STATE OF MICHIGAN

COURT OF APPEALS

In re HARRIET FISHBECK TRUST.

WILLIAM M. FISHBECK,

Petitioner-Appellant,

v

CATHERINE A. BRAUN,

Respondent-Appellee.

UNPUBLISHED
October 5, 1999

No. 208585
Washtenaw Probate Court
LC Nos. 91-096477 TI
90-094073 SE

Before: Markey, P.J., and McDonald and Fitzgerald, JJ.

PER CURIAM.

Petitioner appeals as of right, challenging the probate court's order awarding respondent attorney fees in the amount of $148,564.49, which were incurred in connection with the litigation of the Fishbeck family farm and other property included in the trust estate of Harriet Fishbeck. See *In re Harriet Fishbeck Trust*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 1996 (Docket No. 170708). Petitioner also challenges the trial court's refusal to surcharge respondent for allegedly breaching her fiduciary duties. We reverse and remand for further proceedings.

I

The trial court determined that respondent was entitled to reimbursement for the attorney fees she incurred in the subject litigation pursuant to a family agreement that required petitioner to provide respondent with financial assistance if her financial situation required such assistance. Petitioner first argues that the probate court did not have subject-matter jurisdiction to determine the existence of this alleged family agreement and to award attorney fees on the basis of that agreement. We disagree.

Subject-matter jurisdiction is a question of law that this Court reviews de novo. *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 395; 554 NW2d 345 (1996). As a general matter, jurisdiction does not inhere in a court; it is conferred on it by the power that creates it. *Detroit v Rabaut*, 389 Mich 329, 331; 206 NW2d 625 (1973). Subject-matter jurisdiction is the right of the

court to exercise judicial power over a 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. *Joy v Two-Bit Corp*, 287 Mich 244, 253; 283 NW 45 (1938). A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint. *Grubb Creek Action Committee v Shiawassee Co Drain Comm'r*, 218 Mich App 665, 668; 554 NW2d 612 (1996). If it is apparent from the allegations that the matter alleged is within the class of cases with respect to which the court has the power to act, then subject-matter jurisdiction exists. *Id*.

In *McCormick v McCormick*, 221 Mich App 672, 679-680; 562 NW2d 504 (1997), this Court observed:

> Under MCL 700.1 *et seq*.; MSA 27.5001 *et seq*., the probate court has concurrent jurisdiction of certain matters that are ancillary to the settlement of an estate or trust. Specifically, MCL 700.22; MSA 27.5022 provides in pertinent part:
>
> (1) In addition to the jurisdiction conferred by section 21 [MCL 700.21; MSA 27.5021] and other laws, the probate court has concurrent legal and equitable jurisdiction of the following matters involving an estate of a decedent, ward, or trust:
>
> (a) To determine property rights and interests.
>
> (b) To authorize partition of property.

In the instant case, the probate court had subject-matter jurisdiction over the "family agreement" claim and the related issue of attorney fees because these were matters ancillary to the settlement of the Harriet Fishbeck Trust. Specifically, "the family agreement" issue arose from petitioner's allegation in his complaint that he was entitled to the family farm pursuant to a 1956 oral agreement with his parents. In its prior judgment, upheld by this Court, the probate court determined that the 1956 agreement was amended to provide that respondent's children (or those named in her will) would receive one-half of the farm property upon petitioner's death (or sale of the property while he was still alive). The probate court further determined that the 1956 agreement required petitioner to provide respondent with financial assistance in the event of her financial need.[1] Given that the probate court had concurrent legal and equitable jurisdiction to determine property rights and interests and to authorize the partition of property involving the Harriet Fishbeck Trust, the probate court had subject-matter jurisdiction over the "family agreement" claim, as well as subject-matter jurisdiction to determine whether attorney fees could be awarded pursuant to that agreement.

II

We next address petitioner's claim that the probate court erred in determining that respondent was entitled to attorney fees pursuant to the "financial assistance" condition of the family agreement.

Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, or judicial exception. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 474; 521 NW2d 831 (1994); *Auto Club Ins Ass'n v State Farm Ins*, 221 Mich App 154, 167; 561

NW2d 445 (1997). However, contractual provisions for the payment of reasonable attorney fees as damages are enforceable. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548-549; 362 NW2d 823 (1984).

In the instant case, the parties do not dispute that the family agreement, whereby "[petitioner] would help [respondent] in the event of her financial need," as set forth in the probate court's November 22, 1993, judgment, is the basis for the probate court's award of attorney fees in this case. However, petitioner claims that the trial court erred in determining that respondent was entitled to attorney fees under this agreement. Before determining whether the trial court erred in awarding attorney fees pursuant to the family agreement, it is first necessary to determine the nature of the agreement. *Brauer v Hobbs*, 151 Mich App 769, 774; 391 NW2d 482 (1986). Where construction of a contract is required, "interpretation requires knowledge of the entire context, facts as well as words." *Id.*, citing 1A Corbin on Contracts, § 261, p 476. See also *Smith v First Nat'l Bank*, 177 Mich App 264, 268; 440 NW2d 915 (1989).

