

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

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In re Estate of ANNA METCALFE.

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ANGELA DESILVA and DEBRA DESILVA,

Appellees,

v

LAURA LYNN EARNSHAW DEBORD,

Appellant.

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UNPUBLISHED

March 27, 2014

No. 312377

Oakland Probate Court

LC No. 2008-320789-DA

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Appellant, niece of the decedent, appeals by right from the probate court order approving the personal representative's final account and the closing of the Estate of Anna Metcalfe. We affirm.

Appellant contends that the probate court erred in issuing an order for complete estate settlement before she had completed her discovery. We disagree. In appeals from a probate court decision, the court's factual findings are reviewed for clear error, but its dispositional rulings are reviewed for an abuse of discretion. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

In the probate court, a proceeding is commenced by filing an application or a petition with the court. MCR 5.101(B). MCR 2.302(A)(1) and (B)(1) provide that parties may obtain discovery "[a]fter commencement of an action" as long as the discovery is "relevant to the subject matter involved in the pending action[.]" MCL 700.3404 provides that "[a] party to a formal proceeding who opposes the probate of a will for any reason shall state in his or her pleadings the party's objections to probate of the will." MCL 700.3407 provides that "[a] contestant of a will has the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation."

Under the court rule and statutes, it is clear that there must first be a "commencement of an action" and a "pending action" for there to be formal and legal discovery. Personal investigations, absent the commencement of an action, do not constitute "discovery." Appellant

never commenced an action by filing an application or a petition in the probate court. Thus, there never was a “pending action.” Her “written objections” letter did not rise to the level of “pleadings” and did not create a pending action. Consequently, appellant did not have a legal or enforceable right to obtain formal discovery. Therefore, her claim that the trial court “erred” in closing the estate before she completed her discovery has no merit.

We further find no merit to appellant’s contention that this case “is analogous to civil cases where the general rule is that an order of summary disposition is premature if granted before discovery on a disputed issue is complete.” Appellant is correct that summary disposition is generally premature if discovery is incomplete. *Mackey v Dep’t of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994). However, the rules of discovery are not interpreted to permit “fishing expeditions.” *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004). “If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence.” *Davis v City of Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2005). See also MCR 2.116(C)(10) and MCR 2.116(G)(5).

Here, even if we deemed the probate court’s order to be analogous to a grant of summary disposition, appellant’s request for more time for discovery would clearly have been a fishing expedition. Between the March 11, 2011 order admitting the holographic will to probate and the July 17, 2012 petition for order of complete estate settlement, the personal representative had aided appellant in locating medical documents and other information that she had requested. At the August 29, 2012 hearing on the petition, the court permitted appellant to present her position. However, after 17 months, appellant was not able to support her position that the decedent was not competent when she executed the holographic will, and appellant could not produce any independent evidence that a factual dispute existed. See *Davis*, 269 Mich App at 379-380. The errors that appellant found in the accounting were merely typographical errors that were corrected on the record. Accordingly, the probate court did not abuse its discretion when it issued an order for complete estate settlement in this matter.

Affirmed.

/s/ Michael J. Kelly  
/s/ Mark J. Cavanagh  
/s/ Karen M. Fort Hood