



Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May



Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007 through 2011 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 and 2012 compilations of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

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<http://www.kempklein.com/probate-summaries.php>

DT: August 28, 2012

RE: **Ashley Techner v. Barry S. Greenberg**
STATE OF MICHIGAN COURT OF APPEALS

BASEBALL COMMENTARY:

Guest Editorial by Justin Bristol

“I’d like to thank Alan May for his invitation to write this guest editorial. As a lifelong baseball fan, I’ve learned the rarity of once-in-a-generation players. You don’t often see a guy who you can put in the same conversation as some of the greats, but you tend to know it when you see it.

Albert Pujols clearly ranks among the best hitters of all time with a career .320 average, 1400 RBI(s), and sneaking up on 500 homeruns. His three MVPs have cemented his legacy as one of the best ever. But these days, it’s another halo that’s grabbing all the attention for his performance on the field. Mike Trout is a 20 year old rookie putting up numbers that rival some of the greatest seasons in Major League Baseball history, rookie or veteran. Through 86 games



in the 2012 season, Trout has posted a .348/.411 AVG/OBP with 19 homers, 59 RBI, 86 runs and 36 stolen bases. The epitome of a five-tool player, Trout has all but locked up the Rookie of the Year title and has positioned himself as the MVP front-runner. The youngest MVP ever was Vida Blue in 1971; who turned 22 in the season in which he won. Trout turned 21 on August 7 (Happy belated Mike) and is well on his way to earning the crown despite another spectacular season from Miguel Cabrera and Josh Hamilton. Only time will tell if Trout hits a wall in the last third of the season, but there are certainly no signs of that now so let's enjoy it while it lasts.

REVIEW OF CASE:

Reference Files: Circuit Court v Probate Court Jurisdiction – Embezzlement

Defendant established a Trust for his daughter, Plaintiff. He embezzled the money. Plaintiff sued Defendant in Circuit Court. Defendant moved for summary disposition; saying that the Probate Court had exclusive jurisdiction.

Defendant cited MCL 700.1302 (b) saying that the theft, if any, arose out of the internal affairs and/or distribution of the Trust.

Plaintiff cited MCL 700.1303 (1)(h) which specified that the Probate Court and the Circuit Court had concurrent legal and equitable jurisdiction over a claim to “[a] Trust... against a fiduciary or Trustee for return of property.”

The Court applied the doctrine of ejusdem generis. They correctly pointed out that MCL 700.1303 (1)(h) was particular and 700.1302 was general and said “Accordingly, under the plain language of MCL 700.1303 (1)(h), the circuit court had subject-matter jurisdiction here.”

Taking this to a Federal level and applying the *Anna Nicole Smith* Case, if diversity otherwise lies, this would indicate that a lawsuit for embezzlement could find its way into a Federal Court.

AAM:jv:720568
Attachment

STATE OF MICHIGAN
COURT OF APPEALS

ASHLEY TECHNER,
Plaintiff-Appellee,

UNPUBLISHED
July 19, 2012

v

BARRY S. GREENBERG
Defendant-Appellant.

No. 303859
Oakland Circuit Court
LC No. 2009-100997-CZ

Before: O'CONNELL, P.J., and JANSEN and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals by right an order of the circuit court enforcing an arbitration award. Because the circuit court had concurrent subject-matter jurisdiction with the probate court to hear plaintiff's cause of action, we affirm.

I. BASIC FACTS

Plaintiff is defendant's daughter. In 1998, defendant established a trust of which plaintiff was the beneficiary; defendant was the trustee. On May 21, 2009, plaintiff filed a complaint in the circuit court alleging, among other things, that the value of the trust had decreased significantly from the time of its establishment, and that the decrease in value was due to defendant's misappropriation of the trust funds. Specifically, plaintiff alleged that defendant had improperly written checks to himself out of the trust, and checks to plaintiff which he cashed; plaintiff alleged that she never signed nor endorsed those checks. Plaintiff alleged that she never received any benefit from the trust, in violation of the trust's terms.