The agreement that petitioner would assist respondent if she required financial assistance was part of the 1956 agreement between petitioner and his parents in which it was agreed that petitioner would acquire the family farm upon the death of his parents if he returned home and worked the farm. The probate court found that respondent, who was having some "hard times," was living in California and "was all but out of the family picture" at the time. Therefore, as part of the agreement with his parents, petitioner agreed to assist respondent financially if necessary.

Considering the circumstances as they existed at the time petitioner and his parents entered into the subject agreement, we do not construe the "financial assistance" requirement as contemplating reimbursement for respondent's attorney fees incurred in the litigation of the Harriet Fishbeck Trust. Rather, the circumstances indicate that it was the intent of the parties to provide respondent with basic material support (e.g., food, clothing, shelter) in the event it became necessary. This interpretation is borne out by the fact that petitioner and his parents provided such support to respondent when she and her children returned to live with them after respondent's first marriage failed, and before she remarried in 1964. The record further shows that petitioner and his parents ceased providing material support to respondent once she remarried in 1964. Thus, we construe petitioner's agreement to assist respondent "in the event of her financial need" to mean that petitioner was required to provide respondent with basic material support such as food, clothing, or shelter if her circumstances required it.

Our conclusion that an award of attorney fees was not warranted under the family agreement is further supported by the recognition that payment of attorney fees and litigation costs is generally precluded in the absence of an express agreement, *Roan v Murray*, 219 Mich App 562, 569-570; 556 NW2d 893 (1996), and that "[a]n express authorization is one that is clear and definite, that is, set forth explicitly in words that are neither dubious nor ambiguous." *Kenner v Watha*, 115 Mich App 521, 529-530; 323 NW2d 8 (1982).[2]

Furthermore, even assuming for the sake of argument that the agreement between petitioner and his parents can be construed in a manner that would envision payment of attorney fees in an appropriate

case, we conclude that the probate court clearly erred in finding that respondent sufficiently established a need for financial assistance to justify the award of attorney fees in this case.

Initially, we note that the probate court's finding in its December 13, 1997, order that respondent was "financially in need" contradicts its own previous finding in the November 22, 1993, judgment that respondent "remarried after returning to Michigan during her parents' lifetimes and became *financially secure*" (emphasis provided). In any event, the record clearly belies any suggestion that respondent was in need of financial assistance. On the contrary, the record indicates that respondent and her husband were multimillionaires.

We agree with petitioner that there is no apparent justification for the probate court's decision not to consider respondent's marital holdings in determining her financial need under the agreement. First, as petitioner suggests, there is absolutely no evidence that petitioner and his parents did not intend to consider respondent's marital assets and earnings in determining whether she was in need of financial assistance within the meaning of the family agreement. Second, the record indicates that respondent and her husband's extensive land holdings and much of their other property were titled in their names as "tenants by the entirety," and that they have reported their earnings on joint tax returns for thirty-three years. As petitioner notes, as tenants by the entirety, respondent is equally entitled to the rents, produce, income, profits and control of the properties, MCL 557.71; MSA 26.210(1), and, should she survive her husband, will be entitled to the property in fee. *Fisher v Provin*, 25 Mich 347 (1872); *Aetna Ins Co v Resh*, 40 Mich 241 (1879). Third, we find no adequate justification for respondent's claim that the court could not consider her joint assets because her husband was not a party to this litigation. Although it is true that respondent's husband was not a party, he stood to benefit if respondent was successful in advancing her claim that she was entitled to a 1/3-fee simple interest in the family farm and a 1/2-interest in the assets of Murray's "Trust A," consisting of farm equipment and cash. Thus, it is clear that respondent's husband had a financial interest in the outcome of this litigation. For these reasons, we hold that the probate court erred in awarding respondent attorney fees on the basis of the "financial assistance" condition of the family agreement.

III

Petitioner next argues that the probate court erred in denying his motion for attorney fees. Petitioner claims that respondent should be surcharged for any detriment to the estate under MCL 700.544(1); MSA 27.5544(1) and MCL 700.818(2) and (4); MSA 27.5818(2) and (4), because, as a co-trustee of Murray's trust, she breached her fiduciary duties to petitioner, a beneficiary under the trust. In denying petitioner's request for attorney fees predicated on respondent's alleged breach of her fiduciary duties, the probate court stated that "[t]here is nothing set forth in [petitioner's] position that would suggest to the court the appropriateness of granting attorney fees to him under the circumstances of this case." We disagree with this determination.

In deciding this issue, it is necessary to review the factual background giving rise to petitioner's claim. In this case, petitioner amended his original complaint to add a third claim alleging that respondent used undue influence and breached her fiduciary duties as a co-trustee of Murray's trust by

secretly assisting Harriet in changing the terms of her trust and Murray's trust and concealing these changes from petitioner.

At trial, there was evidence showing that respondent assisted Harriet in amending the trusts and that she concealed these changes from petitioner. In an affidavit introduced into evidence at trial, respondent stated that Harriet agreed to change her will and trust and Murray's "Trust A" in order "to make things more even between Bill's family and my family." There was also testimony that respondent and Harriet agreed to conceal the changes from petitioner in order to avoid a confrontation with him. On December 3, 1986, respondent drove Harriet to attorney Urquhart's office and was present at the conference when Harriet and Urquhart discussed what assets could be transferred to respondent from Murray's "Trust A," of which respondent and petitioner were co-trustees. Before the changes were made, attorney Urquhart sent a letter to respondent on December 9, 1986, in which he "strongly recommended" arranging a meeting with petitioner to discuss any changes.

The record shows that respondent did not inform petitioner about the letter or about Harriet's intention to amend her will and the trusts. The record further shows that respondent then drove her mother two other times to see attorney Urquhart for the purpose of revoking Harriet's previous will and trust dated February 13, 1981, amending the trusts, and executing a new will. Nevertheless, no written notice was provided to petitioner as required under the terms of Murray's trust. Petitioner did not find out about the amendments until after his mother had died, when he was notified by Urquhart. Subsequently, when petitioner asked respondent on several occasions about how Harriet got to Urquhart's office to effect the changes, respondent denied knowing anything about it. At trial, respondent mendaciously testified that she did not know why Harriet wanted to see Urquhart. Respondent also denied that she influenced her mother into amending the trusts and executing a new will. However, respondent admitted that Harriet gave her money to pay for Urquhart's services, and that the fee statement was sent to respondent's house to keep petitioner from finding out about the amendments.

In its Judgment of Specific Performance of Oral Contract, the probate court addressed, but did not decide, the undue influence claim, and did not address at all the breach of fiduciary duty claim:

> There is a suggestion [sic] that Harriet changed her mind because of overreaching by Catherine, but that point is unnecessary for the court to reach. (There is no question that Catherine transported Harriet at least twice to the attorneys [sic] office for the purpose of having the trust and will changed to include her, that she paid the attorneys fee from her own account and that she denied to Bill that she had done these things).

Thus, even though the probate court found it unnecessary to decide petitioner's allegations of undue influence and breach of fiduciary duty, it did find factual support for these claims:

> 11. Bill's mother, clandestinely transported to a lawyer by Catherine, then changed her estate plan to provide that the farm would not go to Bill, as promised, but

instead would be divided [sic][3] between Bill and his sister Catherine. This was inconsistent with the agreement that was reached by the parties.

In the prior appeal in this matter, petitioner raised both the undue influence and the breach of fiduciary duty issues, but this Court declined to address the issues "[b]ecause the lower court declined to enforce Harriet's amended will and trust, a ruling on the undue influence issue would not have altered the probate court's judgment" and "the lower court's decision in fact granted Bill most of the relief he had requested."[4]

MCL 700.501; MSA 27.5501 provides that "[a] fiduciary shall stand in a position of confidence and trust with respect to his . . . beneficiaries[.]" Under MCL 700.813; MSA 27.5813, "[e]xcept as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with property of another[.]" *In re Messer Trust*, 457 Mich 371, 380; 579 NW2d 73 (1998). Further, MCL 700.818(2) and (4); MSA 27.5818(2) and (4) provide, respectively, that "[a] trustee is personally liable for obligations arising from ownership or control of property of the trust estate" and that "[t]he question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, indemnification, or other appropriate proceeding."

This Court discussed the duties of a fiduciary in *In re Green Charitable Trust*, 172 Mich App 298, 312-315, 323-324; 431 NW2d 492 (1988):

> In general, the duties imposed on the trustee are determined by consideration of the trust, the relevant probate statutes and the relevant case law. A claimed breach of duty and any resulting liability is tested by the facts of each case.
>
> The standard of care expected of a trustee is that of "a prudent man dealing with the property of another" . . . To be prudent includes acting with care, diligence, integrity, fidelity and sound business judgment. In addition, the courts have imposed on the fiduciary duties of honesty, loyalty, restraint from self-interest and good faith.
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> * * *
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> Specific duties of trustees include keeping the beneficiaries "reasonably informed of the trust and its administration." MCL 700.814; MSA. 27.5814.
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> * * *
>
> It is a fundamental principle that the trustee must display complete loyalty to the interests of the beneficiary, to the exclusion of all selfish interests or consideration of the interests of third parties. This principle is based on the understanding that a person acting in two capacities or in behalf of two interests may consciously or unconsciously favor one side over the other. It is not necessary that the trustee gain from the transaction to find disloyalty. "In its desire to guard the highly valuable fiduciary relationship against improper administration, equity deems it better to forbid disloyalty

> and strike down all disloyal acts, rather than to attempt to separate the harmless and the harmful by permitting the trustee to justify his representation of two interests." [Citations omitted.]

