

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of William C. Gugel, a
protected person.

BARBARA J. ZABEL and WILLIAM G. ZABEL, as
Co-Trustees of the William C. Gugel Revocable Living
Trust,

Plaintiffs-Appellants,

v

DAVID LEE STEELE,

Defendant-Appellee,

and

GAIL PROCTOR,

Defendant-Non Participant,

and

SHARON J. BARNES and LORI A. MILLER,

Defendants.

BARBARA J. ZABEL and WILLIAM G. ZABEL, as
Co-Trustees of the William C. Gugel Revocable Living
Trust,

Plaintiffs-Appellants,

v

UNPUBLISHED
May 30, 1997

No. 186749
Oakland Probate Court
LC No. 94-237125 CZ

No. 189484

Oakland Probate Court

Defendant-Appellee.

Before: White, P.J., and Cavanagh and J. B. Bruff*, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal the probate court's order granting summary disposition to defendant on the basis of lack of personal jurisdiction (No. 186749) and its order setting aside a default judgment entered against defendant (No. 198484). We reverse in case No. 189484, and conclude the appeal in No. 186749 is thereby rendered moot.

I

William C. Gugel (Mr. Gugel) and Jane Miller (Mrs. Gugel) were married in 1983. Mr. Gugel was seventy years old at the time, and both he and Mrs. Gugel previously had been married. Mr. Gugel had accumulated considerable assets during his thirty-year marriage to his former wife, June Gugel. After June Gugel's death in 1978, Mr. Gugel placed his assets in a revocable living trust. In 1985, Mr. and Mrs. Gugel established joint bank accounts. As Mr. Gugel's health began to deteriorate, Mrs. Gugel gradually took responsibility for the couple's financial affairs. In the summer of 1991, Mrs. Gugel herself became seriously ill. In September 1991, Mrs. Gugel executed a durable power of attorney, naming her daughters, Sharon Barnes and Lori Miller, as attorneys-in-fact. Miller withdrew \$109,000 from the Gugels' joint accounts and distributed the funds to herself and her four siblings, one of whom is defendant.

On October 8, 1991, a petition to appoint Barbara J. Zabel as special conservator and to determine title to personal property in the form of cash totaling \$109,000 was filed by Mr. Gugel's brother, Robert J. Gugel. Zabel was appointed special conservator and filed an emergency petition to enjoin the disposition of assets, issue a preliminary injunction, and determine title. A temporary restraining order was entered ordering that the five siblings be restrained from disposing of the real or personal property of Mr. Gugel which was in their possession or control.

After an evidentiary hearing, the probate court concluded that neither Miller nor Barnes unduly influenced their mother, Mrs. Gugel, to execute the power of attorney or to make withdrawals from her joint accounts with Mr. Gugel. However, the probate court further concluded that the statutory presumption that title to the joint accounts vested in Mrs. Gugel had been overcome by evidence that both parties intended to keep completely segregated monies during their lifetime, and that Mrs. Gugel did not have the legal authority to "gift" the funds from the joint accounts to her children, that Mrs. Gugel violated her fiduciary duty to Mr. Gugel by "gifting" from her joint accounts, and that Mr. Gugel's

* Circuit judge, sitting on the Court of Appeals by assignment.

estate had title to that money. The court's order determining title did not include an enforcement provision.

In late November and early December 1992, citations for examination, MCL 700.607; MSA 27.5607, were filed and served on Miller and Barnes and, following their testimony acknowledging receipt of \$22,500, money judgments were rendered against each in the amount of \$22,500. On appeal to this Court, the judgments were affirmed. *Zabel v Miller (In the Matter of William C. Gugel)*, unpublished opinion per curiam of the Court of Appeals, issued April 28, 1995 (Docket No. 160339).

On December 8, 1993, a default judgment for \$20,000 was entered against defendant Steele based on his failure to appear in response to a citation for examination to rebut the testimony given to the probate court by Miller on December 9, 1992, that Steele received \$20,000 belonging to Mr. Gugel's estate. Zabel filed a motion to issue garnishment in St. Louis (Missouri) County Circuit Court on May 17, 1994. Steele filed a motion to quash garnishment, which was granted by the Missouri court on July 6, 1994, in an order stating that the "Michigan Court did not have jurisdiction" to enter the judgment.

On August 11, 1994, challenging among other things the adequacy of notice to him, Steele moved to set aside the probate court default judgment and sought an injunction to prevent further litigation regarding any matters previously decided or that could have been decided as part of the original proceeding. An order vacating the default judgment was entered by stipulation on August 25, 1994. In September, the court awarded \$6,442 in attorney fees to Steele, but denied his request for injunction. Plaintiffs filed a motion for reconsideration of the award of attorney fees and, on May 31, 1995, the probate court filed an opinion and order setting aside the award.

