

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of LORN WESLEY BACON,
Deceased.

WADE BACON,

Petitioner-Appellant,

v

ESTATE OF LORN WESLEY BACON,
IMELDA MILLER, ELEANOR LOWE, and
PHILIP BACON,

Respondents-Appellees.

UNPUBLISHED
February 14, 2003

No. 239426
Shiawassee Court
LC No. 00-030564-DA

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Petitioner appeals as of right an order denying his petition for re-determination of heirs. We reverse.

Petitioner's only issue on appeal is that the probate court erred in dismissing his petition to re-determine heirs because the petition was timely filed and petitioner never received notice of the original hearing to determine heirs. We agree.

The interpretation and application of court rules presents a question of law that this Court reviews de novo. *Szymanski v Brown*, 221 Mich App 423, 433; 562 NW2d 212 (1997). We review a trial court's decision to grant relief under MCR 2.612 for an abuse of discretion. *Driver v Hanley (After Remand)*, 226 Mich App 558, 564-565; 575 NW2d 31 (1997). We further review a trial court's findings of fact regarding a petition to re-determine heirs under the clearly erroneous standard. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997). A finding is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake was made. *Id.*

When construing a court rule, this Court applies the same legal principles that govern the construction and application of statutes. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998), overruled in part on other grounds *Rafferty v Markovitz*, 461 Mich 265, 372 n 6; 602 NW2d 367 (1999). Statutes and rules which limit the period during which claims

may be submitted against a deceased person's estate are strictly construed so as to encourage the prompt and efficient settlement of claims. *In re Estate of Greenberg*, 157 Mich App 515, 520; 403 NW2d 177 (1987). When construing a statute or rule, every word should be given meaning, and this Court should avoid a construction that would render any part of the statute surplusage or nugatory. *Karpinski v St John Hosp Macomb Center Corp*, 238 Mich App 539, 543; 606 NW2d 45 (1999). The Legislature is presumed to have intended the meaning it plainly expressed, and when the statutory language is clear and unambiguous, judicial construction is neither required nor permitted. *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 163; 577 NW2d 206 (1998). When an ambiguity exists in a statute so that reasonable minds could differ regarding the meaning of the statutory language, *Adrian School Dist v Michigan Public School Employees' Retirement System*, 458 Mich 326, 332; 582 NW2d 767 (1998), the interpreting court should accord every statutory word or phrase its plain and ordinary meaning, *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 736; 641 NW2d 567 (2002).

In denying petitioner's motion for re-determination of heirs, the trial court concluded that by the time petitioner came forward with evidence indicating that he was the son of the decedent, it was "way beyond the statutory time frame." However, the court failed to specify which statutory provision it was relying on to support its conclusion. On appeal, petitioner alleges that, pursuant to MCR 2.612(B), he timely filed his motion to re-determine heirs, as it was based on a lack of notice and was filed within one year of the court's order determining heirs. To the contrary, it appears that respondents are arguing that, pursuant to MCR 7.101(B)(1)(a), petitioner failed to timely file his motion because he did not do so within twenty-one days after the entry of the court's order. Having reviewed the court rules, we conclude that MCR 7.101(B)(1)(a) is not applicable to the present case because this rule applies to appeals to the circuit court. In the instant case, petitioner did not appeal the probate court's order to the circuit court, but rather, he sought re-determination of heirs in the same probate court that originally entered the order. We conclude that MCR 2.612(B) is the appropriate rule under which to analyze the present issue.¹

Under MCR 2.612(B), a trial court may grant relief from a judgment if a party did not have notice of the pendency of the action. MCR 2.612(B) provides:

A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.

Essentially, in order to be entitled to relief from the court's order determining heirs, this rule requires that petitioner (1) was a person over whom personal jurisdiction was necessary and

¹ We note that MCR 5.001 states that procedures in probate court are governed by the rules applicable to other civil proceedings, unless modified by the rules in Chapter 5. Having found no probate court rules modifying MCR 2.612, we conclude that MCR 2.612(B) is applicable to the present case.

acquired; (2) did not in fact have knowledge of the pendency of the original hearing to determine heirs; (3) entered an appearance within one year of the order determining heirs; (4) shows a reason that justifies relief from the order; and (5) shows that innocent third persons will not be prejudiced.

