STATE OF IDAHO)
County of KOOTENAI)ss
FILED 6/13/19
AT 1:05 O'Clock P. M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

THE KOOTENAI HUMANE SOCIETY, INC., an Idaho nonprofit corporation,

Plaintiff,

VS.

KATHLEEN A. KEOUGH, individually and as Trustee of the George P. Feldena and Mary A Felden Trust; and JOHN A. KEOUGH, Individually and as Personal Representative of the Estate of George Patrick Felden,

Defendants.

Case No. **CV28-18-9769**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion to Dismiss filed on March 22, 2019, by defendants Kathleen A. Keough (Kathy) and John A. Keough (John). Oral argument on the Motion to Dismiss was held on May 23, 2019.

On February 5, 1990, George Patrick Felden ("Felden") executed the Will of George Patrick Felden (the "Felden Will"), naming his nephew, John, as personal representative of the Felden Estate. First Am. Compl., ¶ 2.2. Also, on February 5, 1990, Felden and his wife, Mary A. Felden (Mary), executed the George P. Felden and

Mary A. Felden Trust (the "Felden Trust"). *Id.*, ¶ 2.3. On May 2, 2012, Felden, as the sole remaining Trustee, executed the First Amendment to the Felden Trust and designated his niece, Kathy, as the successor Trustee. *Id.*, ¶ 2.6. Mary passed away in April 2012. First Am. Compl. 2, ¶ 2.5. On December 22, 2016, Felden passed away and plaintiff The Kootenai Humane Society, Inc. (KHS) became the sole remaining beneficiary of both the Felden Trust and the property under Article IV of the Felden Will. *Id.*, ¶¶ 2.7--2.8. Shortly after Felden's death, John filed a petition in the Kootenai County Magistrate Court of the First Judicial District of Idaho to formally probate the Felden Will and be formally appointed as personal representative of the Felden Estate. Defs.' Post-Hr'g Supplement, p. 3. Kathy accepted appointment as successor Trustee and registered the Felden Trust in the Kootenai County District Court of the First Judicial District of Idaho on September 28, 2017. *Id.*, Ex. A.

On March 4, 2019, KHS filed a complaint against Kathy and John, both individually and as Trustee of the Felden Trust and Personal Representative of the Felden Estate, respectively. First Am. Compl., 1. First, KHS alleges that John and Kathy breached their respective fiduciary duties via the following actions: (1) paying the trustee unreasonable compensation greater than the $50,000 as written in the Felden Trust, (2) negligently or intentionally incurring excessive expenses for tasks involved in the role as trustee or personal representative, (3) unnecessarily employing agents for the performance of remedial tasks and charging unreasonable rates of fees, and (4) paying out funds unassociated with the management of the trust or will, including travel for spouses, unassociated travel expenses, and unreasonable lodging expenses. *Id.* at ¶ 3.5. Second, KHS alleges that John and Kathy committed tortious conversion

by paying themselves money that was to be distributed to KHS by means of charging unreasonable and unassociated costs and fees. *Id.* at ¶ 4.5.

Rather than filing an answer, on March 22, 2019, John and Kathy filed a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Idaho Rule of Civil Procedure 12(b)(1) and a Motion to Dismiss KHS's conversion claim for failure to state a claim pursuant to Idaho Rule of Civil Procedure (I.R.C.P.) 12(b)(6). Mem. in Supp. of Defs'. Mot. Dismiss, 2. On April 23, 2019, KHS filed Response and Opposition to Defendant's Motion to Dismiss.

Oral argument for the motions was held on May 23, 2019. At oral argument, counsel for John and Kathy cited cases which were not mentioned in briefing by either side. Because of that, the Court gave counsel for KHS time to file a memorandum in response to the authorities raised for the first time by counsel for John and Kathy at oral argument, and the Court gave counsel for John and Kathy time to file a response memorandum. At the conclusion of the hearing, the Court advised the parties it would take the motion to dismiss under advisement once the post-hearing supplemental memorandum were filed. On May 25, 2019, counsel for KHS timely filed The Kootenai Humane Society Inc.'s Post-Hearing Supplemental Brief in Opposition to Defendants' Motion to Dismiss. On May 28, 2019, counsel for John and Kathy filed Defendants' Post-Hearing Supplement.

For the reasons set forth below, the Court denies John and Kathy's Motion to Dismiss for lack of subject matter jurisdiction and denies John and Kathy's Motion to Dismiss Count II of the Complaint for failure to state a claim.

