

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of AARON LORESO DORSEY.

ANTHONY PAYNE, Personal Representative of
the Estate of Aaron Loreso Dorsey,

UNPUBLISHED
April 16, 2013

Appellant,
and

TODD WEGLARZ,

Appellant,

v

AMANDA MASON, Co-Personal Representative
of the Estate of Aaron Loreso Dorsey,

No. 308398
Wayne Probate Court
LC No. 2010-762423-DE

Appellee.

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Appellant¹ appeals by right the probate court order effectively denying his request to dismiss the petition for lack of subject-matter jurisdiction and the appointment of appellee as co-personal representative of the estate of the decedent, Aaron Loreso Dorsey. We vacate the probate court order and remand for proceedings consistent with this opinion.

The decedent was killed in a police involved shooting in Durham, North Carolina. Appellant, the decedent's brother, petitioned the Wayne County probate court for appointment as the personal representative of the decedent's estate. The sole asset of the estate was the possible

¹ Although Todd Weglarz is designated as an appellant, this appeal involves the actions of appellant Anthony Payne, the brother of the decedent and initially the sole personal representative of the decedent's estate. The singular appellant refers to Payne only.

wrongful death lawsuit. Appellant discharged his attorney, the Fieger law firm, and retained an attorney previously employed by the Fieger law firm. Appellee, the decedent's girlfriend and the mother of the decedent's infant son,² moved to remove appellant as the personal representative, alleging that he engaged in misconduct, and filed an order to show cause seeking to have appellant, his counsel, and the attorneys handling the North Carolina paternity and wrongful death suits in contempt. Appellant and the attorneys denied any misconduct and alleged that the course of action taken in North Carolina was required by the laws of that state. In the pleadings addressing the petition to remove and order to show cause, the attorneys for appellant and appellee raised allegations of misconduct, misrepresentations, and violations of the rules of professional conduct against each other.

Appellant then filed a motion for summary disposition of the petition for the administration of the decedent's estate, asserting that the probate court lacked subject-matter jurisdiction. He submitted an affidavit alleging that the decedent's domicile was in North Carolina. Appellant explained that he placed his own address on the decedent's death certificate at the suggestion of the coroner's office. However, he learned that the decedent worked in North Carolina, obtained a state identification card, and registered to vote there. On the contrary, counsel for appellee asserted that it was the decedent's intention to return to Michigan, and shortly before his death, he returned to Michigan, staying with appellant as he searched for employment here. Regarding the issue of domicile, counsel for appellee sought to introduce testimony. Appellee also alleged that appellant was judicially estopped from challenging jurisdiction because of his representations that the decedent was domiciled in Wayne County. The probate court did not respond to the request to take testimony addressing the decedent's domicile and did not expressly rule on the issue of subject-matter jurisdiction. Rather, the probate court appointed appellee as co-personal representative of the estate and dismissed the order to show cause, thereby effectively denying the dismissal for lack of jurisdiction. In reaching that decision, the probate court did not make any factual findings regarding attorney misconduct or false representations. The probate court also did not make any findings regarding the propriety of the paternity and wrongful death filings in North Carolina.³ This appeal followed.

First, appellant contends that the probate court erred by denying his motion for summary disposition for lack of subject-matter jurisdiction when the decedent was domiciled in North Carolina. In light of the insufficient record and the failure to take testimony, we vacate the probate court's order and remand for an evidentiary hearing to determine the decedent's domicile and whether the statutory requirements for probate court jurisdiction were satisfied.

² Appellee apparently retained the Fieger law firm to protect her interests, but she was represented by another firm in this probate action.

³ Because the lower court failed to resolve the factual disputes surrounding misconduct, misrepresentations, and violations of the rules of professional conduct, we do not address them. Additionally, the propriety of the proceedings filed in North Carolina is not relevant to the issues raised on appeal.