Regarding the first requirement, personal jurisdiction over petitioner was necessary because, as an alleged heir to the decedent's estate, petitioner was an interested person as defined in MCR 5.125(C)(3).² In addition, although petitioner argues that he never received notice of the original petition for determination of heirs, we hold that personal jurisdiction over petitioner was nonetheless acquired by the publication of notice to all interested persons printed in the Argus Press newspaper. Further, it appears that petitioner consented to personal jurisdiction when he filed his motion for re-determination of heirs with the probate court.

With respect to the second element, the rules do not define the term knowledge for purposes of complying with MCR 2.612(B). However, upon considering this rule in conjunction with the notice requirements of MCR 5.102 and MCR 5.105(A), we conclude that knowledge of the pendency of the action required that petitioner receive actual written notice of the hearing to determine heirs. MCR 5.102 provides:

A petitioner, fiduciary, or other moving party must cause to be prepared, served, and filed, a notice of hearing for all matters requiring notification of interested persons. It must state the time and date, the place, and the nature of the hearing. Hearings must be noticed for and held at times previously approved by the court.

MCR 5.105(A) provides, in relevant part:

- 1) Service on an interested person may be by personal service within or without the State of Michigan.
- (2) Unless another method of service is required by statute, court rule, or special order of a probate court, service may be made to the current address of an interested person by registered, certified, or ordinary first-class mail.
- (3) An interested person whose address or whereabouts is not known may be served by publication, if an affidavit or declaration under MCR 5.114(B) is filed with the court, showing that the address or whereabouts of the interested person could not be ascertained on diligent inquiry.

Respondent Estate argues that because it did not know petitioner's address or whereabouts, its publication of notice to all interested persons satisfied the notice requirement. However, Spencer, personal representative of the decedent's estate, admitted that she knew

² MCR 5.125 provides, in relevant part: When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief: . . . (3) The persons interested in a petition to determine the heirs of a decedent are the heirs. Because the Estate's petition to determine heirs also included a request for formal probate and appointment of a personal representative, we conclude that the petition satisfies the requirement of MCR 5.125.

petitioner's name and phone number. In fact, although the content of the conversation is contested, it is undisputed that Spencer spoke with petitioner's mother regarding the death of the decedent before the trial court held the hearing to determine heirs. Because Spencer was able to obtain petitioner's name and phone number, and speak directly to his mother, we find that, upon diligent inquiry, Spencer could have ascertained petitioner's current address for purposes of serving petitioner with notice of the hearing. Furthermore, there is no evidence in the record that respondent Estate ever filed with the court any type of affidavit or declaration stating that, after diligent inquiry, it had been unable to determine the address or whereabouts of petitioner.

Moreover, even assuming to be true respondent Estate's claim that petitioner's mother told Spencer that petitioner did not want to have anything to do with the decedent's estate, Spencer could not rely on that statement as either consent or as a waiver of the right to notice of hearing, because petitioner made no such statement on the record at the hearing or in a writing as required by MCR 5.104(B).³ Further, there is no evidence that petitioner's mother was authorized to waive or consent on petitioner's behalf. Because there is no indication in the record that Spencer, as personal representative of respondent Estate, used diligent inquiry in an effort to obtain either a current mailing address for petitioner, or even a last known address pursuant to MCR 5.106(D),⁴ we hold that respondent Estate failed to provide petitioner with adequate notice of the hearing to determine heirs. We also hold, therefore, that petitioner did not have knowledge of the pendency of the hearing pursuant to MCR 2.612(B).

Additionally, it should be noted that respondents' argument that petitioner had actual notice because petitioner's counsel knew about the hearing is without merit since the record indicates that petitioner's counsel was not aware of petitioner's name and number until September 2001 when respondent Estate's counsel provided it to him. Thus, we conclude that

³ MCR 5.104(B) provides, in relevant part:

(1) *Waiver*. The right to notice of hearing may be waived. The waiver must (a) be stated on the record at the hearing, or (b) be in a writing, which is dated and signed by the interested person or someone authorized to consent on the interested person's behalf and specifies the hearing to which it applies.