II. STANDARD OF REVIEW.

A motion to dismiss pursuant to I.R.C.P. 12(b)(1), which raises facial challenges to jurisdiction, is reviewed under a standard which mirrors the standard of review used

under I.R.C.P. 12(b)(6). *Owsley v. Idaho Indus. Comm'n*, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005). Thus, the Court looks only to the pleadings, and all inferences are viewed in the light most favorable to the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002). "The question is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Id.* On the other hand, a factual challenge to jurisdiction will allow the court to go outside the pleadings without converting the motion into one for summary judgment. *Owsley* at n.1, 106 P.3d at n.1. This is a facial challenge to this Court's jurisdiction.

"A motion to dismiss under Rule 12(b)(6) for failure to state a claim must be read in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim and calls for 'a short and plain statement of the claim showing that the pleader is entitled to relief' and a demand for relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992) (citing I.R.C.P. 8(a)(1)-(2)). A court may only consider matters within the pleadings as part of a Rule 12(b)(6) motion. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990) (citing I.R.C.P. 12(b)).

The non-moving party is entitled to have all inferences from the record viewed in his or her favor. *Orthman v. Idaho Power Co.*, 126 Idaho 960, 961, 895 P.2d 561, 562 (1995). "After drawing all inferences in the non-moving party's favor, [the court then determines] whether a claim for relief has been stated." *Id.* "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.'" *Id.* (citations omitted). To dismiss a complaint pursuant to Rule 12(b)(6), "it must appear beyond doubt that the plaintiff can prove no set of facts in

support of his claim which would entitle him to relief." *Ernst v. Hemenway & Moser, Co.*, 120 Idaho 941, 946, 821 P.2d 996, 1001 (Ct. App. 1991).

III. ANALYSIS

A. This Court has subject-matter jurisdiction over this action pursuant to I.R.C.P. 12(b)(1).

1. In general.

Subject matter jurisdiction is the power to determine cases of a general type or class of dispute. *Boughton v. Price*, 70 Idaho 243, 249, 215 P.2d 286, 289 (1950). "[S]ubject matter jurisdiction can never be waived or consented to, and a court has a sua sponte duty to ensure that it has subject matter jurisdiction over a case." *State v. Urrabazo*, 150 Idaho 158, 163, 244 P.3d 1244, 1249 (2010) (overruled on other grounds, *Verska v. Saint Alphonsus Regional Medical Center*, 151 Idaho 889, 265 P.3d 502 (2011)). If this Court lacks subject matter jurisdiction, it must dismiss this case. I.R.C.P. 12(g)(4). Judgments made without subject matter jurisdiction are void, "are subject to collateral attack, and are not entitled to recognition in other states under the full faith and credit clause of the United States Constitution." *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 626-27, 586 P.2d 1068, 1070-71 (1978). Whether a district court has subject matter jurisdiction is separate determination, independent from the merits of the case. *Bagley v. Thomason*, 155 Idaho 193, 307 P.3d 1219, 1222 (2013).

The Idaho Constitution grants district courts original jurisdiction over all matters at law and in equity. Idaho Const. art. V, § 20. While district courts are courts of general jurisdiction, "[j]udges of the magistrate division receive their cases by assignment from the district judges, pursuant to statutes and to rules of our Supreme Court." *St. Benedict's Hosp. v. Twin Falls Cty.*, 107 Idaho 143, 146, 686 P.2d 88, 91 (Ct. App. 1984).

2. Claims against the Personal Representative of the Estate.

John and Kathy first assert, "Plaintiff's Complaint contains allegations related solely to the distribution and administration of Felden's estate and the Felden Trust; in other words, subject matter solely related to probate." Mem. in Supp. of Defs.' Mot. Dismiss, 4. As shown below, it is wrong for counsel for John and Kathy to conflate estate administration with trust administration and call them both matters "solely related to probate." Next, John and Kathy cite to *Moyes v. Moyes,* 60 Idaho 601, 609, 94 P.2d 782, 785 (1939), and *Miller v. Mitcham,* 21 Idaho 741, 745, 123 P. 941 (1912), for the proposition, respectively, that probate courts have "original" and "exclusive" jurisdiction. *Id.* at 5. The problem with that case authority is that those cases were penned four to six decades *before* the Uniform Probate Code was adoped in Idaho in 1971. John and Kathy next turn their attention to the Uniform Probate Code, and argue:

> This requirement [of "original" and "exclusive" jurisdiction of probate courts] was later codified by the Uniform Probate Code, adopted by Idaho in 1971: Idaho Code § 15-3-105 clearly states that the probate court has "exclusive jurisdiction of formal proceedings to determine how decedents' estates . . . are to be administered, expended and distributed." As the bases of Plaintiff's allegations relate only to matters of trust and estate distribution and administration, they fall squarely within the exclusive jurisdiction of the probate court.

