STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF LOUIS HENRY BITTO III.

ESTATE OF LOUIS HENRY BITTO III, by JOANN BUSH, Personal Representative,

Appellant,

v

LOUIS HENRY BITTO IV,

Appellee.

UNPUBLISHED
August 21, 2018

Nos. 339083; 339507
Monroe Probate Court
LC No. 15-000538-DA

Before: CAMERON, P.J., and RONAYNE KRAUSE and TUKEL, JJ.

PER CURIAM.

After the death of Louis Henry Bitto III (the "decedent") in 2015, appellant Joann Bush ("appellant") applied for informal probate of the decedent's 2015 will, which named appellant as personal representative of the decedent's estate. The decedent's son, appellee Louis Henry Bitto IV ("appellee"), contested the 2015 will and maintained that the decedent and his wife, Judith Bitto, previously executed a joint will in 2005, which became irrevocable upon Judith's death in 2006. The parties filed cross-motions for summary disposition regarding the enforceability of the competing wills. The probate court granted appellee's motion and denied appellant's motion, concluding that there was no genuine issue of material fact that the 2005 will created a binding contract between the decedent and Judith, which became irrevocable upon Judith's death in 2006, thereby rendering the proffered 2015 will void and invalid. Appellant appeals as of right, and we now affirm.[1]

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[1] Appellant filed a claim of appeal from both the probate court's June 16, 2017 written decision deciding the parties' cross-motions, and a July 20, 2017 order incorporating that decision. Although appellee challenges this Court's jurisdiction as of right over both appeals, appellee raised these same challenges in a prior motion to dismiss, which this Court denied. *In re Bitto Estate*, unpublished order of the Court of Appeals, entered October 16, 2017 (Docket Nos.

I. BACKGROUND

The parties agree that the decedent and his wife Judith executed a joint will in 2005, but the parties disagree as to whether that will created a contract that became irrevocable upon Judith's death in 2006. The 2005 will included the following pertinent provisions:

> We, **Louis H. Bitto, III** and **Judith Ann Bitto** . . . , being of sound mind and disposing memory, for the purpose of making disposition upon our death, of our entire estate, real, personal and mixed, and any estate which we may have power to dispose of, wherever situate, whether owned and possessed by us at the date of execution hereof or acquired by us after such date, do hereby make, publish and declare this to be our Last Will and Testament.
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> * * *
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> ALL of our estate, whether held jointly, severally, or as tenants in common, both real, personal and mixed, shall be held by the survivor of us with the right to the income, rents or profits of all our property for the life of the survivor, and so much of the principal as the survivor may desire from time to time for his or her care and support with his or her sound discretion, and with the further right on the part of the survivor to sell and execute conveyances of, without the authority or approval of any Court, any or all of the property, to invest and reinvest the same, and to use the proceeds as he or she may deem proper during the survivor's lifetime for his or her care and support without being required in any manner to account therefore.
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> Upon the death of the survivor of us, or in the event of our simultaneous deaths, WE GIVE, DEVISE AND BEQUEATH, all of the rest, residue and remainder of our estate, real, personal, or mixed, of whatsoever nature and wheresoever situate, to which we may be entitled or which we may own, and any estate which we may have the dispose of at death, and which has not been heretofore disposed of in this Will to our three children, **SHERYL L. DAUTERMAN, BRIAN M. BITTO** and **LOUIS H. BITTO, IV**, and to Louis H. Bitto, III's son, **TERRY MICHAEL WOODS** in the following shares: . . .

At issue is whether the probate court erred in ruling that the 2005 will established a binding contract that became irrevocable upon Judith's death in 2006, thereby rendering a later will executed by the decedent in 2015 void or invalid.[2]

II. STANDARD OF REVIEW

339083 & 339507). Because the jurisdictional challenges have already been resolved, we do not revisit those challenges in this opinion.

[2] The 2015 will added appellant as a beneficiary and omitted appellee entirely.

The probate court decided this issue in the context of the parties' cross-motions for summary disposition. We review a probate court's decision to grant summary disposition de novo. *In re McKim Estate*, 238 Mich App 453, 455; 606 NW2d 30 (1999). Although the probate court's order refers to MCR 2.116(C)(8), (9), and (10), the court's written decision is based on its determination that there is no genuine issue of material fact that the 2005 will established a binding contract that became irrevocable after the death of the decedent's wife. Therefore, the probate court's decision is appropriately analyzed under MCR 2.116(C)(10), which provides that a party is entitled to summary disposition when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."

