

DA 19-0324

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 293

IN THE MATTER OF THE ESTATE OF

JOHN P. COONEY, II,

Deceased.

APPEAL FROM: District Court of the Fourteenth Judicial District,
In and For the County of Wheatland, Cause No. DP 15-04
Honorable Randal I. Spaulding, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Rebecca R. Swandal, Swandal Law, PLLC, Livingston, Montana

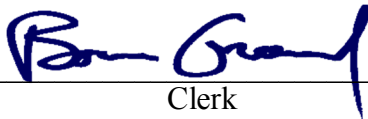
For Appellee:

Brandon JT Hoskins, Jeff G. Sorenson, Moulton Bellingham PC,
Billings, Montana

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Decided: December 24, 2019

Filed:


Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 John Cooney II died in 2015, devising his property by will to his son John Cooney III. John II’s daughters moved to invalidate parts of his will in the probate proceedings, claiming that the will contravened a prior marital property settlement agreement between John II and his ex-wife. In that agreement, incorporated into John II’s dissolution decree, he agreed to leave real property he owned to all of his children “in equal shares to share and share alike.” The District Court denied the daughters’ motion for lack of subject matter jurisdiction, and this appeal followed. We affirm for the reason that their claim is not properly brought in the probate proceedings.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 John II and his ex-wife, Loriann Cooney, divorced in 1980. They entered into a Separation and Property Settlement Agreement (“Separation Agreement”), in which they agreed that the remainder of the ranch property¹ that John II owned at the time of his death would be distributed to their daughters, Jonnie and Melissa, “and any other children hereinafter born to [John II], in equal shares to share and share alike.” The dissolution court incorporated the Separation Agreement into the final decree. John II later had two more children, Jill and John III. John Cooney II died on April 27, 2015. His final written will, executed in 2011, left all of his real property to John III.

¹ The Separation Agreement specifically describes the properties involved in “the remainder of the ranch property” as the “Mud Creek,” “Foster Ranch” and the “Home Ranch” properties and provides the legal descriptions.

¶3 John II's will was admitted to formal probate in the Fourteenth Judicial District Court, Wheatland County. Appellants Jonnie, Melissa, and Jill ("Daughters") filed a motion to invalidate portions of the will that left the property entirely to John III, arguing that those portions contravened the Separation Agreement, resulting in fraud on the court. The District Court denied their motion, concluding that it did not have subject matter jurisdiction over equitable claims for relief and claims at law while sitting in probate. The Daughters appeal, asserting that the court erred when it determined that the Daughters could not enforce the Separation Agreement in the probate proceeding. They argue that the probate court had subject matter jurisdiction to administer the estate in accordance with the Separation Agreement because it directly involves the estate's property, and the probate court has jurisdiction to determine that they were the rightful heirs and successors to the property by virtue of the Separation Agreement.

STANDARDS OF REVIEW

¶4 Whether a court has subject matter jurisdiction is a question of law that we review for correctness. *Haugen v. Haugen*, 2008 MT 304, ¶ 8, 346 Mont. 1, 192 P.3d 1132. Formal probate proceedings are subject to the Montana Rules of Civil Procedure. *In re Estate of Glennie*, 2011 MT 291, ¶ 10, 362 Mont. 508, 265 P.3d 654; § 72-1-207, MCA. The parties agree that the District Court's denial of the Daughters' motion is analogous to a dismissal for failure to state a claim on which relief could be granted. We accordingly apply our standard of review for a motion to dismiss under M. R. Civ. P. 12(b)(6). *Glennie*, ¶ 10 (citing *McKinnon v. W. Sugar Coop. Corp.*, 2010 MT 24, ¶ 12, 355 Mont. 120, 225 P.3d 1221). A district court's determination that a complaint failed to state a

claim is a conclusion of law that we review for correctness. *Glennie*, ¶ 11 (citing *McKinnon*, ¶ 12).

DISCUSSION

¶5 1. *Did the District Court err when it determined it did not have subject matter jurisdiction to enforce the Separation Agreement while sitting in probate?*

¶6 A district court sitting in probate has limited, not general, jurisdiction as set forth in § 72-1-202, MCA:

Subject matter jurisdiction. (1) To the full extent permitted by the constitution, the court has jurisdiction over all subject matter relating to:

(a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; and

(b) protection of minors and incapacitated persons.

(2) The court has full power to make orders, judgments, and decrees and take all other action necessary and property to administer justice in the matters which come before it.