Id. This argument by John and Kathy, "that the probate court has 'exclusive jurisdiction of formal proceedings to determine how decedents' estates . . . are to be administered, expended and distributed'" is blatantly misleading. Idaho Code (I.C.) § 15-3-105 does not even mention the word "probate court"; that code section in its entirety reads:

> **Proceedings affecting devolution and administration — Jurisdiction of subject matter.** Persons interested in decedents' estates may apply to the registrar for determination in the informal proceedings provided in this chapter, and may petition the court for orders in formal proceedings within the court's jurisdiction including but not limited to those described in this chapter. The court has exclusive jurisdiction of formal proceedings to

> determine how decedents' estates subject to the laws of this state are to be administered, expended and distributed.

This Court notes that nothing in I.C. § 15-3-105 defines what is meant by the words "the court", and nothing in the Probate of Wills and Administration section of the Idaho Code (I.C. § 15-3-101 et. seq) limits the phrase "the court" in that section to magistrates only. Indeed, to do so would contravene I.C. § 1-2208.

The Idaho Court of Appeals held, "[i]t is true that under I.C. § 1–2208(2) ... magistrates may be assigned to hear proceedings involving will probates and administration of decedents' estates, but such assignments do not deprive the district judges of their subject matter jurisdiction." *Olson v. Kirkham*, 111 Idaho 34, 36, 720 P.2d 217, 219 (Ct. App. 1986). Idaho Code § 1-2208 provides, in relevant part, that magistrates may be assigned "[p]roceedings in the probate of wills and administration of estates of decedents, minors and incompetents." I.C. § 1-2208. (underlining added). That statute makes it clear that it is the district judge that has the jurisdiction, and it is the district judge that may (if he or she chooses to exercise that discretion) assign certain matters to a magistrate judge. One of the matters a district judge may assign to a magistrate is "Proceedings in the probate of wills and administration of estates of decedents, minors and incompetents." I.C. § 1-2208(2). This Court notes that I.C. § 1-2208 does not address or allow for assignment to magistrates cases involving administration of trusts. Setting aside the trustee aspect of this case for the moment, at least as to the estate aspect of this case, *Olson* and I.C. § 1-2208 alone eviscerate the argument made by John and Kathy that the magistrate judge has original jurisdiction.

John and Kathy next argue that "relief must be originally sought in the probate court" because KHS's allegations relate solely to the distribution of the Felden Trust

and Felden Estate. Mem. in Supp. of Defs.' Mot. to Dismiss, 7. John and Kathy begin their "probate court" argument as follows:

> Furthermore, Plaintiff has filed the present Complaint in the First Judicial District Court rather than in probate court as required by Idaho Code §§ 15-3-105 and 15-7-201. The claims alleged in the Complaint arise solely from concerns involving the Felden Trust and the Estate. As stated in I.C. § 15-3-105, Plaintiff is required to first seek relief from the probate court. Plaintiff's decision to file the Complaint in the District Court constitutes a fatal barrier to its ability to proceed with the claims alleged, as the District Court lacks the proper subject matter jurisdiction to hear the case.

Id. John and Kathy then proceed to refer to the "probate court" in their opening brief several more times, and they make the same "probate court" reference several times in their post-hearing supplement. However, counsel for John and Kathy fail to recognize that "probate court" ceased to exist since 1971, nearly five decades. Effective January 11, 1971, Idaho Code § 1-103 reads:

> **PROBATE, POLICE AND JUSTICE OF THE PEACE COURTS ABOLISHED — TRANSFER OF JURISDICTION.** All probate courts, justice of the peace courts, and police courts shall cease to exist on the date [January 11, 1971] as provided in this act. Wherever the words probate court, justice court or police court appear in the Idaho Code they shall mean the district court, or the magistrate's division of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate court, justice court or police court shall be transferred to the district court or the magistrate's division of the district court, as the case may be. Wherever the words judge, probate judge, justice of the peace or police judge appear in the Idaho Code they shall mean the district judge or the magistrate of the district court, as the case may be, and any power, duty, responsibility, function or jurisdiction of the probate judge, justice of the peace, or police judge shall be transferred to the district judge or the magistrate of the district court, as the case may be.

John and Kathy next cite *Miller v. Estate of Prater*, 141 Idaho 208, 108 P.3d 355 (2005), and claim the [Idaho Supreme] "Court addressed the 'exclusive jurisdiction' vested to the courts pursuant to I.C. § 15-3-105." Mem. in Supp. of Defs.' Mot. to Dismiss, 6. Even this is a bit misleading by John and Kathy. In *Miller*, Thomas Miller was one of two children of Bernice Prater. 141 Idaho at 210, 108 P.3d at 357. Bernice