III. ANALYSIS

The parties agreed that the decedent properly executed the 2005 will with his wife, but the probate court was asked to rule on whether the terms of that will made it irrevocable, which would mean that the decedent could not change his estate plan by way of the 2015 will. We conclude that the probate court correctly determined that the 2005 will was a contract, and appellee was entitled to specific performance of that contract.

MCL 700.2514 provides:

> (1) If executed after July 1, 1979, a contract to make a will or devise, not to revoke a will or devise, or to die intestate may be established only by 1 or more of the following:
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> (a) Provisions of a will stating material provisions of the contract.
>
> (b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.
>
> (c) A writing signed by the decedent evidencing the contract.
>
> (2) The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

A party seeking specific performance of a contract to leave property pursuant to a will has the burden of proving that contract. *In re McKim Estate*, 238 Mich App at 456.

In this case, appellee relied on the terms of the will alone to establish a contract. MCL 700.2514(1)(a) expressly provides that a contract to make a will, or not revoke a will, may be established by the "[p]rovisions of a will stating material provisions of the contract." Thus, it is not necessary that a contract be established by a separate document. However, simply executing a joint will does not create a presumption of a contract not to revoke the will. MCL 700.2514(2).

The terms of the 2005 will created a life estate in the surviving spouse, after one spouse predeceased the other spouse, even though the surviving spouse could dispose of the estate's property during his or her lifetime. See *Quarton v Barton*, 249 Mich 474; 229 NW 465 (1930) (a grant of an estate to a spouse for her lifetime, with the remainder to named individuals, creates a life estate, even though the surviving spouse has the right to dispose of the estate's property

during her lifetime). The 2005 will provides that, upon the death of the surviving spouse, the estate shall be divided among the couple's three children and the decedent's son. While the will does not explicitly state that it is irrevocable, the probate court relied on *Rogers v Rogers*, 136 Mich App 125, 131; 356 NW2d 288 (1984), for the following rule:

> As a general rule, a mutual or joint will may be revoked by either of the co-makers, provided it was not made in pursuance of a contract. But, where such a will has been executed in pursuance of a contract or agreement entered into by the testators to devise their separate property to certain designated beneficiaries, subject to a life estate or other interest in the survivor, it is generally held irrevocable when, upon the death of one, the survivor avails himself of the benefits of the devise in his favor.
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> Thus, for the terms of the will to be irrevocable upon the death of one of the parties, an agreement between the parties must be established. The general rule is stated as follows:
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> > "A will jointly executed by two testators may disclose so clearly that it is the product of a contract between them, that the will itself is sufficient evidence to establish the contract." [Footnotes omitted.]

The rule in *Rogers* was based on *Schondelmayer v Schondelmayer*, 320 Mich 565; 31 NW2d 721 (1948). In that case, which is factually similar to the instant case, our Supreme Court considered whether a joint will became irrevocable upon the death of the first spouse. The Court reviewed the language of the will to determine if the will itself was evidence of a contract to make the will irrevocable upon the death of the first spouse. The Court stated:

> On this appeal we must first determine whether under the record the trial court was correct in decreeing that Charles and Cathrin Schondelmayer "executed a joint and mutual will *which contains an agreement therein for the executing of a joint and mutual will*."
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> We are not in accord with appellant's contention that a recital in the will itself of the agreement by the parties to constitute the instrument their joint mutual will is not competent evidence of such contract. The will involved in the instant case contains the following:
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> "It is hereby agreed that whichever is deceased first, be it Charles Schondelmayer or Cathrin Schondelmayer, the survivor shall pay the funeral expenses and all just debts of either or both, and shall thereafter become the sole owner of any and all property owned by either or both of them. The said survivor shall live as he or she has been accustomed, using so much of the income or principal as may be necessary for his or her comfort of [or?] convenience.
>
> > "This instrument is hereby declared to be the last will and testament of either, as the said survivor, and after the decease of the said survivor, the estate shall be divided as follows."

