a four-count amended complaint, alleging that she could recover under the theories of mistake, promissory estoppel, breach of contract and gift.

I

Denise first argues that the trial court erred in granting summary disposition regarding her claim that she was mistakenly omitted from Albert's will. We disagree.

A trial court's determination of a motion for summary disposition is reviewed de novo on appeal. *Plieth v St. Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995).

In her amended complaint, Denise alleged that she had a close relationship with Albert, that he had promised to take care of her, and that she had been mistakenly omitted from his will. The pretermitted heir statute, the authority upon which Denise based her claim of mistake, states as follows:

> If a testator fails to provide in the testator's will for any of his or her children; for the issue of a deceased child; or for a child who is born out of wedlock or who is born or conceived during a marriage but is not the issue of that marriage, which child was conceived as a result of a sexual intercourse between the testator and the child's mother, and except as provided in subsection (3), it appears that the omission was not intentional but was made by mistake or accident, the child, or the issue of the child, shall have the same share in the estate of the testator as if the testator had died intestate. The share shall be assigned as provided in subsection (1). [MCL 700.127(2); MSA 27.5127(2).]

On appeal, Denise claims that reasonable inferences could be drawn that she was mistakenly omitted from Albert's will. Therefore, Denise believes that, under the above-cited statue, she should take an intestate share. Under MCL 700.127(2); MSA 27.5127(2), the plaintiff bears the burden of proof to demonstrate that the omission was not intentional but rather a mistake or accident. *In re Potts' Estate*, 304 Mich 47, 52-53; 7 NW2d 217 (1942). In support of Denise's claim that she was unintentionally

omitted from Albert's will, Denise relies on the fact that Albert's will was only three paragraph's long and that it was made on a pre-printed form. We find that Denise's allegations of mistake amount to nothing more than pure speculation and conjecture. Indeed, upon reviewing the lower court record, we note that Albert was aware of Denise's needs and had provided for her by purchasing a condominium for her use. Albert did not provide for any of his children in his will, but rather, decided to give his entire estate to his wife, Jane. Denise presented no evidence supporting her claim that out of all of her sisters, she should have received a special provision in Albert's will.

Denise had the burden of presenting some factual support for her claim of mistake. The mere fact that Albert's will was short does not render it invalid. There is no evidence to support her claim that Albert's will was made on a pre-printed form. Indeed, there is no authority for the suggestion that use of a pre-printed form would make it more likely than not that Denise was mistakenly omitted from the will. Overall, we conclude that reasonable minds could not differ from the conclusion that Denise was not mistakenly omitted from Albert's will. Thus, summary disposition was properly granted in this case. Compare *In re Potts' Estate, supra*; *In re Briner's Estate*, 275 Mich 396, 400-402; 266 NW 394 (1936).

Additionally, we conclude that further discovery was not necessary or warranted in this case. Although summary disposition is usually inappropriate before the completion of discovery on a disputed issue, *Department of Social Services v Aetna Casualty & Surety Co*, 177 Mich App 440, 446; 443 NW2d 420 (1989), it may be appropriate if further discovery does not stand a fair chance of uncovering factual support for the opposing party's position, *Neumann v State Farm Mutual Automobile Insurance Co*, 180 Mich App 479, 485; 447 NW2d 786 (1989). Moreover, when a party opposes a motion for summary disposition on the ground that discovery is incomplete, that party must assert that a dispute exists and support that allegation by independent evidence. *Bellows v Delaware McDonald's Corporation*, 206 Mich App 555, 561; 522 NW2d 707 (1994). In this case, Denise specifically claims that she should have been allowed to depose Jane. However, in Jane's affidavit, Jane specifically stated that she had expected that Albert would have left his entire estate to her and that Albert never made any promises to Denise regarding support or finances. Thus, we believe that there exists no fair chance that Denise will uncover factual support for her claim of mistake. Accord *Stebbins v Concord Wrigley Drugs, Inc*, 164 Mich App 204, 214; 416 NW2d 381 (1987).

II

Denise next argues that the trial court improperly granted summary disposition under MCR 2.116(C)(8) regarding Denise's claim of promissory estoppel. We disagree. The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Mt Carmel Mercy Hospital v Allstate Insurance Co*, 194 Mich App 580, 589; 487 NW2d 849 (1992). To support a claim of estoppel, a promise must be definite and clear. *State Bank of Standish v Curry*, 442 Mich 76, 85; 500 NW2d 104 (1993). A promise is a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would

justify a promisee in understanding that a commitment had been made. *Id.* If a promise lacks the required specificity and is indefinite and uncertain, reliance by the promisee is not justified, and the doctrine of promissory estoppel cannot be invoked. *McMath v Ford Motor Co*, 77 Mich App 721, 726; 259 NW2d 140 (1977).