A second citation for examination was served on Steele on August 7, 1995, which ordered him to appear in Oakland County Probate Court on August 18, 1995. After Steele failed to appear, a \$20,000 default judgment was entered. A bench warrant issued for Steele's arrest.

Steele filed a motion for reconsideration, which was granted with respect to the default judgment by order dated September 18, 1995:

MCL 700.611 provides that if a person against whom a citation is issued refuses to appear and render an account, the court may proceed as provided in MCL 700.607. MCL 700.607(2) specifically provides a remedy for the failure to appear in a citation proceeding. The remedy is the issuance of a bench warrant. The statute does not provide for entering a default judgment. Respondent has demonstrated palpable error by which the court was misled and a different disposition would result from a correction of that error. The motion for reconsideration is GRANTED with respect to the default judgment and DENIED with respect to the bench warrant.¹

Plaintiffs appeal the probate court's order of September 18, 1995 in docket No. 189484.

In the interim, on August 29, 1994, Zabel filed a civil complaint in probate court against the five siblings, including defendant. The complaint sought judgment for \$109,000 and injunctive relief, and alleged in pertinent part that Steele received \$20,000 in 1991, while in the State of Michigan. The probate court issued a temporary restraining order.

Defendant's answer included as affirmative defenses lack of personal jurisdiction, res judicata, plaintiffs' failure to timely appeal the probate court's 1992 order, and due process. On Steele's motion for summary disposition, the probate court dismissed the action for lack of personal jurisdiction. Plaintiffs appeal this ruling in docket no. 186749.

Defendant has not filed a brief in either appeal.

II

Initially, we note that while jurisdiction is contested in No. 196749, it is not at issue in the original probate proceeding, No. 189484. Steele appeared and was represented by counsel in this proceeding, and the court recognized that it had personal jurisdiction over Steele.

Plaintiffs contend that the probate court erred in reconsidering its entry of a default judgment against Steele because, in doing so, it erroneously concluded that a judgment could not be entered against a party for the failure to appear in response to a citation for examination. We agree.

The statute governing citations for examination, MCL 700.607; MSA 27A.5607, provides:

(1) The judge may cite a person to appear before the court and be examined upon the matter of a complaint which is filed with the court under oath by a fiduciary, heir, devisee, creditor, or any other interested person in the estate of a decedent or ward alleging that: (a) the person is suspected to have, or has knowledge that another may have, concealed, embezzled, conveyed away, or disposed of, any property of the decedent or ward; (b) the person has possession or knowledge of a deed, conveyance, bond, contract or other writing, which contains evidence of, or tends to disclose the right, title, interest or claim of the decedent or ward to any of the estate; or (c) the person has possession or knowledge of a last will and testament of the decedent.

(2) If the person cited under subsection (1) refuses to appear and be examined or refuses to answer interrogatories as may be put to him touching the matter of complaint, the judge may, by warrant for that purpose, commit the person to the county jail to remain in custody until that person submits to the order of the court.

The statute provides a discovery mechanism for obtaining information from both parties and non-parties by authorizing the probate court to issue and enforce an order that a person who is alleged to possess relevant information appear before the court for examination. *Perrin v Calhoun Circuit Judge*, 49 Mich 342, 344-345; 13 NW 767 (1882) (discussing a prior version of the statute).

The probate court in this case erroneously determined that it could only issue a bench warrant to enforce its order that defendant Steele appear in response to a citation for examination. Procedure in the probate court is governed by the rules applicable to other civil proceedings. MCR 5.001(A); *In re Pitre*, 202 Mich App 241, 243; 508 NW2d 140 (1993). Under MCR 2.506(F)(6), the court may enter a default judgment against a party who fails to appear pursuant to a court order for the purpose of testifying in open court. MCL 700.607(2); MSA 27A.5607(2) merely grants the court the additional power to issue a bench warrant to compel any person to appear for examination. It does not foreclose other means of enforcement when the order to appear is directed at a party to the action, such as defendant in this case. Accordingly, the probate court abused its discretion in granting defendant's motion for reconsideration of the entry of a default judgment on the basis of its erroneous interpretation of the applicable law. The order granting reconsideration is reversed, and the default judgment is reinstated. In light of our decision in No. 189484, the appeal in No. 186749 is rendered moot.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff

¹ A bench warrant issued on September 19, 1995.