

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of Court P. Bentley Trust U/A Dated
May 22, 1970.

EMILY BENTLEY and the Estate of COURT P.
BENTLEY,

UNPUBLISHED
August 23, 2002

Petitioners-Appellants,

v

COMERICA BANK and JERRY L. DES
JARDINS,

No. 228711
Shiawassee Probate Court
LC No. 29,900(b)

Respondents-Appellees.

Before: Hood, P.J., and Holbrook, Jr., and Owens, JJ.

PER CURIAM.

Petitioners appeal as of right from a judgment for respondents, the trustees of the Court P. Bentley trust. We affirm.

A trust was established for the benefit of Court P. Bentley (Bentley). The trust was designed such that Bentley could live off the income generated from the trust assets. However, requests for additional funding from the principal could be requested in writing to an oversight committee that was given the discretion to grant requests. Oversight was a necessity in light of Bentley's history of mental illness. Bentley died at his residence in Florida on July 24, 1998. The trustees filed a petition for limited supervision in probate court because of a disparity between will documents and the trust documents. While the will was submitted to probate court in Florida, the petition for supervision was filed in Michigan, without initial objection by petitioners. In the petition, the trustees noted that there was a difference with respect to notice to potential beneficiaries between Michigan and Florida law. Months later, petitioners questioned the jurisdiction of the Shiawassee Probate Court to decide the trust questions. Ultimately, the probate court assumed jurisdiction of the trust and granted respondents' requests for approval of their accounts and fees.

Petitioners first allege that the Michigan probate court did not have jurisdiction¹ to render a decision. We disagree. In *Bowie v Arder*, 441 Mich 23, 36, 39; 490 NW2d 568 (1992), the Supreme Court, quoting *Joy v Two-Bit Corp*, 287 Mich 244, 253-254; 283 NW 45 (1938), defined subject matter jurisdiction:

(j)urisdiction over the subject matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court in which it is pending, because of some inherent facts which exist and may be developed during the trial.

Subject matter jurisdiction is critical to a court's authority, and there is an independent obligation to acknowledge a lack of jurisdiction even when the parties do not raise the issue. *In re AMB*, 248 Mich App 144, 166-167; 640 NW2d 262 (2001). Thus, a challenge to the court's subject matter jurisdiction may be raised at any time. *Guzowski v Detroit Racing Ass'n, Inc*, 130 Mich App 322, 325; 343 NW2d 536 (1983). Circuit courts are courts of general jurisdiction such that subject matter jurisdiction is presumed unless expressly prohibited or given exclusively to another court by constitution or statute. *Grebner v Oakland County Clerk*, 220 Mich App 513, 516; 560 NW2d 351 (1996). The probate court, however, is a court of limited jurisdiction, deriving all of its power from statutes. *Manning v Amerman*, 229 Mich App 608, 611; 582 NW2d 539 (1998).

Personal jurisdiction is a question of law that is reviewed de novo on appeal. *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426; 633 NW2d 408 (2001). A plaintiff bears the burden of establishing jurisdiction over a defendant. *Id.* at 426-427. However, only a prima facie showing of jurisdiction is necessary to defeat a motion for summary disposition. *Id.* at 427. The *Oberlies* Court set forth the following rules regarding personal or in personam jurisdiction:

Before a court may obligate a party to comply with its orders, the court must have in personam jurisdiction over the party. Jurisdiction over the person may be established by way of general personal jurisdiction or specific (limited) personal jurisdiction. The exercise of general jurisdiction is possible when a defendant's contacts with the forum state are of such nature and quality as to enable a court to adjudicate an action against the defendant, even when the claim at issue does not arise out of the contacts with the forum. When a defendant's contacts with the forum state are insufficient to confer general jurisdiction, jurisdiction may be based on the defendant's specific acts or contacts with the forum. [*Oberlies, supra* at 427 (citations omitted).]

"The defense of lack of personal jurisdiction is waived unless it is properly raised in a party's first responsive pleading." *Dundee v Puerto Rico Marine Management, Inc*, 147 Mich App 254,

¹ Petitioners do not specify the type of jurisdiction at issue, and the allegations also raise questions about the choice of venue. Therefore, a brief discussion of the applicable principles is necessary.

257; 383 NW2d 176 (1985). “Venue relates to and defines the particular county or territorial area within the state or district in which the cause must be brought or tried.” *Grebner, supra* at 516. Venue rules are designed to ensure that proceedings are held in the most convenient forum. *Id.*