> Immediately following the foregoing, the will contains the provisions for the three sons as above noted. The words just above quoted from the will, which was solemnly executed by the respective parties, must be held to be competent evidence of an understanding and agreement between the parties that after the death of one of them the will should be and remain the last will and testament of the survivor in accordance with the terms of which disposition should be made of the estate.
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> > "A contract incorporating the mutual will of the parties is sufficient evidence of the agreement in pursuance of which the will was executed.
> >
> > "Upon the death of one party to a contract to make mutual will, the agreement underlying the will becomes irrevocable and right of action to enforce it vested in the beneficiaries." [*Schondelmayer*, 320 Mich at 571-572 (citation omitted).]

Based on *Rogers* and *Schondelmayer*, the probate court correctly held that the joint and mutual will executed by the Bittos in 2005 was intended to be irrevocable upon the death of the first spouse. The Bittos prepared a joint and mutual will in which they planned to dispose of their joint estate to designated beneficiaries, subject to a life estate in the surviving spouse. Their will was almost identical to the wills in *Rogers* and *Schondelmayer*, which were held to be irrevocable upon the death of the first spouse. Accordingly, the probate court correctly held that the 2005 will became irrevocable upon Judith Bitto's death. As a result of being bound by their mutual agreement regarding their 2005 will, the decedent could not dispose of the estate by means of the will he executed in 2015.

Appellant argues that even if the 2005 will created a binding contract that became irrevocable upon Judith's death, that does not invalidate the 2015 will. According to appellant, appellee may maintain an action for breach of contract, but that does not render the 2015 will invalid.

In *In re VanConett Estate*, 262 Mich App 660, 666; 687 NW2d 167 (2004), this Court observed "[w]hen parties enter a contract to make a will, the contract, rather than the will itself, becomes irrevocable by the survivor after the death of a party." Nevertheless, "to the extent any subsequent wills contradicted the contract [to make a will], plaintiffs have a right to seek specific, [sic] performance of the agreement." *Id*. In *Kozyra v Jackman*, 60 Mich App 7, 12-13; 230 NW2d 284 (1975), this Court also recognized that the remedy for breach of a contract for a mutual and joint will is specific performance of that contract, which is distinguishable from probating a will. This Court stated:

> We further hold that the probate of the 1967 will did not constitute res judicata as to the present controversy. The issue in the probate court was whether the document presented was the last will of the decedent. The probate court has limited statutory jurisdiction. MCLA 701.19 . . . . It is not a ground for contest to the probate of a will that it breaches a contract made under a prior joint and mutual will. The injured's remedy lies in his right of action to enforce the

> contract, not in a contest of the probate of the will which constitutes the breach. See *Keasey v Engles*, 259 Mich 178, 181-182; 242 NW 878, 879-880 (1932). See also 57 Am Jur, Wills, § 715, 716, pp 485, 486; Annotation, *Joint, mutual and reciprocal wills*, 169 ALR 9, 53-55, 60, 81. In short, a judgment probating a revoking will is not res judicata as to an action for specific performance of a contract manifested by the earlier, revoked will. [*Kozyra*, 60 Mich App at 12-13.]

In this case, the estate remained open and unsettled, and the probate court had jurisdiction to decide appellee's challenge to the 2015 will. Indeed, the probate court's jurisdiction has expanded since *Kozyra* was decided. See *Noble v McNerney*, 165 Mich App 586, 592-593; 419 NW2d 424 (1988). MCL 700.1302(a) grants the probate court jurisdiction over matters related to the administration of a decedent's estate. In particular, a probate court has jurisdiction to review a claim for specific performance of a contract related to a will. MCL 700.1303(1)(c) provides:

> (1) In addition to the jurisdiction conferred by section 1302 [MCL 700.1302] and other laws, the court has concurrent legal and equitable jurisdiction to do all of the following in regard to an estate of a decedent . . . .:
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> * * *
>
> (c) Authorize or compel specific performance of a contract in a joint or mutual will or of a contract to leave property by will.

In contrast to *Kozyra*, the probate court was still overseeing the administration of the decedent's estate when appellee raised his claim that the 2005 will was irrevocable. Having decided that the 2005 will established a binding contract that became irrevocable after the death of Judith in 2006, the probate court was authorized to compel specific performance of that contract, which necessarily precluded administration of the estate pursuant to the terms of the 2015 will. Accordingly, the probate court did not err in ruling that the 2015 will was void or invalid.

Affirmed.

/s/ Thomas C. Cameron
/s/ Amy Ronayne Krause
/s/ Jonathan Tukel