A lower court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). Summary disposition of an action is appropriate when a lower court lacks subject-matter jurisdiction, MCR 2.116(C)(4). *Cairns v City of East Lansing*, 275 Mich App 102, 107; 738 NW2d 246 (2007). Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr Co*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id.* The documentation offered in support of and in opposition to this dispositive motion must be admissible as evidence. MCR 2.116(G)(6); *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). "The affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion." *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

When ruling on a motion for summary disposition, the court does not assess the credibility of the witnesses. *White v Taylor Distrib Co*, 482 Mich 136, 142; 753 NW2d 591 (2008). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). When the truth of a material factual assertion made by a moving party is contingent upon credibility, summary disposition should not be granted. *Id.* at 136. When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003). Inconsistencies in statements given by witnesses cannot be ignored. *White*, 482 Mich 142-143. Application of disputed facts to the law present proper questions for the jury or trier of fact. *Id.* at 143.

"The 'power to review' thus granted is the power to hear and determine. It is language of jurisdiction." *Peplinski v Michigan Employment Security Comm*, 359 Mich 665, 668; 103 NW2d 454 (1960). Questions surrounding subject-matter jurisdiction present questions of law and are reviewed de novo. *In re Lager Estate (On Remand)*, 286 Mich App 158, 162; 779 NW2d 310 (2009). Generally, subject-matter jurisdiction is defined as a court's power to hear and determine a cause or matter. *Id.* More specifically, subject-matter jurisdiction is the deciding body's authority to try a case of the kind or character pending before it, regardless of the particular facts of the case. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 204; 631 NW2d 733 (2001). Subject-matter jurisdiction cannot be waived and can be raised at any time by any party or the court. *MJC/Lotus Group v Brownstown Twp*, 293 Mich App 1, 7-8; 809 NW2d 605 (2011) rev'd in part on other grounds *Mich Props, LLC v Meridian Twp*, 491 Mich 518; 817 NW2d 548 (2012). The plaintiff bears the burden of demonstrating subject-matter jurisdiction. *Phinney v Perlmutter*, 222 Mich App 513, 521; 564 NW2d 532 (1997). A trial court must dismiss an action for lack of subject-matter jurisdiction, and a party cannot be estopped from raising the issue. *In re Acquisition of Land for the Central Indus Park Project*, 177 Mich App 11, 17; 441 NW2d 27 (1989). "Probate courts are courts of limited jurisdiction. Const 1963, art 6, § 15. The jurisdiction of the probate court is defined entirely by statute." *In re Wirsing*, 456 Mich 467, 472; 573 NW2d 51 (1998). "The jurisdiction of the probate court must be determined solely by reference to the statutes." *In re Mayfield*, 198 Mich App 226, 230-231; 497 NW2d 578 (1993).

In 1998, the Michigan Legislature enacted the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*; a statute designed to “modernize probate practice by simplifying and clarifying the law concerning decedents’ affairs and by creating a more efficient probate system.” *In re Leete Estate*, 290 Mich App 647, 661; 803 NW2d 889 (2010). MCL 700.1302 provides for exclusive subject matter jurisdiction and states in relevant part:

The 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.

(vi) Determination of death of an accident or disaster victim under section 1208.

MCL 700.3202 is entitled “Decedent’s domicile; resolution of conflicting claims”:

If conflicting claims as to the decedent’s domicile are made in a formal testacy or appointment proceeding commenced in this state and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this state shall stay, dismiss, or permit suitable amendment in the proceeding in this state unless it is determined that this state’s proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced is determinative in this state’s proceeding.

The term “domicile” does not appear to be defined in EPIC. However, in *In re Fox Estate*, 3 Mich App 501, 507; 142 NW2d 866 (1966), this Court held that the terms “residence” and “domicile” were synonymous. Michigan statutes addressing voting, eligibility to hold office, taxation, and probate administration made no distinction in the terminology. *Id.* The *Fox Estate* Court went on to note that domicile was a fact specific inquiry, stating as follows:

“Domicile is so essentially a question of intent, depending on the facts and circumstances of each particular case, that precedents, with necessarily varying facts, are of slight assistance; a fact of controlling importance in one case may have but slight significance in relation to all the facts of another, the

determination of the place of domicile depending on the circumstances of each case. Proof of domicile, therefore, does not depend on any particular fact, but on whether all the facts and circumstances taken together tend to establish it; and all acts indicative of purpose must be carefully scrutinized.” 28 CJS, Domicile, § 18, p 41. (Footnotes omitted.) [*Fox Estate*, 3 Mich App at 509.]