At issue in this case is the jurisdiction over a trust, and Michigan probate courts are given subject matter jurisdiction by statute to handle trusts. MCL 700.21; MCL 700.805; *Manning, supra*.² After a petition for limited supervision was filed by the trustees, petitioner Emily Bentley responded to this petition and filed her own petitions to obtain release of the trust assets. Counsel for petitioner Emily Bentley even acknowledged jurisdiction over her at the hearing to dissolve the ex parte order staying distribution of trust assets. By failing to object to personal jurisdiction in the first motion or responsive pleading, petitioner Emily Bentley waived any challenge to the exercise of personal jurisdiction. MCR 5.001(A); MCR 2.116(D)(1); see also *Maxman v Goldsmith*, 55 Mich App 656, 658; 223 NW2d 113 (1974). Furthermore, a party who submits to personal jurisdiction in a particular forum submits to continued jurisdiction even if subsequent action is based on a new complaint. *Ewing v Bolden*, 194 Mich App 95, 100-101; 486 NW2d 96 (1992); see also *In re MacLoughlin*, 82 Mich App 301, 307; 266 NW2d 800 (1978). Accordingly, the probate court properly exercised subject matter and personal jurisdiction in this case.³

Petitioners next allege that the probate court improperly dismissed pre-1996 equitable claims based on the statute of limitations when the trustees prevented the claims from being raised through threats and intimidation. We disagree. An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). An action alleging breach of fiduciary duty sounds in tort and is therefore controlled by the general three-year statute of limitations. *Miller v Magline, Inc.*, 76 Mich App 284, 313 ; 256 NW2d 761 (1977). The nature of the claim, specifically an action in equity, does not preclude application of the statute of limitations. *Lothian v Detroit*, 414 Mich 160, 175; 324 NW2d 9 (1982); MCL 600.5815.⁴

² The revised probate code was repealed and the Estates and Protected Individuals Code became effective on April 1, 2000. The parties do not dispute that the prior statutory framework applies to this litigation.

³ We note also that petitioners question the basis of the filing of the petition in Shiawassee Probate Court instead of Wayne County, the venue provided in the trust document, and also question the relationship of trustee Jerry Des Jardins to the judge in Shiawassee County. However, petitioners did not file a motion for change of venue, MCR 5.221, and did not move to disqualify the probate court judge. In order to raise an issue for appellate review, it must be raised in the statement of questions presented, *Persinger v Holst*, 248 Mich App 499, 507 n 2; 639 NW2d 594 (2001), and it must be raised before and addressed by the trial court. *Id.* at 510. Because these issues were not raised and addressed below and were not raised in the statement of questions presented, we need not address the allegations. *Id.*

⁴ Even if we concluded that the trial court erred in dismissing the pre-1996 claims, there is no available remedy. See *Persichini v William Beaumont Hosp*, 238 Mich App 626, 637 n 5; 607 NW2d 100 (1999). Petitioner Emily Bentley testified regarding the trustees’ coercive and

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Lastly, petitioners allege that the trial court erred by allowing the trustees' accounts and fees and denying the petition to surcharge. We disagree. In *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993), this Court set forth the standard of review:

Findings of fact made by a probate court sitting without a jury will not be reversed unless clearly erroneous. *In re Powell Estate*, 160 Mich App 704, 710; 408 NW2d 525 (1987). A finding is said to be clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). The reviewing court will defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court. *Id.*; MCR 2.613(C).

In *Comerica Bank v City of Adrian*, 179 Mich App 712, 723; 446 NW2d 553 (1989), this Court held that a trustee was entitled to just and reasonable compensation for services rendered, citing MCL 700.541. The Court also adopted the following factors to determine the reasonableness of a trustee's proposed fee:

(1) the size of the trust, (2) the responsibility involved, (3) the character of the work involved, (4) the results achieved, (5) the knowledge, skill, and judgment required and used, (6) the time and the services required, (7) the manner and promptness in performing its duties and responsibilities, (8) any unusual skill or experience of the trustee, (9), the fidelity or disloyalty of the trustee, (10) the amount of risk, (11), the custom in the community for allowances, and (12) any estimate of the trustee of the value of his services. [*Id.* at 724.]

The weight to be given to any one factor and the determination of reasonable compensation is within the probate court's discretion. *Id.* at 724. The individual circumstances of each case must be examined to determine which factors are to be given weight. *Id.* The burden of proof is on the claimant to satisfy the court that the services rendered were necessary and that charges for the services are reasonable. *Id.* A failure to present records is weighed against the claimant. *Id.*

The probate court was presented with two diametrically opposed versions of events through the testimony of Janet Elinoff, Comerica Bank representative, and petitioner Emily Bentley. The probate court rendered its decision consistent with the testimony of Elinoff and rejected petitioner Emily Bentley's testimony. We cannot conclude that the findings were clearly erroneous. While petitioners contend that Elinoff's testimony was inherently incredible, we defer to the probate court's assessment of credibility because of its unique vantage point.

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abusive efforts to prevent Court P. Bentley from filing suit or obtaining trust funds regarding the post 1996 claims. However, the probate court rejected that testimony when it upheld the trustees' fee request.

Accordingly, we cannot conclude that the trial court's findings were clearly erroneous.⁵ *Erickson Estate, supra.*

Affirmed.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ Donald S. Owens

⁵ We note also that petitioners did not raise in the statement of questions presented a challenge to the probate court's ruling based on MCR 2.517. *Persinger, supra.*