# STATE OF MICHIGAN

# COURT OF APPEALS

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In the Matter of the Estate of KATHERINE ANTONOFF, Deceased.

UNPUBLISHED
December 10, 1999

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GEORGE PRAPPAS, Personal Representative of the Estate of KATHERINE ANTONOFF,

Appellee,

v

MICHAEL J. BOYLE,

Appellant.

No. 209852
Oakland Probate Court
LC No. 96-255261 IE

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In the Matter of the Estate of KATHERINE ANTONOFF, Deceased.

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GEORGE PRAPPAS, Personal Representative of the Estate of KATHERINE ANTONOFF,

Appellee,

v

PAULINE G. KAZAKEVICH, PAULINE BILLEY BOYAR, BARBARA PAYNE, ELAINE SHAW and PHILLIP BILLEY,

Appellants.

No. 209856
Oakland Probate Court
LC No. 96-255261 IE

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Before: Gribbs, P.J., and Smolenski and Gage, JJ.

PER CURIAM.

In this consolidated appeal, appellants Michael J. Boyle, Pauline Kazakevich, Barbara Payne, Phillip Billey, Pauline Billey Boyar and Elaine Shaw appeal as of right from orders granting summary disposition in favor of appellee, George Prappas, independent personal representative of the estate of Katherine Antonoff. We affirm in part, reverse in part and remand.

Katherine Antonoff executed a last will and testament dated July 15, 1994 (the 1994 will) which benefited Boyle. Some months later, on January 25, 1995, Antonoff executed another last will and testament (the 1995 will) in which she gave certain property to Prappas and the residue of her estate to Prappas as trustee of a trust (the trust). Antonoff died on December 21, 1996, leaving as heirs her half-sister Kazakevich, and the children of her deceased half-sister Anna Lusk, i.e., Payne, Billey, Boyar and Shaw. On December 26, 1996, the probate court granted Prappas' petition to admit the 1995 will to probate and appointed him independent representative of the estate. On December 31, 1996, Prappas gave statutory notice to appellants Kazakevich, Payne, Billey, Boyar and Shaw (collectively referred to as "the heirs") of the commencement of probate proceedings and his appointment pursuant to MCL 700.315; MSA 27.5315 (§ 315).[1]

On March 26, 1997 Kazakevich filed a "Motion to set-aside will and limited supervision" alleging, among other things, that Antonoff lacked testamentary capacity and was unduly influenced and coerced by Prappas to execute the 1995 will and trust. The hearing on Kazakevich's motion was set for May 20, 1997; however, the record reflects that the probate court adjourned the hearing and rescheduled it for June 16, apparently at the request of Kazakevich or her attorney. Prappas' attorney and Kazakevich's attorney subsequently entered into a stipulation to adjourn the June 16 hearing. However, the record contains no evidence that Kazakevich ever presented her motion to the court.

All of the heirs filed a second objection to the admission of the 1995 will and Prappas' appointment as independent representative on May 5, 1997. Prappas moved for summary disposition of the objections pursuant to MCR 2.116(C)(7), (8) and (10) on the basis that the objections did not constitute a petition for supervision of the estate and was barred because it was filed more than ninety days after the independent representative gave notice of his appointment pursuant to MCL 700.358; MSA 27.5358 (§ 358). Then, on July 2, 1997, Boyle filed several pleadings, including objections to the 1995 will and a petition to admit the 1994 will to probate. Prappas subsequently moved for summary disposition as to Boyle's objections and petition pursuant to MCR 2.116(C)(7), (8) and (10) on the ground that Boyle was not an interested party under MCL 700.7(3); MSA 27.5007(3) (Subsection 7(3)) and that his objections were barred by the ninety-day limitation in §358. On December 7, 1997, the probate court, apparently without a hearing, granted Prappas' motions for summary disposition as to Boyle's pleadings and the heirs' objections pursuant to MCR 2.116(C)(10). In granting Prappas' motion for summary disposition, the probate court concluded as a matter of law that the proof of service for Kazakevich's motion failed to include Prappas and his attorney and that the

"Claimants \ Heirs-at-Law \ Respondents" failed to comply with MCL 700.351; MSA 27.5351 (§ 351) and subsection 358(4).