married Wid Prater, and Wid had two children. *Id.* Wid and Bernice entered into a contract where they agreed to leave their entire estates to each other in consideration for their mutual promises that neither would alter the ultimate disposition of their property equally among their four children, upon the death of the survivor. *Id.* Bernice then died, and Wid remarried, and he eventually signed a new will and a new trust which "substantially changed the distribution scheme", and then Wid died. *Id.* Thomas Miller sued Wid's estate's personal representative in district court alleging breach of contract. *Id.* The district judge bifurcated the jury trial into 1) whether the contract was breached and 2) what the damages were. 141 Idaho at 211, 108 P.3d at 358. The Idaho Supreme Court affirmed on the issue of liability (breach of contract), but reversed on the issue of damages, and remanded with instructions for the district judge to certify damages (Tom Miller's monetary entitlement) to the judge handling the pending probate proceeding. 141 Idaho at 215, 108 P.3d at 362. Because this Court finds *Miller* does not require this Court to grant the motion to dismiss made by John and Kathy, and because this Court does not read *Miller* as broadly as counsel for John and Kathy, the entire portion of that decision is as follows:

> **B. The Damage Award Must Be Reversed.**
>
> Following the jury's determination that the Estate was liable for breaching the Contract, the issue of damages was tried and submitted for decision by the jury. The Estate objected to having the matter determined in the breach of contract action, contending that the judge in the pending probate had exclusive jurisdiction to determine Miller's entitlement. On the other hand, Miller contended that the district court had exclusive jurisdiction over contract damages. The jury returned a damage verdict for Miller in the sum of $124,000. On appeal, the Estate asserts the district court erred in having the jury, rather than the judge in the probate, determine Miller's entitlement from the Estate. We agree.
>
> The Estate argues that I.C. § 15–3–105 gives the court handling a probate exclusive jurisdiction to determine any estate beneficiary's entitlement. This section provides, in pertinent part, that the "court has exclusive jurisdiction of formal proceedings to determine how decedent's estates subject to the laws of this state are to be administered, expended and distributed." The Estate argues that the judge in the probate was best

positioned to determine the gross amount of the estate, the expenses chargeable against Miller's one-fourth share, and the net amount to which Miller was entitled.

On the other hand, Miller contends that the judge handling a probate proceeding does not have jurisdiction to entertain an action involving the breach of a contract to make a will or devise, citing *In Re Isaacson's Estate,* 77 Idaho 12, 285 P.2d 1061 (1955). In *Isaacson* the probate court had determined that the execution of a joint will and the receipt of benefits thereunder by the survivor created an irrevocable contract, rendering a later will invalid. This Court determined that:

> The issues of whether such an irrevocable contract exists and the enforcement thereof are matters to be tried out in a court of equity, and are beyond the equitable powers of the probate court in probate matters.

Id. at 15, 285 P.2d at 1063. Thus, Miller argues, the damage issue could only be decided in district court.

What Miller overlooks is that Idaho adopted the Uniform Probate Code (Code) in 1971. The Code provided the court handling a probate with wide ranging powers to determine contested matters, such as that involved in this case. I.C. § 15–3–104 provides that, "No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative." I.C. § 15–1–201(5) defines "claims" to include liabilities of the decedent "whether arising in contract, in tort or otherwise ..." As pointed out by the Estate, I.C. § 15–3–105 provides the "court" with exclusive jurisdiction of "formal proceedings" to determine how decedent's estates are to be "expended and distributed." According to I.C. § 15–1–201, formal proceedings are those conducted before a judge with notice to interested persons. I.C. § 15–3–106 provides catch-all authority for the court to determine any other controversy to which an estate may be a party, covering any matters not addressed in I.C. §§ 15–3–104 and 105. Necessarily included in such matters are contracts to make a will or devise, which are specifically addressed in I.C. § 15–2–701.

In considering these Code provisions, it is clear that the court handling a probate has jurisdiction to determine the existence and enforcement of a contract to make a will or devise. These Code provisions have rendered ineffective any contrary language in *Isaacson.* **This does not necessarily mean, however, that the judge in a probate proceeding has exclusive jurisdiction of these matters. I.C. § 15–1–201(6) defines "court" as follows:**

> **'Court' means the court or branch having jurisdiction in matters relating to the affairs of decedents, minors, incapacitated and disabled persons. This court in this state is known as the district court.**

The question of whether a district judge or magistrate judge should determine issues relating to a contract to make a will or devise is not so much a matter of jurisdiction as it is of assignment. I.C. § 1–2208(2) allows for the assignment to magistrate judges of proceedings in the probate of wills and administration of estates of

decedents. I.R.C.P. 82(c)(1)(A) provides for the jurisdiction of magistrate judges in such matters. The upshot is that both district judges and magistrate judges have "jurisdiction" to entertain actions for the enforcement or breach of contracts to make wills or devises. Since magistrate judges have been assigned responsibility for probate proceedings, all matters related to decedent's estates should first be considered and determined by the magistrate judge in the probate proceeding. A reading of I.C. § 15–3–105 indicates this to be the legislative intent. It also makes practical sense.