(2) *Consent*. The relief requested in an application, petition or motion may be granted by consent. An interested person who consents to an application, petition or motion does not have to be served with or waive notice of hearing on the application, petition or motion. The consent must (a) be stated on the record at the hearing, or (b) be in a writing which is dated and signed by the interested person or someone authorized to consent on the interested person's behalf and must contain a declaration that the person signing has received a copy of the application, petition or motion.

(3) *Who May Waive and Consent*. A waiver and a consent may be made (a) by a legally competent interested person; (b) by a person designated in these rules as eligible to be served on behalf of an interested person who is a legally disabled person. . . .

⁴ MCR 5.106(D) provides that a copy of the publication notice: (1) must be mailed to an interested person at his or her last known address if the person's present address is not known and cannot be ascertained by diligent inquiry; (2) need not be mailed to an interested person if an address cannot be ascertained by diligent inquiry.

any knowledge petitioner's counsel had regarding the hearing to determine heirs could not be attributed to petitioner since counsel was not representing petitioner at that time.

The third element of MCR 2.612(B) requires petitioner to have entered an appearance within one year of the final judgment. In this case, the record reveals that the court's order determining heirs was issued on February 7, 2001. On September 6, 2001, petitioner's counsel entered his appearance on behalf of petitioner. Therefore, petitioner entered an appearance within the time frame allowed under MCR 2.612(B). As a result, since the probate court provided no specific statutory support for its conclusion that petitioner's claim was not timely, and because we have concluded that MCR 2.612(B) is applicable to the present case, we hold that the court erred in finding that petitioner's motion for re-determination of heirs was filed beyond the statutory time frame.

Next, MCR 2.612(B) requires that petitioner show a reason that justifies relief from the court's order determining heirs. Petitioner alleges that he is entitled to re-determination of heirs because he was not given proper notice of the original hearing to determine heirs, and, as the biological son of the decedent, he is the sole rightful heir of the decedent's estate. Having already concluded that Spencer, as personal representative of the decedent's estate, did not fulfill her obligation to give petitioner actual notice of the hearing, we conclude that petitioner has provided a reason that justifies relief from the court's order determining heirs without petitioner having the opportunity to provide proof of his relationship to the decedent.

Finally, petitioner must show that no innocent third persons would be prejudiced by a re-determination of heirs. Because the probate court has already determined that the decedent's siblings, respondents Miller, Lowe, and Bacon, to be the heirs to the decedent's estate, it is clear that these respondents are third persons that would be prejudiced if a re-determination of heirs was granted and petitioner was proven to be the rightful heir. It is not so obvious, however, whether respondents were *innocent* third persons. While it is apparent from Spencer's own admission that she was aware of petitioner's existence and his status as potential heir to the decedent's estate, there is no direct evidence that respondents had this same knowledge. However, we conclude that there is sufficient circumstantial evidence from which it can be inferred that respondents had the same knowledge as Spencer regarding petitioner's existence.

The record reveals that during the original hearing on respondent Estate's motion to determine heirs, respondent Estate's counsel affirmed that he had spoken with both Spencer and some of the decedent's "direct relatives" who were present in court, and that based on those conversations, he determined that the decedent was, in fact, involved in a marriage in which there was a son. Respondent Estate's counsel was, at that time, aware of at least petitioner's first name, acknowledged that petitioner had been contacted, but claimed that he had been unable to determine whether petitioner was a child of the marriage. Further, respondent Estate's counsel also stated that respondents believed that there had been some type of paternity dispute regarding the son of the marriage, and that the decedent had been proven not to be the father. However, respondents did not produce any evidence to support this belief. Moreover, it was not until the hearing on petitioner's motion to re-determine heirs that respondents made any claim of the decedent's inability to father children because of a war injury, and they failed to provide any evidence to support that claim as well. Based on this evidence, we find that respondents were aware that petitioner was possibly the son of the decedent, and knew petitioner's name and how

to get in contact with him. Thus, we conclude that although respondents are third persons that would be prejudiced by a re-determination of heirs, they are not innocent third persons.

Applying MCR 2.612(B) to the present case, we therefore grant petitioner relief from the court's order denying his petition for re-determination of heirs.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Kathleen Jansen

/s/ Pat M. Donofrio