¶7 A district court sitting in probate has only the special and limited powers expressly conferred by statute; the court may not hear or determine any matters other than those under the statute or which are necessary to exercise its powers. *Haugen*, ¶ 9 (citing *In re Graff's Estate*, 119 Mont. 311, 316-17, 174 P.2d 216, 218 (1946)); see *In re Estate of Pegg*, 209 Mont. 71, 84, 680 P.2d 316, 322 (1984) (“[A] probate court has subject matter jurisdiction over *estates* of decedents.”) (emphasis in original). The administration of an estate is “neither an action at law nor a suit in equity[;] it is a special proceeding.” *State ex rel. Reid v. Fifth Judicial Dist. Court*, 126 Mont. 586, 591, 256 P.2d 546, 549 (1953).² We have held that district courts sitting in probate have jurisdiction to consider a claim

² *Reid* cited §§ 93-2201 and -2202, RCM (1947), now codified in § 27-1-102, MCA, which recognizes two judicial remedies under Montana law: (1) actions and (2) special proceedings.

on a contract for the *sale* of real estate where no real controversy over the claim exists, but do not have jurisdiction to consider matters equitable in nature. *In re Day's Estate*, 119 Mont. 547, 553, 177 P.2d 862, 866 (1947). We have held also that a probate court does not have jurisdiction to decree specific performance of an oral contract. *Bullerdick v. Hermsmeyer*, 32 Mont. 541, 552, 81 P. 334, 337 (1905); *see Reid*, 126 Mont. at 531, 256 P.2d at 549; *Chadwick v. Chadwick*, 6 Mont. 566, 13 P. 385 (1887).

¶8 Montana law is clear that “a person may make a valid contract to dispose of his property by will.” *Lazetich v. Miller*, 206 Mont. 247, 251, 671 P.2d 15, 16 (1983) (citing *Erwin v. Mark*, 105 Mont. 361, 369, 73 P.2d 537, 539 (1937)); *Conitz v. Walker*, 168 Mont. 238, 244, 541 P.2d 1028, 1031 (1975). These contracts are known as succession contracts. Montana adopted the Uniform Probate Code (“UPC”) in 1974. It requires that any succession contract be in writing. *In re Estate of Braaten*, 2004 MT 213, ¶¶ 12-13, 322 Mont. 364, 96 P.3d 1125 (citing *Orlando v. Prewett*, 218 Mont. 5, 705 P.2d (1985)); § 72-2-534, MCA. Montana recognized succession contracts prior to its adoption of the UPC, but litigation focused primarily on questions involving oral contracts to devise property. *Bullerdick*, 32 Mont. at 550-51, 81 P. at 336; *In re Day's Estate*, 119 Mont. at 551-52, 117 P.2d at 865.

¶9 The succession contract at issue is the 1980 Separation Agreement. The decedent John II signed the Separation Agreement, which contains a promise to include a specific devise in his will. The Separation Agreement therefore meets the statutory requirement

for a “writing signed by the decedent evidencing the contract.” Section 72-2-534(1)(c), MCA.³

¶10 If a party to a succession contract fails to carry out the promise to make a valid will, “courts of equity will grant relief in the nature of specific performance by compelling the personal representative, the heirs, devisees, or legatees to hold the property as trustees for the benefit of the promisee.” *Erwin*, 105 Mont. at 369, 73 P.2d at 539. This is not technical specific performance, since “there is no attempt to compel the promisor to make a will.” *Erwin*, 105 Mont. at 370, 73 P.2d at 539; see 1 *Page on the Law of Wills* § 10.30, 536 (Rev. Ed. 2003). It is instead relief in the nature of specific performance, the purpose of which is to have the “devisees, next of kin, or personal representative of the deceased promisor held as trustees of the property which the promisor had agreed to devise or bequeath, and to compel them to hold the legal title thereto for the benefit of the promisee *cestui que trust* [possessing equitable rights in the property].” *Erwin*, 105 Mont. at 369, 73 P.2d at 539 (citations omitted). We reaffirmed *Erwin* in *Rowe v. Eggum*, holding that “an oral contract to make a will, when acted and relied upon, may be made the foundation of an action for relief in the nature of specific performance.” 107 Mont. 378, 389, 87 P. 2d 189, 193 (1938).

¶11 An “action” is a proceeding “by which one party prosecutes another for the enforcement or protection of a right.” Section 27-1-102(2), MCA. “The remedy of beneficiaries [in a breach of contract to devise property] is not a proceeding in the

³ The validity of the Separation Agreement is not at issue in this appeal, and we treat it as a valid contract for purposes of the analysis.

probate court . . . but an action in equity in a court of general jurisdiction.” 79 Am. Jur. 2d *Wills* § 343 (2003). The equitable remedy of specific performance thus must be sought in a court of equity; it may not be administered by the probate court in a direct proceeding for that purpose. See 1 *Page on the Law of Wills* § 10.37, 537 (Rev. Ed. 2003).

¶12 A probate court has authority to settle claims against the estate, such as creditor claims. *Christian v. A. A. Oil Corp.*, 161 Mont. 420, 430, 506 P.2d 1369, 1374 (1973). Enforcement of a contract to devise property is not a claim against the estate. *Erwin*, 105 Mont. at 371, 73 P.2d at 539 (adopting the Colorado Supreme Court’s analysis distinguishing a claim against the estate and the rights of a claimant under a contract with the deceased). In *Erwin*, this Court held that the right of a claimant under a succession contract is a “right or interest in the estate, an equitable ownership therein, after the claims against the estate have been allowed and paid.” *Erwin*, 105 Mont. at 372, 73 P.2d at 540.