While the parties to this proceeding agreed, by virtue of the jury's finding of liability, that Miller was entitled to a one-fourth share of the Estate, there was substantial disagreement as to how that amount was to be determined, what expenses should be deducted, whether attorney fees incurred by the Estate in this action could be properly considered as a deduction under I.C. § 15–3–720, and how any amount of damages determined by the jury might affect other Estate beneficiaries. The jury instructions provide little edification in this regard and it is likely that the jury was somewhat confused. It arrived at a damage figure almost exactly halfway between the differing amounts proposed by Miller and the Estate.

While it is clear that the district court had jurisdiction to consider and determine the issue of liability on the breach of contract claim, neither party has raised on appeal the question of whether or not the liability issue should have been considered in the first instance by the judge in the probate proceeding by virtue of the assignment of these matters to the magistrate division. However, the issue of the propriety of allowing the jury to decide the issue of damages is before the Court. **Again, it is not a matter of jurisdiction but of proper assignment of the issue.** Were the jury to have been provided with all of the pertinent information necessary to make the decision regarding the amount of Miller's entitlement, there might be some inclination by this Court to allow the determination to stand. However, the district court and parties mistakenly believed that the Contract contained provisions relating to the determination of Miller's entitlement and there was confusion regarding what expenses, particularly attorney fees, could be deducted from his share. The wisdom of placing the responsibility of allowing the judge handling the probate to determine how the estate should be expended and distributed is clear from the missteps below.

The trial judge and parties considered the following language in the Contract to be pertinent in determining the amount of Estate expenses to be assessed against Miller's one-fourth share:

> To further clarify (sic) our agreement, it is understood that with respect to properties that are now, or may in the future be, held in our names and in the names of one or more of our children, as joint tenants, and with respect to the proceeds from certain accounts and insurance policies under which one or more of our children have been designated as beneficiaries, that the time that said joint tenancies were created or said beneficiary designations made, we had an understanding with the child who was

> named as joint tenant or designated as beneficiary that the properties which such child would acquire at the time of our deaths by virtue of the joint tenancy or because of such beneficiary designation shall be held in trust by that child to first pay all of our debts, expenses of our last illness, funerals and burials, and that any amounts remaining after said payments are made shall be distributed in equal shares to our four children, KAREN LEE McGRATH, MICHAEL WID PRATER, SUSAN KAY LEWIS and THOMAS JAMES MILLER.
>
> All concerned interpreted this language to mean that "our debts, expenses of our last illness, funerals and burials," were the items to be considered by the jury in determining the deductions to be applied against the gross estate in order to determine the amount of Miller's one-fourth share. However, it is obvious from a reading of this language that it applies only to joint tenancy property and to accounts and insurance policies under which any of the children is designated as beneficiary. It was not intended to apply to estate property generally.
>
> The parties hotly disputed the question of whether "debts" included attorney fees, particularly attorney fees incurred by the Estate in defending this case. The parties submitted their conflicting positions regarding the attorney fee issue to the jury, as well as disagreements regarding the gross amount of the Estate, whether the monthly fees of Susan Lewis as trustee of the Trust should or should not be deducted and if so how much, and whether or not taxes should or should not be deducted. It is no wonder that the jury decided to merely split the difference.
>
> The judge handling the probate is best positioned to determine the net share of any estate beneficiary, considering all expenses, the overall scheme of distribution, and the effect of one beneficiary's entitlement upon that of the others. By following the intent of the applicable statutes and rules pertaining to assignment of probate proceedings to the magistrate division, the confusion can be averted or alleviated. Since this preferred scheme was not followed and since the determination of Miller's entitlement from the Estate was the product of confusion, the damage determination is reversed.

141 Idaho 208, 212--15, 108 P.3d 355, 359--62 (bold added).

KHS does not discuss *Miller* in its briefing. The bold portion of Miller set forth above makes it abundantly clear to this Court that this Court still has jurisdiction over this case brought by KHS and that the motion to dismiss by John and Kathy must be denied. KHS is not seeking to have John replaced as personal representative and KHS is not asking this Court to administer Felden's estate. KHS claims a breach of fiduciary

duty and a breach of contract against John and Kathy in their respective representative capacities as personal representative and trustee. This Court has jurisdiction to hear those claims. While KHS seeks a money recovery against both John and Kathy (First Am. Compl., 8-9), at the present time, the most that can be said under *Miller* is that the issue of damages against John alone, in his capacity as personal representative, may be handed off to the magistrate judge assigned to Kootenai County Case No. CV 2017 1017. Defs.' Pst-Hr'g Supp., 3.