Defendant filed, among other things, a motion for summary disposition, arguing, among other things, that the circuit court lacked subject-matter jurisdiction to hear the claim because, by statute, the probate court has exclusive jurisdiction over matters relating to the internal affairs, administration, or settlement of a trust. Plaintiff responded that this matter did not involve the internal affairs or administration of a trust, that she was only seeking the return of the misappropriated trust assets, and, by statute, the circuit court had concurrent subject-matter jurisdiction over the claim. The circuit court determined that it had concurrent jurisdiction, and denied defendant's summary disposition motion. On the eve of trial, the parties agreed, in a stipulated order, that arbitration would resolve the matter, and that "any award and/or decision of [the] arbitrator shall be enforceable in any Court of competent jurisdiction, which shall apply the

case evaluation provisions of MCR 2.403(O) to the said award and/or decision as if it were a verdict.”

The arbitrator found in favor of plaintiff, determining that defendant “breached his fiduciary duty in many aspects.” For example, the arbitrator found that defendant had been “concealing trust assets and transactions from [plaintiff], using trust funds to pay his own expenses, borrowing money . . . without a record of reimbursements and using trust money to make his house payments.” The trial court subsequently ordered defendant to pay an amount of \$611,237.81 into the trust, plus statutory interest.

II. ANALYSIS

Unlike challenges based on personal jurisdiction, “[l]ack of subject-matter jurisdiction may be raised at any time, and parties to an action can neither confer jurisdiction by their conduct or action nor waive the defense by not raising it.”¹ Whether a court possesses subject-matter jurisdiction is a question of law, reviewed de novo.²

Defendant argues that the circuit court lacked subject-matter jurisdiction to hear this matter in the first instance.³ Defendant argues that, by statute, the probate court had exclusive subject-matter jurisdiction over the matter. We disagree.

“Jurisdiction over the subject-matter is the right of the court to exercise judicial power over that 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. . . .”⁴ Whether a court has subject-matter jurisdiction is determined solely by reference to the allegations in the complaint, and not to the facts of the case subsequently developed.⁵

The disposition of this case turns on which statute applies. Defendant bases his argument largely on the plain text of MCL 700.1302(b), which specifies that the probate court has

¹ *Winters v Dalton*, 207 Mich App 76, 79; 523 NW2d 636 (1994).

² *In re Martin*, 237 Mich App 253, 255; 602 NW2d 630 (1999).

³ Below, defendant also argued that the circuit court lacked personal jurisdiction, but does not raise this argument on appeal.

⁴ *Pease v North American Financial Corp*, 69 Mich App 165, 168; 244 NW2d 400 (1976).

⁵ *Fox v Martin*, 287 Mich 147, 152; 283 NW 9 (1938) (“Jurisdiction always depends upon the allegations and never upon the facts. When a party appears before a judicial tribunal and alleges that a certain right is denied him, and the law has given the tribunal the power to enforce that right-his adversary being notified-it must proceed to determine the truth or falsity of his allegations. The truth of the allegations does not constitute jurisdiction. The tribunal must have jurisdiction before it can take any adverse step.”); *Grubb Creek Action Comm v Shiawassee Co Drain Comm’r*, 218 Mich App 665, 668; 554 NW2d 612 (1996) (“A court’s subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint.”)

exclusive jurisdiction over “[a] proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary. . . .” However, MCL 700.1303(1)(h) specifies that the probate court and the circuit court have concurrent legal and equitable jurisdiction over a claim “in regard to . . . [a] trust . . . against a fiduciary or trustee for the return of property.” Accordingly, we must determine, solely by reference to plaintiff’s complaint and not subsequent factual developments, whether plaintiff’s cause of action falls under MCL 700.1303(1)(h) or MCL 1302(b).