In Denise's amended complaint, Denise alleged that Albert had told her on several occasions that he would make arrangements so that she would become a millionaire upon his death. Denise also alleged that Albert promised to arrange for financial support so that she would be able to live at a standard of life at least equivalent to that which she had enjoyed when she entered maturity. Finally, Denise alleged that Albert promised her that she would never have to worry about money. Even assuming that Denise's allegations are true, we conclude that no legally enforceable obligation was made by Albert.

Albert's ambiguous promise of future financing was not sufficient to invoke the doctrine of promissory estoppel. Indeed, the vaporous and amorphous pledge of "support" was not a clear and definite promise. No terms of the support were specified, i.e., the amount of monetary support Denise was to receive, the payment schedule, and the method of payment. Overall, even after drawing all due inferences in favor of Denise, Albert's statements were not a clear and definite promise sufficient to apply promissory estoppel. At best, Albert's statements were opinions or mere predictions of future events. This Court has deemed that opinions or mere predictions of future events are improper criterion for the invocation of the doctrine of promissory estoppel. *Ypsilanti Township v General Motors Corp*, 201 Mich App 128, 134 n 2; 506 NW2d 556 (1993). Accordingly, we affirm the dismissal of Denise's promissory estoppel claim. See also *Association of Hebrew Teachers v Jewish Welfare Federation*, 62 Mich App 54, 61-62; 233 NW2d 184 (1975).

III

Denise next argues that the trial court improperly dismissed Denise's breach of contract claim for failing to state a claim upon which relief could be granted. We disagree. As stated, *supra*, Denise alleged in her complaint that Albert promised to financially support her for the rest of her life. Denise also alleged that in exchange for the financial support promise, Denise gave Albert love and affection as consideration. We conclude that Denise did not have an enforceable contract with Albert.

The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). In this case, Albert's promise of financial support is too indefinite to be considered enforceable. Albert's promise was illusory, as his vague promise gave him the sole discretion to determine the amount of payment to Denise and the terms of such a payment. *Earl Dubey & Sons v Macomb Concrete Corp*, 81 Mich App 662, 676-677; 266 NW2d 152 (1978).

Moreover, no adequate consideration on Denise's behalf existed to support the existence of a contract. Consideration for an agreement exists where there is benefit on one side or a

detriment suffered, or services done, on the other. *Department of Natural Resources v Board of Trustees of Westminster Church of Detroit*, 114 Mich App 99, 104; 318 NW2d 830 (1982). Denise argues that Albert's promise was supported by the consideration of love and affection. There is no merit to this claim. Any promise made by Albert regarding his arranging financial support for Denise remained unexecuted. Accordingly, Denise's claim of consideration is clearly unenforceable as a matter of law. See *Fischer v Union Trust Company,* 138 Mich 612; 101 NW 852 (1904). No factual development can possibly justify Denise's right to recover on a theory of breach of contract, and therefore, summary disposition was properly granted.

IV

Finally, Denise argues that the trial court erred in summarily dismissing her claim of gift. In Denise's amended complaint, Denise alleged that Albert promised to make a gift of financial support and that public policy required enforcement of the gift. The trial court dismissed Denise's claim of gift pursuant to MCR 2.116(C)(8) because it believed that this case did not involve a charitable gift situation. We agree with the trial court's conclusion.

In this case, unlike *In re Timko Estate*, 51 Mich App 662; 215 NW2d 750 (1974), any promise made by Albert to Denise cannot be considered a "charitable contribution." At best, Albert's promise to Denise regarding financial support was an intention to make a gift in the future. However, this Court has held that intentions to make a gift are not enforceable as a contract. *Riemersma v Riemersma*, 29 Mich App 485, 487; 185 NW2d 556 (1971). Further, even were we to construe Albert's promise as a charitable pledge, Denise provides no authority to support her argument that the charitable pledge exception set forth in *Timko, supra*, should be applied to pledges made to an individual, as opposed to an organization. A party may not leave it to this Court to search for authority to sustain or reject its position. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). Accordingly, we affirm the trial court's decision to grant summary disposition to Jane regarding Denise's claim of gift.

Affirmed.

/s/ Michael R. Smolenski
/s/ Roman S. Gribbs