This court agrees with KHS's argument:

> Kootenai Humane Society's claims are outside the scope of any underlying probate proceedings, therefore, Defendants' claims as to probate jurisdiction in accordance with Idaho Code § 15-3-105 are without merit. The only connection between Defendants' claims and any probate action is the means by which Defendants obtained control over the property in question. Construing Kootenai Humane Society's Complaint liberally sets forth facts supporting breach of fiduciary duty, as well as damages resulting from such a breach. Such a claim is within this Court's jurisdiction. Not even in its prayer for relief did Plaintiff request such actions only applicable to the Court determined as the Court of registration, namely, removal of a trustee or appointment of a replacement. *See* LC. § 15-7—201. Therefore, regardless of this Court's exclusive jurisdiction through registration, Plaintiff's claims as pled fall within the Court's general jurisdictions. Defendants' Motion to Dismiss should be denied.

Pl.'s Resp. and Opp'n to Defs.' Mot. to Dismiss, 4.

3. Claims against the Trustee.

First, this Court sees no reason why *Miller* in any way applies to Kathy in her capacity as trustee. As noted above, while one of the matters a district judge may assign to a magistrate pursuant to I.C. § 1-2208(2) is "Proceedings in the probate of wills and administration of estates of decedents, minors and incompetents", this Court notes that I.C. § 1-2208 does not address or allow for assignment to magistrates cases involving administration of trusts.

KHS argues that this Court has proper subject matter jurisdiction pursuant to I.C. § 15-7-201 which provides in pertinent part: "The court of registration has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." Opp'n to Defs'. Mot. to Dismiss, 3. KHS argues that this Court is the proper court of registration because the principal place of administration of the Felden Trust is Kootenai County. *Id.* Alternatively, KHS argues that, even if this Court is not the proper court of registration, the Complaint alleges breach of fiduciary duty, which has been "specifically held as separate and apart from the duties provided under Idaho Code § 15-7-201(a)" and is "subject to the jurisdiction of the court as invoked by interested parties or as otherwise provided by law." *Id.*, (citing *Chabot v. Chabot*, No. 4:11-CV-217-BLW, 2011 WL 5520927, at *5 (D. Idaho Nov. 14, 2011)).

As pointed out by KHS, I.C. § 15–7-201 governs jurisdiction of trusts and provides "the court of registration" with exclusive jurisdiction of proceedings concerning the internal affairs of trusts. The internal affairs of trusts include, but are not limited to, reviewing trustees' fees and determining questions arising in the administration or distribution of any trust. I.C. § 15–7-201(a)(2)-(3). The Felden Trust was registered by Kathy in Kootenai County District Court of the First Judicial District of Idaho. Defs.' Post-Hr'g Suppl., Ex. A. While registering the trust, Kathy signed a document requiring that she "submits to the jurisdiction of the Court in any proceeding relating to the trust." *Id.* at ¶ 6. As this Court is the "court of registration" and this dispute relates to the trust, this Court has subject matter jurisdiction over the matter.

Additionally, as this Court mentioned above, I.C. § 1-2208 does not address or allow for assignment to magistrate judges cases involving administration of trusts. Also, Idaho Court Administrative (I.C.A.R.) Rule 5 and 6 do not provide for assignment of trust cases to magistrate judges. The only logical reading of I.C.A.R. 5 and 6 is that if

the trust compromised a value of less than $10,000.00, then the case may be assigned by a district judge to a magistrate judge pursuant to I.C. § 1-2210. The value of the trust in this case is clearly over $10,000.00. Compl., 8, ¶ 1. John and Mary claim the state had a value of $2.5 million in land alone and that the trust had distributed over $2 million to KHS already. Defs.' Post-Hr'g Suppl., 4.

Counsel for John and Kathy claim that *Chabot* indicates the same analysis that applies for assigning estate cases to magistrate judges applies to assigning trust cases to magistrate judges. Mem. in Supp. of Defs.' Mot. to Dismiss, 6. The Court has read *Chabot*. Nothing in *Chabot* supports the reading of that case given by counsel for John and Kathy. Such a reading runs contrary to I.C. § 1-2208.

B. KHS's claim of conversion, the second cause of action in the Amended Complaint, will not be dismissed pursuant to I.R.C.P. 12(b)(6); the Court finds KHS adequately plead its claim of conversion.

Under Idaho law, conversion is "defined as a distinct act of dominion wrongfully asserted over another's personal property in denial of or inconsistent with [his] rights therein." *Med. Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 400, 336 P.3d 802, 807 (2014) (citations omitted) (explaining further that "conversion is a dealing by a person with chattels not belonging to him, in a manner inconsistent with the rights of the owner."). A valid conversion claim requires three elements: "(1) that the charged party wrongfully gained dominion of property; (2) that [the] property is owned or possessed by plaintiff at the time of possession; and (3) the property in question is personal property." *Id.* (quoting *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642, 662 (2010)).