We conclude that MCL 700.1303(1)(h) applies and that the circuit court therefore had concurrent subject-matter jurisdiction over the case. Plaintiff’s cause of action was “against a fiduciary or trustee for the return of property,” under MCL 700.1303(1)(h), and not “[a] proceeding that concerns the validity, internal affairs . . . settlement . . . [or] administration” of the trust under MCL 700.1302(b). The complaint alleged that defendant was the trustee for the trust, and that he had embezzled and otherwise used trust assets for his own purposes. Importantly, the relief plaintiff sought was the return of the funds defendant had allegedly misappropriated; there is no indication in the complaint that defendant sought damages beyond the property to which she was allegedly entitled but for defendant’s actions. Accordingly, under the plain language of MCL 700.1303(1)(h), the circuit court had subject-matter jurisdiction here.

Defendant argues that MCL 700.1302(b) applies because the actions giving rise to plaintiff’s cause of action arose “out of the internal affairs, administration and/or distribution of the trust herein at issue.” To the contrary, plaintiff alleged that defendant had stolen money from the trust to use for his own purposes. In short, the actions plaintiff alleged fall outside the boundaries of overseeing the “internal affairs” or “administration” of the trust.⁶ Moreover, none of the cases cited by defendant in support of his position arose in a context analogous to the one here,⁷ and none involved MCL 700.1303(h). “In determining jurisdiction, this Court will look

⁶ See *Waters v Manufacturers Trust Co*, 143 F2d 383, 385 (CA 6, 1944) (in context of a trust, the term “administration . . . includes preservation of assets, dealings with creditors, and a determination of what may be done by them in securing their rights”).

⁷ See, e.g., *In Re Messer*, 457 Mich 371; 579 NW2d 73 (1998) (addressing whether trustee’s prudence regarding the sale of trust property was a matter for the circuit or probate court); *Manning v Amerman*, 229 Mich App 608; 582 NW2d 539 (1998) (addressing whether a claim for emotional distress related to a trustee’s misappropriation fell within the probate court’s exclusive jurisdiction); *In re Green Charitable Trust*, 172 Mich App 298; 341 NW2d 492 (1988) (action for accounting and to have trustees removed); *Kowalesky v Kowalesky*, 148 Mich App 151; 384 NW2d 112 (1986) (divorce action in which the wife, trustee for a trust established for the children, ordered to repay the trust for funds she misappropriated); *Lepard v NBD Bank*, 384 F3d 232 (CA 6, 2004) (interpreting the “probate exception” to diversity jurisdiction). Regarding *Kowalesky* and *Green*, even if these cases were analogous to the facts of this case, neither is binding precedent. MCR 7.125(J)(1); see also *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 641; 765 NW2d 31 (2009).

beyond a [party's] choice of labels to the true nature of the [the party's] claim."⁸ MCL 700.1303(h) expressly authorizes concurrent subject-matter jurisdiction in cases against a trustee for the return of property, and plaintiff's complaint sought the return of trust property allegedly improperly taken by defendant; defendant's attempt to frame the issue otherwise is unpersuasive.

Although not raised as a separate issue on appeal, implicit throughout defendant's argument on appeal is a notion that the arbitration was somehow improper and the award should be set aside. We disagree. Defendant consented to the arbitration, and agreed that the arbitration would resolve all claims related to whether he was liable for misappropriating trust funds. Defendant did not object to the arbitration at the time. Accordingly, by consenting to the arbitration, he waived his right to dispute the validity of the arbitration agreement.⁹ This Court has held that "a party may not participate in an arbitration and adopt a 'wait and see' posture, complaining for the first time only if the ruling on the issue submitted is unfavorable."¹⁰ Indeed, absent some showing that the arbitrator exceeded his authority, this Court is bound to enforce arbitration awards.¹¹

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Michael J. Riordan

⁸ *Manning*, 229 Mich App at 613.

⁹ *In re Nestorovski Estate*, 283 Mich App 177, 183; 769 NW2d 720 (2009) ("[B]y voluntarily participating in the arbitration process without objection, respondent waived the issue whether the parties had entered into a valid agreement to arbitrate.").

¹⁰ *Id.* at 183-184.

¹¹ *City of Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009).