In *Hartzler v Radeka*, 265 Mich 451, 452; 251 NW 554 (1933), our Supreme Court held:

The question of domicile when the facts are settled is one of law, and when the place of domicile is disputed, as it was in this case, the court might properly submit the question of fact to a jury. Domicile is the place where a person has his home, with no present intention of removing, and to which he intends to return after going elsewhere for a longer or shorter time.

In *Leader v Leader*, 73 Mich App 276, 281; 251 NW2d 288 (1977), this Court noted that the terms “residence” and “domicile”⁴ were synonymous and held that for purposes of determining residence: “Presence, abode, property ownership and other facts are often considered, yet intent is the key factor.”

In *Fox Estate*, 3 Mich App at 503, the decedent lived on a farm in Cass County until he became ill and was cared for by a neighboring farm owner in St. Joseph County. However, when his condition worsened, the neighbor called an ambulance, and the decedent was taken to a hospital in Kalamazoo, where the decedent’s daughter apparently resided. Both the neighbor and the decedent’s daughter visited him on a daily basis. The daughter petitioned the Kalamazoo probate court for guardianship, alleging that he was mentally incompetent. She further alleged that the neighbor had wrongfully taken the assets and personal property of the decedent. After the decedent passed, the neighbor and the daughter raised conflicting claims regarding the documents which constituted the last will and testament. The neighbor moved to dismiss the proceedings for lack of jurisdiction because the decedent was a resident of Cass County. *Id.* at 503-504.

The probate court took testimony, granted the neighbor’s motion to dismiss for lack of jurisdiction, and the circuit court affirmed. *Id.* at 502-503. On appeal, this Court also affirmed the dismissal for lack of jurisdiction. This Court held that the facts established that the decedent lived in Cass County, owned a farm and paid taxes in Cass County, voted in that county, and his last will described his residency at Cass County. His daughter also told hospital and funeral representatives that the decedent was a resident of Cass County. Although it was the daughter’s intention to take the decedent home with her in Kalamazoo if his health improved, that intention was insufficient to overcome the other irrefutable facts. *Id.* at 510-511.

⁴ Appellant contends that a three-part test was adopted in *Leader* to determine domicile. However, in a footnote, this Court cited a three-part test presented in an Iowa Supreme Court decision. *Leader*, 73 Mich App at 281 n 3. The *Leader* Court never formally adopted this test.

In the present case, the exclusive legal and equitable jurisdiction of the probate court is contingent on whether the decedent was domiciled in the county at the time of death or domiciled out of state leaving an estate⁵ within the county to be administered. MCL 700.1302. In the present case, appellant submitted an affidavit indicating that “on information and belief,” the decedent worked in North Carolina and had a voter’s registration and state identification card there. Appellant further indicated that the decedent, in 2010, after attending a funeral, expressed intent to return to Michigan to “visit.” Appellant did not submit admissible documentary evidence to support the decedent’s employment and registration in North Carolina. *Maiden*, 461 Mich at 120-121; *SSC Assoc*, 192 Mich App at 364. Furthermore, summary disposition is inappropriate where motive and intent are at issue or where the credibility of the witnesses is crucial. *Foreman*, 266 Mich App at 135-136. Appellee was not provided the opportunity to present testimony regarding domicile. See generally, *Fox Estate*, 3 Mich App at 510-511. Accordingly, we vacate the probate court order and remand for an evidentiary hearing to resolve the propriety of jurisdiction. MCL 700.1302.⁶

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

⁵ MCL 700.3201(5) addresses venue for determining the location of property for nondomiciliaries when the property consists of debts, commercial paper, or other instruments. The parties do not characterize the type of property and proper location for a possible wrongful death recovery. Therefore, we do not address it.

⁶ Appellee’s contention that judicial estoppel precluded a challenge to subject-matter jurisdiction is without merit. *Central Indus Park Project*, 177 Mich App at 17. Furthermore, the plain language of MCL 700.3202 does not support appellee’s position. MCL 700.3202 addresses the circumstance when there are two testacy or appointment proceedings pending, one in this state and another state. The parties provided evidence of a paternity and wrongful death action pending in North Carolina, but no evidence of a pending appointment proceeding in another state. Furthermore, there has never been a formal “determination of domicile.” See MCL 700.3202. In light of our ruling regarding jurisdiction, we do not address the remaining issues raised on appeal.