John and Kathy seek dismissal of KHS's conversion claim, arguing that KHS has failed to properly plead the first element of a conversion claim-- that the defendants

gained control over the property without a right to do so. Mem. in Supp. of Defs.' Mot. to Dismiss, 8--9. Further, John and Kathy argue that KHS's conversion claim cannot be maintained because the allegedly misappropriated funds paid to John and Kathy no longer retain the "specific identity" required for a conversion claim. *Id.* at 10. In response, KHS argues that by alleging that John and Kathy reimbursed to themselves money from the trust for expenses that were unrelated to their duties, it sufficiently pled all required elements of conversion, including the defendants' wrongful possession. Pl.'s. Resp. and Opp'n. Defs.' Mot. Dismiss, 4.

In its Amended Complaint, KHS alleged conversion as follows:

> 4.1 Plaintiff incorporates by reference the allegations set forth above as though fully set forth herein.
> 4.2 Defendant Kathleen A. Keough, is the Trustee of the Felden Trust and was a hired agent of the Felden Will.
> 4.3 Defendant John Keough, is the Personal Representative of the Felden Will and hired agent of the Felden Trust.
> 4.4 Defendants in their respective positions are fiduciaries with direct access and control of funds to be paid to Plaintiff through the Estate, Felden Will, and/or Felden Trust.
> 4.5 Defendants independently in their respective positions, stole money from Plaintiff by paying themselves money that was to be distributed to the Plaintiff, by means of charging unreasonable and unassociated costs and fees.

First Am. Compl., 8.

John and Kathy correctly note that, "[d]etermining dismissal pursuant to I.R.C.P. 12(b)(6) requires all inference from the record to be drawn in favor of the non-moving party. *Miles v. Idaho Power Co.*, 116 Idaho 635 [,637, 778 P.2d 757, 759] (1989)." Mem. in Supp. Defs.' Mot. to Dismiss, 8. John and Kathy then argue:

> A claim for conversion requires plaintiff to prove three elements: 1) that the charged party wrongfully gained dominion of property; 2) that the property is owned or possessed by plaintiff at the time of possession; and 3) the property in question is personal property. *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642, 663 (2010); *See Beasley Transfer & Storage Co.*, 132 Idaho 732, 743, 979 P.2d 605, 616 (1999). Under these

requirements, Plaintiff cannot establish a basic claim for conversion; specifically, Plaintiff cannot meet the first requirement as neither John nor Kathy "wrongfully" gained dominion over the subject property. Quite the opposite occurred in this case as John was appointed as Personal Representative of Felden's estate by the Court and Kathy accepted appointment as successor Trustee in accordance with Article V, Section 5 of the Felden Trust. As previously stated, Felden executed the First Amendment to the Felden Trust in 2012 to name Kathy as the appointed successor Trustee of the Felden Trust. Simply put, Defendants did not "wrongfully" gain dominion over the subject property. Furthermore, Defendants' control is necessary to fulfill their duties as Personal Representative of the estate and successor Trustee of the Felden Trust.

The only property Plaintiff alleges to have been misappropriated is money Defendants reimbursed to themselves while acting in their capacities as successor Trustee and Personal Representative. *See* Complaint, ¶ 4.5. While the courts generally agree that intangible property can provide a basis for a claim of conversion, the courts have "expressly held that 'conversion for misappropriation of money does not lie unless it can be described or identified as specific chattel.'" *Med. Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 400, 336 P.3d 802, 807 (2014) quoting *Warm Springs Props., Inc. v. Andora Villa, Inc.*, 96 Idaho 270, 272, 526 P.2d 1106, 1108 (1974). In *Med. Recovery Servs., LLC v. Bonneville*, the court held that the claim for conversion could not stand because the funds lost whatever specific identity they had once they were comingled with a checking account. *Id.* at 401, 336 P.3d at 808.

Here, Plaintiff cannot specifically identify the funds Defendants allegedly misappropriated to themselves. Plaintiff's prayer for relief requests judgment against Defendants "jointly and severally for damages in an amount in excess of $10,000.00, an amount to be proven at the time of trial" but does not identify a specific amount related to the claim of conversion. *See* Complaint "Prayer for Relief" ¶ 1. Likewise, Plaintiff's "Exhibit C" and "Exhibit D" to the Complaint make no distinctions between funds which may be appropriate and those alleged to be wrongful misappropriations. Even if Plaintiff could point to which funds were allegedly misappropriated, any funds paid to Defendants no longer retain the "specific identity" required for a claim of conversion. *See Med. Recovery Servs., LLC*, 157 Idaho at 401.

