STATE OF MICHIGAN

COURT OF APPEALS

In re WILLIAM W. WEIGLE REVOCABLE TRUST.

TIMOTHY McCONNELL, Co-Trustee, and LINDA McCONNELL,

Petitioners-Appellants,

v

STEPHEN DEMYANOVICH, Co-Trustee,

Respondent-Appellee.

UNPUBLISHED
June 19, 2014

No. 314722
Jackson Probate Court
LC No. 12-001336-TV

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Petitioners, Timothy and Linda McConnell, appeal as of right the probate court's order, which granted summary disposition to respondent, Stephen Demyanovich, pursuant to MCR 2.116(C)(7) and (8), and dismissed petitioners' claims challenging the validity of the trust of William W. Weigle. The probate court determined that the doctrine of election barred petitioners' claims because they accepted a benefit under the trust and then sought to challenge that same trust before tendering back the benefit received. We affirm.

Petitioners and respondent were neighbors of Weigle, and they all claimed to have provided care and services to him during his lifetime, such as housekeeping, personal care, maintenance, and bill payments, for which they understood they would be compensated for when he died. Weigle executed a Last Will and Testament and the William W. Weigle Revocable Trust on November 22, 1994. He amended those documents three times: January 7, 2005, December 11, 2007, and December 8, 2011. Notably, he reserved the right to amend and revoke the trust in all amendments. The 2007 amendments are when Weigle added petitioners and respondent as beneficiaries, allegedly because they provided care and services to him and promised to continue to do so. The parties do not dispute Weigle's 1994 and 2005 estate planning documents, or that he had a valid trust funded with his house and a Comerica securities account valued at approximately $2,000,000. The dispute arises between the 2007 and 2011 trust amendments.

Pursuant to the 2007 trust amendment, petitioners were to receive a one-half interest in Weigle's house and 72 percent of the balance of the trust assets, which included the $2,000,000 securities account. Respondent was to receive 19 percent of the assets. Weigle, however, amended his trust in 2011, granting petitioners all interest in the house and granting respondent 100 percent of the balance of the trust assets. Upon Weigle's death in January 2012, respondent and Mr. McConnell, in their capacities as co-trustees, executed a Deed of Trust conveying the house to petitioners, and the deed was recorded. Respondent sent petitioners the Notice to Beneficiary of Interest in Trust on April 6, 2012, along with copies of the original trust and its amendments.

Subsequently, petitioners petitioned the probate court to compel the estate to transfer to petitioners the property they were to receive pursuant to the 2007 estate planning documents, specifically, the percentage of the $2,000,000 securities account. Petitioners alleged that the 2007 trust amendments were made pursuant to an oral contract with Weigle not to revoke that trust provision, and the 2011 amendments constituted a breach of that contract. They also filed a second petition in which they sought to remove respondent as trustee and to object to the 2011 trust amendment.

Respondent moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that a contract to make a will must be evidenced in the will itself or by a writing signed by the decedent pursuant to MCL 700.2514, and here it was not. A few weeks later, on May 22, 2012, respondent amended his motion to argue that petitioners' claims were barred by the doctrine of election because petitioners received and accepted benefits from the trust and did not tender back the distributions, and as such, petitioners failed to state a claim for relief pursuant to MCR 2.116(C)(8). Petitioners then attempted to tender back the property on May 30, 2012. Having determined that the doctrine of election required petitioners to tender back the property before initiating an action challenging the validity of the trust, regardless of the type of claims being asserted, the trial court granted respondent's motion for summary disposition and dismissed all of petitioners' claims. On appeal, petitioners argue that the trial court erred in this regard.

We review de novo a trial court's grant of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Although it is not required, a party may support a motion made pursuant to MCR 2.116(C)(7) with documentary evidence, and the court must consider it. *Id.* When reviewing a motion pursuant to MCR 2.116(C)(7), "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.*

A motion made pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden*, 461 Mich at 119. Summary disposition pursuant to MCR 2.116(C)(8) may be granted where the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotation marks and citation omitted).