See also *In re Childress Trust*, 194 Mich App 319, 324, 328; 486 NW2d 141 (1992).

In the instant case, the record indicates that respondent, a co-trustee of Murray's trust, violated her fiduciary duties by failing to provide petitioner with "relevant information about the assets and administration of the trust" so as "to enable him to enforce his rights under the trust or to prevent or redress a breach of trust." *In re Green Charitable Trust*, *supra*; *In re Childress Trust*, *supra*. Further, the record indicates that respondent did not act with honesty, loyalty, restraint from self-interest and good faith when she assisted Harriet in amending Murray's trust and executing a new will, and then concealed these changes from petitioner. Further, it is apparent that respondent violated her fiduciary duty by failing to "display complete loyalty to the interests of the beneficiary, to the exclusion of all selfish interests or consideration of the interests of third parties." As a co-trustee of Murray's trust, respondent had a fiduciary duty to avoid self-dealing by advancing her own interests, and to avoid a conflict of interest by promoting the interests of her own children over those of petitioner.

Because respondent violated her fiduciary duties, she may be liable for surcharge after a determination in an appropriate proceeding. According to petitioner, respondent should be held liable for his attorney fees because she was to blame for causing him to file his petition seeking to determine whether respondent was a beneficiary of the trusts and for forcing him to defend against her unsuccessful petition alleging conversion and seeking his removal as co-trustee. See *In re Gerber Trust*, 117 Mich App 1, 15-17; 323 NW2d 567 (1982); *In re Valentino*, 128 Mich App 87, 95-96; 339 NW2d 698 (1983); *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996). To make this determination, we remand this case to the probate court for further proceedings to ascertain what attorney fees, if any, respondent may be liable for the breach of her fiduciary duties. Any amount assessed as a surcharge is within the discretion of the probate court. *In re Tolfree's Estate*, 347 Mich 272, 288-289; 79 NW2d 629 (1956).

Finally, we decline to address petitioner's claim that the probate court erred in failing to impose mandatory sanctions under MCR 2.116(F) and MCR 2.114(E), because petitioner has not sufficiently briefed this issue, thus effectively abandoning it. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ E. Thomas Fitzgerald

[1] Because this Court did not address this aspect of the agreement in its prior unpublished opinion, and because the issue of subject-matter jurisdiction was never raised on appeal or ruled upon by this Court, there was no appellate ruling that binds this Court or the probate court with regard to that issue. Thus, contrary to what respondent argues, the law of the case doctrine is not applicable to this issue. *Johnson v White*, 430 Mich 47, 52-53; 420 NW2d 87 (1988); *Webb v Smith (After Second Remand*), 224 Mich App 203, 209-210; 568 NW2d 378 (1997); *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559-560; 528 NW2d 787 (1995).

[2] Apart from the absence of any express authorization for an award of attorney fees, we also conclude that attorney fees were not warranted pursuant to the court's inherent authority within its equity jurisdiction to award attorney fees on the basis that "[respondent's] efforts to enforce the agreement and keep the asset intact within the family is a cause worthy of expenditure of fees." *Walch v Crandall*, 164 Mich App 181, 193; 416 NW2d 375 (1987). Similarly, there is no equitable principle justifying an award of attorney fees in this case, given that respondent violated the equitable maxim that one who comes into equity must come with "clean hands." *Giannetti v Cornillie*, 209 Mich App 96, 102-103; 530 NW2d 121 (1995); *Royce v Duthler*, 209 Mich App 682, 688-689; 531 NW2d 817 (1995). Nor is there any "unusual circumstance" justifying attorney fees as a element of costs or damages in this case. *Taylor v BCBSM*, 205 Mich App 644, 658; 517 NW2d 864 (1994); *Brooks v Rose*, 191 Mich App 565, 574-575; 478 NW2d 731 (1991).

[3] The farm was not "divided," i.e. split in two, under Harriet's amended trust and will executed on February 12, 1987. Rather, respondent received 1/3 of the farm property in fee simple (Harriet's portion), while petitioner received 2/3 of the farm in fee simple. Moreover, respondent also received 1\2-interest of Murray's trust consisting of farm equipment and cash.

[4] We again note that, contrary to respondent's argument, the question whether respondent breached her fiduciary duties is not governed by the law of the case doctrine, because neither the probate court in its November 22, 1993, judgment, nor this Court in its unpublished opinion in Docket No. 170708, expressly ruled on that issue.