¶13 The Daughters seek an equitable remedy in the nature of specific performance of the Separation Agreement. The probate court’s limited jurisdiction does not extend to adjudicating a breach of contract claim. The Daughters seek not a “construction of” the will or “determination of heirs and successors,” § 72-1-202, MCA, but a judgment to enforce a contract the decedent made during his lifetime to dispose of his property in a certain way. The Daughters, as third-party beneficiaries to the contract, have rights or interests in the estate—in other words, a claim to equitable ownership. Their claim to the

real property seeks enforcement of a contract right, which may be prosecuted in an action. Section 27-1-102(2), MCA.

¶14 The Daughters thus are mistaken that the probate court's refusal to exercise jurisdiction leaves them with no remedy. To the contrary, the Daughters have a contract claim against John II's estate. They may bring an action for breach of that contract in district court against the personal representative of John II's estate to litigate the Separation Agreement in its own right.⁴ The breach of contract claim seeking specific performance is a discrete action, separate from John II's will, and must be brought against the personal representative. *See Erwin*, 105 Mont. at 369, 73 P.2d at 539.

¶15 “[T]he appropriate remedy when the surviving party to a contractual will attempts to circumvent the terms of that will is to impose a constructive trust on the estate in order to enforce the terms of the contractual will.” 79 Am. Jur. 2d *Wills* § 344 (2013). Constructive trusts arise when the title holder to property is subject to an equitable duty to convey it to another because the title holder would be unjustly enriched if permitted to retain the property. Section 72-38-123, MCA; *In re Estate of Erickson*, 2017 MT 260, ¶ 32, 389 Mont. 147, 406 P.3d 1; *Volk v. Goeser*, 2016 MT 61, ¶ 49, 382 Mont. 382, 367 P.3d 378; *see* 76 Am. Jur. 2d *Trusts* § 169 (2016) (“A constructive trust arises when equity so demands; it is an equitable remedy imposed by the courts but only in the absence of an adequate remedy at law.”). Equity principles afford courts broad discretion

⁴ The period of limitations for an action based upon a breach of a succession contract does not begin to run until the promisor's death, “since the cause of action does not accrue before that time.” 79 Am. Jur. 2d *Wills* § 320 (2013); *see also Erwin*, 105 Mont. at 370, 73 P.2d at 539 (“It is not necessary to present a claim for the specific performance of a contract entered into by deceased during his lifetime.”).

to impose constructive trusts “despite any lack of wrongdoing by the person holding the property.” *Volk*, ¶ 45 (citing *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶ 29, 368 Mont. 330, 396 P.3d 450).

¶16 In summary, the probate court lacks jurisdiction to adjudicate a party’s rights under a succession contract. At this point, the Daughters possess a contract claim, enforceable through a civil action against the personal representative of John II’s estate, who would be bound by any judgment entered in such an action. Distribution of John II’s estate in the probate matter will be affected only if the Daughters obtain a judgment concluding that he breached the contract; the Daughters may seek relief in their contract action in the form of a constructive trust on the property, and the probate court can effectuate any resulting judgment in its administration of the estate. *See Erwin*, 105 Mont. at 369, 73 P.2d at 539. As the District Court has issued a stay in the probate proceedings, we conclude that the Daughters are not without a remedy.

¶17 2. *Did the District Court err when it denied the Daughters’ motion to invalidate part of the will due to fraud on the court?*

¶18 The Daughters assert that the District Court’s acceptance of John II’s will as written constitutes a fraud on the court. They argue the court erred when it denied their motion to partially invalidate the will for fraud. The District Court determined that the circumstances of the alleged fraud were not stated with particularity, as required under M. R. Civ. P. 9(b). This Court will affirm a district court’s denial if it concludes the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim. *Glennie*, ¶ 11 (citing *McKinnon*, ¶ 12).

¶19 Fraud on the court involves “[c]oncealment of facts by a person who was under a legal duty to make a full disclosure to the court.” *Selway v. Burns*, 150 Mont. 1, 9, 429 P.2d 640, 644 (1967). The Daughters assert that John II’s execution of the will was an attempt to conceal from the District Court facts he was under a duty to disclose by virtue of his promise in the Separation Agreement. John III argues that the Daughters allege only that John II committed fraud when his will did not comport with the Separation Agreement, and that this is not a proper objection to the validity of John II’s will. We agree with John III.

¶20 Fraud between the parties is not fraud upon the court. *In re Marriage of Weber*, 2004 MT 211, ¶ 20, 322 Mont. 341, 96 P.3d 716 (citing *In re Marriage of Miller*, 273 Mont. 286, 292, 902 P.2d 1019, 1022 (1995)). Fraud upon the court embraces only that species of fraud which subverts or attempts to subvert the integrity of the court itself. *Miller*, 273 Mont. at 292, 902 P.2d at 1022. The Daughters’ allegations to the court in the present matter involve a breach of the Separation Agreement. If there was fraud, it was fraud by John II during his lifetime when he did not honor his promise to Loriann, not fraud on the probate court after his death. The District Court was correct when it dismissed the Daughters’ motion to invalidate the will for fraud upon the court.

¶21 We affirm.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ INGRID GUSTAFSON

/S/ DIRK M. SANDEFUR

/S/ JIM RICE