The doctrine of election is derived from the law of equitable estoppel and applies in the context of both wills and trusts. *In re Beglinger Trust*, 221 Mich App 273, 276-277; 561 NW2d 130 (1997). "Under the doctrine of election, a 'person cannot accept and reject the instrument,

or, having availed himself of it as to part, defeat its provisions in any other part.' " *Id.* at 276, quoting *Holzbaugh v Detroit Bank & Trust Co*, 371 Mich 432, 436; 124 NW2d 267 (1963). If a party wishes to challenge the validity of the trust after accepting the distribution, then the party must withdraw the acceptance by tendering back the distribution before initiating the action. *Beglinger Trust*, 221 Mich App at 278. Therefore, contrary to petitioners' argument, the presence of fraud or undue influence, or even petitioners' ignorance in failing to read the trust documents before signing them, do not provide a basis to avoid the imposition of the doctrine of election, because petitioners failed to tender back the benefits received *before* initiating the present action. See *id.*

Petitioners argue, however, that they did not avail themselves of the 2011 trust amendment, that they received the house under the 2007 trust amendment. This argument is without merit, because a trust instrument, which includes the terms of the trust and any amendment to a term of the trust, must be read and construed as a whole, MCL 700.7103(m); *Detroit Trust Co v Rivard*, 315 Mich 62, 70-71; 23 NW2d 206 (1946), and having availed themselves "as to part" of the trust instrument, they cannot "defeat its provisions in any other part." *Beglinger Trust*, 221 Mich App at 276.

Petitioners also argue that they could not tender back the property due to deed errors, but this argument is irrelevant given that petitioners never attempted to tender back the property before initiating the action. The law is clear: to overcome the doctrine of election, petitioners were required to tender back the property before initiating the action.

Petitioners also argue that the doctrine of election does not bar contract claims, particularly, in this context, where they claim they are not challenging the validity of the trust amendment. Notably, however, petitioners filed two petitions in which they seek to object to the 2011 trust amendment and to compel the court to transfer property per the 2007 trust amendment. Contrary to what petitioners argue, they are attempting to challenge the trust. Further, this Court has made it clear that "[u]nder the doctrine of election, a party who accepts a benefit under a will [or trust] adopts the whole and renounces *every* right inconsistent with it." *Beglinger Trust*, 221 Mich App at 277. Petitioners accepted a benefit under the trust and are now arguing that that trust was a breach of contract to make a will. This is an attempt to "blow hot and cold at the same time" and is barred under the doctrine of election. *Id.* at 276 (quotation omitted).

Finally, petitioners argue that there was evidence of a contract to make a will and the trial court erred by declining to consider the issue. Because petitioners failed to tender back the property, this claim is barred and we need not address this issue. Nevertheless, we find that there is no evidence that the parties had an oral contract to make a will. Weigle had a will and trust evidencing his intent. The trust does not contain a provision stating the material provisions of a contract, or even expressly referencing the contract. In fact, Weigle reserved the right to amend his trust when he created it in 1994, as well as with every subsequent amendment, which as noted in *Soltis v First of America Bank-Muskegon*, 203 Mich App 435, 442-443; 513 NW2d 148 (1994), contradicts petitioners' argument that any contract existed, as such provision evidences the exact opposite intention.

Petitioners rely on *In re McKim Estate*, 238 Mich App 453; 606 NW2d 30 (1999), to argue that even if an implied in fact contract claim were barred, an implied in law contract claim could proceed. This Court did note that claims to enforce oral agreements must be in writing under MCL 750.2514, but the "Legislature left open the possibility that recovery may be sought under a contract implied in law or quantum meruit theory." *McKim Estate*, 238 Mich App at 460-461. However, a contract implied in law is based on the premise that no promise was made, *id.* at 457, and here, petitioners assert that Weigle made a promise to them. Additionally, even if petitioners did not assert that a promise was made, they received the house, the contents, and all personal property under the trust and have failed to show that this was not reasonable compensation for the services they rendered to Weigle.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens