

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KARI PROVIZER, ERIC KUTINSKY, and THE  
ESTATE OF JULIA BARRIS,

UNPUBLISHED  
March 29, 2012

Plaintiffs-Appellants,

v

SHERRY JACKSON,

No. 298797  
Oakland Circuit Court  
LC No. 2010-107530-CZ

Defendant-Appellee.

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Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction). We affirm in part and reverse in part.

Julia B. Barris died on April 18, 2005. The decedent's will, dated November 4, 1968, provided that her daughters, Kay Kutinsky and defendant Sherry Jackson, were each to receive one-third of her estate. The will further provided that Kay's two children, plaintiffs Eric Kutinsky and Kari Provizer, were each to receive one-sixth of the decedent's estate.

At the time of death, the decedent's estate contained a brokerage account with the decedent and her two daughters, Kay and Sherry, listed as joint tenants with rights of survivorship. Plaintiffs allege that Kay and Sherry were made joint tenants on the brokerage account for the convenience of the decedent (not as recipients of a gift), and were only to access the account on behalf of the decedent in the case of emergency. Plaintiffs further allege that neither Kay nor Sherry accessed the account for their own purposes; plaintiffs state that both daughters understood the funds in the account remained solely the property of the decedent.

After the decedent's funeral, a formal meeting of the beneficiaries was convened by, and at the home of, Donald Barris, the brother-in-law of the decedent. At this meeting, the will was read to the beneficiaries, who then discussed matters of the estate and its distribution. Plaintiffs allege that at this meeting, the nature of the aforementioned brokerage account was recognized by all beneficiaries to be one of convenience. Plaintiffs further allege that based on this recognition, Kay and Sherry both promised to distribute, from the funds they received as joint tenants from the brokerage account, a total of one-sixth to Eric and one-sixth to Kari. Plaintiffs claim that defendant promised to distribute one-twelfth at the end of the then-current year

(2005), and one-twelfth at the beginning of the following year (2006). Plaintiffs claim that all of the beneficiaries believed defendant and trusted defendant to fulfill this promise.

The decedent's estate was opened in the Oakland County Probate Court and originally administered by Kay and defendant from April 25, 2005, through its initial closing on August 14, 2006.<sup>1</sup> Plaintiffs allege that based on the aforementioned agreement, the brokerage account was not listed as an asset of the estate, but was instead simply distributed one-half each to Kay and defendant. Plaintiffs allege that they relied on defendant's promise to distribute the brokerage account and fully expected defendant to fulfill this promise. From the brokerage-account funds she received, Kay distributed one-sixth of the original account to Eric and Kari in accordance with the alleged agreement. Plaintiffs allege that defendant declared that she would invest the funds promised to plaintiffs on their behalf. Plaintiffs allege that, because they believed defendant to be an experienced investor who, along with her husband, invested large sums of money, they trusted defendant to do so on their behalf.

Several years passed and defendant did not distribute any funds from her share of the brokerage account to plaintiffs. Plaintiffs then sued defendant. In count one of their complaint, plaintiffs allege that their forbearance from listing the brokerage account as an asset of the estate in probate in exchange for the promise of defendant to distribute funds from the account created a contract. Plaintiffs further claim that defendant breached this contract by not distributing the funds from the brokerage account, which has caused plaintiffs significant financial losses, in excess of \$25,000. In count two, plaintiffs claim that they detrimentally relied on defendant's promise to distribute the brokerage-account funds, and had a right to do so. More specifically, plaintiffs allege that had defendant not made the promise to distribute the brokerage-account funds as discussed above, they would have sought to have the assets of the brokerage account claimed by the estate and distributed in accordance with the will. As a result of this reliance, plaintiffs allege, they suffered substantial financial losses. Finally, in count three, plaintiffs allege that in retaining and, later, promising to invest their share of the brokerage-account funds, defendant became a fiduciary to plaintiffs with respect to those funds. Plaintiffs claim that defendant owed them a fiduciary duty based on this relationship to invest the funds in a conservative manner; accordingly, plaintiffs claim they are owed interest on the retained funds at a reasonable rate of return. Plaintiffs assert that the circuit court has exclusive jurisdiction over the claims in counts one through three.

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<sup>1</sup> On October 7, 2009, plaintiff Kari Provizer petitioned the Oakland County Probate Court to reopen the estate pursuant to count four of plaintiffs' complaint, a claim in the alternative, discussed below. By order dated November 18, 2009, the Oakland County Probate Court granted the petition and appointed Mark S. Frankel as independent personal representative; the proceedings remain pending. The personal representative has agreed to allow the individual plaintiffs to pursue their claim in this Court "using the name of the estate as necessary" but "without taking a position on the efficacy of such a claim, or the likelihood that such a claim could prevail."

In count four, plaintiffs allege in the alternative that if a trier of fact determines that defendant made no promises to plaintiffs in relation to the brokerage account, the account was nevertheless an account created for the convenience of the decedent. Accordingly, plaintiffs claim, the funds were an asset of the estate rather than funds of the surviving joint tenants. Therefore, plaintiffs allege, the funds have been wrongfully retained by defendant and should be returned to the estate and distributed in accordance with the decedent's will. Plaintiffs assert that the circuit court has concurrent jurisdiction with the probate court over count four.

In opposition, defendant argues that the fact that plaintiffs are attempting to bring their contract and tort claims against defendant individually does not automatically vest the circuit court with jurisdiction. Defendant argues that the test for probate-court jurisdiction under MCL 700.1302(a) is whether the matter relates to “[e]state administration, settlement, and distribution” or a “[d]eclaration of rights that involve an estate, devisees, heir, or fiduciary.” MCL 700.1302(a)(ii) and (iii). Defendant further argues that, because plaintiffs seek a finding that they have a right to the brokerage account as beneficiaries, their claims fall squarely within the statute. Accordingly, defendant alleges, the probate court has exclusive jurisdiction of all plaintiffs' claims. The circuit court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(4), after finding that the claim arising from the promise made by defendant to plaintiffs, the promise itself, and plaintiffs' actions in reliance upon the alleged promise all relate to the estate of decedent.

The Court of Appeals “reviews de novo a motion for summary disposition pursuant to MCR 2.116(C)(4).” *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008). “Likewise, an issue of subject-matter jurisdiction that turns on an interpretation of statutory provisions is reviewed de novo.” *Cairns v City of East Lansing*, 275 Mich App 102, 107; 738 NW2d 246 (2007). “In considering a motion challenging jurisdiction under MCR 2.116(C)(4), a court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate that the court lacks subject matter jurisdiction.” *CC Mid West, Inc v McDougal*, 470 Mich 878; 683 NW2d 142 (2004).

The circuit courts are courts of general jurisdiction with original jurisdiction over “all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state.” MCL 600.605. Alternatively, the probate court is a court of limited jurisdiction, which derives all of its power from statutes. *D'Allessandro v Ely*, 173 Mich App 788, 794; 434 NW2d 662 (1988). Therefore, in order to make a determination regarding whether the probate court has jurisdiction over the claims at issue, examination of the language of the controlling jurisdictional statutes is essential. MCL 700.1302 provides, in relevant part:

The [probate] court has exclusive legal and equitable jurisdiction of all of the following:

(a) A matter that relates to the settlement of a deceased individual's estate, whether testate or intestate, who was at the time of death domiciled in the county or was at the time of death domiciled out of state leaving an estate within the

county to be administered, including, but not limited to, all of the following proceedings:

- (i) The internal affairs of the estate.
- (ii) Estate administration, settlement, and distribution.
- (iii) Declaration of rights that involve an estate, devisee, heir, or fiduciary.
- (iv) Construction of a will.
- (v) Determination of heirs.

Further, the probate courts have concurrent legal and equitable jurisdiction to “[h]ear and decide a contract proceeding or action *by or against* an estate, trust, or ward.” MCL 700.1303(1)(i) (emphasis added).

Plaintiffs’ appeal of the trial court’s grant of defendant’s motion for summary disposition is based on plaintiffs’ principal characterization of their claims as being directly against defendant individually, as opposed to matters that relate to the settlement of a deceased individual’s estate. More specifically, plaintiffs allege breach of contract, detrimental reliance warranting estoppel, and breach of fiduciary duties by defendant in counts one through three. In the alternative, plaintiffs maintain in count four that there was a mischaracterization of the nature of the brokerage account that requires the account be returned to, and distributed by, the estate in accordance with the decedent’s will. Accordingly, plaintiffs argue that the circuit court has exclusive jurisdiction over counts one, two, and three of the complaint, in addition to having concurrent jurisdiction over count four with the probate court. However, it is important to note that a plaintiff’s characterization of his or her claim is not dispositive; it is well established that “the court may look behind the technical label that a plaintiff attaches to a cause of action to the substance of the claim asserted.” *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995).

Count four of plaintiffs’ complaint “is seeking the return of [the brokerage account funds] from [d]efendant so that the funds [can] be distributed in accordance with the Last Will and Testament” of the decedent. As stated above, this claim is based on the alleged mischaracterization of the nature of the account as a gift, as opposed to an entity set up for the convenience of the decedent that was not meant to be distributed entirely to Kay and defendant upon the decedent’s death. Such a claim ultimately deals with either “estate administration, settlement, and distribution” or a “declaration of rights that involve an estate, devisee, heir, or fiduciary” on its face; therefore, it is under the exclusive jurisdiction of the probate court. MCL 700.1302. Plaintiffs cite no authority to support their position that the circuit courts possess concurrent jurisdiction over such a claim, and the plain language of MCL 700.1302 vests “exclusive” jurisdiction in the probate court. For these reasons, with regard to this count of plaintiffs’ complaint, the circuit court did not err in granting summary disposition under MCR 2.116(C)(4).

With regard to the remainder of plaintiffs' claims, defendant asserts that, regardless of plaintiffs' characterization of the claims, the gravamen of plaintiffs' complaint is essentially that the nature of the brokerage account was mischaracterized and that the account should be returned to the estate and distributed to the beneficiaries according to the decedent's will. Defendant argues that plaintiffs' alleged agreement to refrain from probating the brokerage account in exchange for a portion of account proceeds was not valid consideration for a binding contract unless the brokerage account belonged to the estate. Accordingly, defendant asserts, plaintiffs have no rights to the account except as beneficiaries under the will. Therefore, regardless of the form or validity of plaintiffs' claims, all such claims ultimately relate to "[e]state administration, settlement, and distribution" or a "declaration of rights that involve an estate, devisees, heir, or fiduciary," and are within the exclusive jurisdiction of the probate court under MCL 700.1302.

However, defendant fails to recognize the longstanding contract principle that a good-faith promise to forbear assertion of a legal claim or defense can act as sufficient consideration for contract formation, regardless of speculations about that claim or defense's ultimate viability. See Restatement 2d of Contracts, §§ 74-75; see also *Conklin v Conklin*, 165 Mich 571, 580; 131 NW 154 (1911).

The right to challenge the nature of the brokerage account, and the alleged agreement not to do so in exchange for a distribution of a portion of the proceeds of the account, could act as a binding contract between plaintiffs and defendant separate and distinct from the nature of the account and its connection to the estate of the decedent.<sup>2</sup> Contrary to defendant's contentions, we conclude that plaintiffs have validly stated a cause of action within the jurisdiction of the circuit court based on the alleged agreement to forbear from attempting to list the brokerage account as an asset in probate.<sup>3</sup> Plaintiffs have claims against defendant separate and distinct from any right they may or may not possess to a distribution of brokerage-account funds from the estate.<sup>4</sup>

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<sup>2</sup> Notably, even if it was later determined that plaintiffs' probate claim was invalid, the good-faith forbearance from asserting the claim could still act as valid consideration. See Restatement 2d of Contracts, § 74.

<sup>3</sup> Similarly, separate and distinct arguments for promissory estoppel, based on defendant's promise to distribute the account, and breach of fiduciary duty, for failing to invest the account funds on behalf of plaintiffs, as alleged in count two and three of plaintiffs' complaint, would also fall within the jurisdiction of the circuit court for the same reasons.

<sup>4</sup> A somewhat analogous distinction was discussed in *Huhtala v Travelers Ins Co*, 401 Mich 118, 130-132; 257 NW2d 640 (1977), wherein the Court characterized an agreement between a party injured in a car accident and an insurance company as separate and distinct from the injured party's right to compensation from the insured driver. The Court in *Huhtala* elaborated as follows:

In the instant case, the law imposed on Travelers [the insurance company] no duty in favor of the plaintiffs to pay or to promise to pay a fair settlement. If such an obligation arose, it is because Travelers chose to promise to do so. While

Counts one, two, and three of plaintiffs' complaint assert separate and distinct contract claims directly against defendant, as opposed to matters that relate to the settlement of the decedent's estate. In *In re Estate of Shields*, 254 Mich App 367, 369; 656 NW2d 853 (2002), quoting MCL 700.1303(1)(i), the Court recognized that the probate court has jurisdiction to "[h]ear and decide a contract proceeding or action by or against an estate, trust, or ward." MCL 700.1303. Here, as discussed above, plaintiffs' claims are not "by or against an estate, trust, or ward," but are instead against defendant individually. Accordingly, the probate court does not have exclusive jurisdiction or concurrent jurisdiction to decide the remainder of plaintiffs' claims. Therefore, the circuit court retains original jurisdiction.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter

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plaintiffs had a personal injury claim against the owner of the automobile in which Cummings was riding and that claim arose by reason of a duty imposed by law, Travelers had no obligation to the plaintiffs as a result of any duty imposed by law. Plaintiffs' sole claim against Travelers has been and is contractual. [*Id.* at 131-132.]