In sum, the facts alleged by Plaintiff simply cannot support a claim for conversion. As such, Plaintiff's claim under Count II (Conversion) should be dismissed pursuant to I.R.C.P. 12(b)(6).

Id., at 8--10. This argument made by John and Kathy has superficial merit if one looks only at the allegations made in KHS's First Amended Complaint, paragraphs 4.1

through 4.5, as set forth above. However, this Court must also consider the following allegations made by KHS:

> 2.9 The Amendment provided the following language with regard to Trustee compensation and payment: "If at any time, Kathy Keough, serves as successor Trustee, she shall be entitled to Fifty Thousand Dollars ($50,000.00), which is what I determine is fair and reasonable compensation for her services rendered as fiduciary." "In addition to receiving compensation, a Trustee may be reimbursed for reasonable costs and expenses incurred in carrying out its duties under this agreement."
>
> 2.10 As Trustee of the Felden Trust, Defendant Kathleen A. Keough, was subject to the duties and obligations prescribed in the Felden Trust and under Idaho law, including but not limited to, the fiduciary duty of loyalty, duty of care and good-fajth owed to the beneficiaries in the administration and distribution of the Trust.
>
> 2.11 Defendant Kathleen A. Keough breached her fiduciary duty by paying money fiom the Trust as reasonable compensation in excess of Fifty Thousand Dollars ($50,000) as was explicitly determined in the Amendment.

First Am. Compl., 4.

With regard to the first element of conversion, applying all inference in favor of KHS, the non-moving party, KHS has adequately pled that John and Kathy gained or exercised wrongful control of property. The Felden Trust instructs that "the Trustee shall hold, manage and control the property comprising the trust estate" and states that the Trustee's own compensation "may be collected annually by the Trustee out of income or principal." First Am. Compl., Ex. A. In its complaint, KHS specifically refers to John and Kathy as "fiduciaries with direct access and control of funds to be paid to [KHS]." *Id.* at ¶ 4.4. In stating its claim for conversion, KHS simply alleges that John and Kathy stole money "by means of charging unreasonable and unassociated costs and fees." *Id.* at ¶ 4.5. Those allegations viewed in isolation may be insufficient to raise a reasonable inference that John or Kathy exercised dominion or control over the trust assets *without a right to do so*. However, paragraph 2.9 of the First Amended Complaint makes clear that KHS alleges that Kathy was limited under the trust to a fee

of $50,000.00 for her reasonable compensation for her services as a fiduciary, and paragraph 2.11 alleges that Kathy exceeded that amount. The argument made by John and Kathy that "neither John nor Kathy 'wrongfully' gained dominion over the subject property" is misplaced. John and Kathy had dominion over the subject property, but the allegation by KHS is that at least Kathy exceeded that legal dominion and control by paying herself in excess of the expressly stated $50,000.00 amount. Accordingly, KHS's claim for conversion has been adequately pled and that claim will not be dismissed pursuant to I.R.C.P. 12(b)(6).

Finally, John and Kathy also argue the "specific identification" issue in a conversion claim which involves money. John and Kathy argue:

> While the courts generally agree that intangible property can provide a basis for a claim of conversion, the courts have "expressly held that 'conversion for misappropriation of money does not lie unless it can be described or identified as specific chattel.'" *Med. Recovery Servs., LLC v. Bonneville Billing & Collections, Inc.*, 157 Idaho 395, 400, 336 P.3d 802, 807 (2014) quoting *Warm Springs Props., Inc. v. Andora Villa, Inc.*, 96 Idaho 270, 272, 526 P.2d 1106, 1108 (1974). In *Med. Recovery Servs., LLC v. Bonneville*, the court held that the claim for conversion could not stand because the funds lost whatever specific identity they had once they were comingled with a checking account. *Id.* at 401, 336 P.3d at 808.

Mem. in Supp. of Defs.' Mot. to Dismiss, 9. The Court has read each of those cases cited by John and Kathy. None of those cases dealt with the situation at present, where a motion to dismiss is presented and no discovery has been conducted. *Med. Recovery Servs., LLC* concerned a case on summary judgment. *Warm Springs Props., Inc.* concerned a case on summary judgment. John and Mary ask this Court to make a determination as a matter of law based on facts which, at the present time, are completely unknown. This Court cannot make the assumptions and presumptions which John and Kathy ask this Court to make.

IV. CONCLUSION.

For the reasons stated above, the Motion to Dismiss KHS's complaint for lack of subject matter jurisdiction made by John and Kathy is denied, as is their Motion to Dismiss KHS's claim for conversion for failure to state a claim.

IT IS HEREBY ORDERED the Motion to Dismiss filed by defendants is DENIED.

Entered this 13th day of June, 2019.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of June, 2019 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Mark A. Ellingsen
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By _____
Jeanne Clausen, Secretary