Boyle raises four issues on appeal in Docket No. 209852, while the heirs raise two similar issues on appeal in Docket No. 209856. First, Boyle contends that the trial court erred in dismissing his petition to admit the 1994 will. We agree. As a preliminary matter, Prappas contends that Boyle did not preserve this issue for appeal. It is unclear from the record as to whether Boyle preserved this issue. The probate court decided this issue without argument and the record does not contain Boyle's response to the motion for summary disposition. However, regardless of whether Boyle preserved the issue, we shall review the issue because it is necessary for a proper determination of the case, *Joyce v Vemulapalli*, 193 Mich App 225, 228; 485 NW2d 445 (1992), and all of the facts necessary for resolution of this question of law are before the Court. *Westfield Cos v Grand Valley Health Plan*, 224 Mich App 385, 387; 568 NW2d 854 (1997).

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings and documentary evidence filed in the action in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A court may grant a motion for summary disposition if the evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto, supra*.

We agree with the probate court that Boyle's objection to the admission of a will to independent probate would be untimely under the ninety-day statute of limitation for filing objections set forth in subsection 358(4). However, Boyle contends that his petition was timely pursuant to MCL 700.173(4); MSA 27.5173(4) (subsection 173(4)), which provides that:

> If a will is admitted to probate, and thereafter a petition for admission of another will is filed, the court shall determine whether the other will is the last will and testament of the decedent and should be admitted to probate and the former admission revoked.

Boyle's contention presents a question of statutory interpretation, which this Court reviews de novo on appeal. *In re Jagers*, 224 Mich App 359, 362; 568 NW2d 837 (1997). The primary goal of judicial interpretation of statutes is to ascertain the intent of the Legislature. *Manning v Amerman*, 229 Mich App 608, 612; 582 NW2d 539 (1998). When a statute is clear and unambiguous, judicial construction is unnecessary. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992).

Boyle's petition filed pursuant to subsection 173(4) seeks an alternative remedy to a will contest initiated by filing objections to the admission of the will pursuant to MCL 700.318; MSA 27.5318 (§ 318) and §§ 351 and 358. Subsection 173(4) requires the court to determine whether a subsequently produced will is the decedent's last will. Unlike objections to a will filed pursuant to §§ 318, 351 and 358, subsection 173(4) does not contain any limitation on the time for filing a petition to

admit another will. By enacting § 173, the Legislature expressed its intent to allow parties to require the probate court to determine the validity of a subsequently produced will after the court has admitted a will to probate. See, e.g., MCL 700.173(5); MSA 27.5173(5), which provides for the filing of a petition to admit another will after final distribution of the estate if the personal representative or an interested party "commits wilful fraud or gross negligence." Because § 173 provides a separate statutory procedure for determining the validity of a subsequently produced will, without reference to filing objections pursuant to §§ 318, 351 and 358, we conclude that the ninety day limitation for filing objections does not apply to Boyle's petition.

We reject Prappas' contention that subsection 173(4) does not apply to the present case because the will admitted to probate was the decedent's last dated will. Prappas apparently relies on the requirement in MCL 700.173(3); MSA 27.5173(3) (subsection 173(3)) that the probate court "shall consider the last dated will first to determine whether it should be admitted as the last will and testament of decedent." However, subsection 173(3) applies to a petition for admission of another will which is filed *before* the hearing on the petition to admit the earlier will. Subsection 173(3) does not apply to the present case because Boyle filed his petition *after* the probate court admitted the 1995 will. Accordingly, we conclude that the probate court erred when it dismissed Boyle's petition to admit the 1994 will as untimely filed.

Second, both Boyle in Docket No. 209852 and the heirs in Docket 209856 contend that the probate court erred in dismissing Kazakevich's March 26, 1997 motion. We agree. It appears from the record that the probate court treated Kazakevich's motion as an objection to admission of the 1995 will and dismissed the motion on that basis. However, Prappas' motion for summary disposition was not directed at Kazakevich's motion, but at the heirs' objections. It further appears that Prappas first addressed the Kazakevich's motion in his reply brief to the heirs' response in opposition to the motion for summary disposition. While Kazakevich's motion was similar to the heirs' objections, and while she joined the other heirs in filing their objections on May 5, her March 26 motion constituted a separate claim. We find no authority for the probate court's dismissal of a non-moving party's claim which is not addressed in a motion under MCR 2.116(C)(10). On the contrary, MCR 2.116(C), provides that "[t]he *motion* . . . must specify the grounds on which it is based." [Emphasis added.] Furthermore, MCR 2.116(G)(4) provides that "[a] motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." Because Prappas did not move for summary disposition as to Kazakevich's motion, her claims were not properly before the court. Therefore, we conclude that the court erred when it held that Kazakevich's claims were barred as a matter of law.

However, we agree with the probate court that the petition for supervision filed by all of the heirs on May 5, 1997 was untimely. Under § 358, "a proceeding to contest a will admitted to independent probate will be barred 90 days after giving notice of appointment to interested parties pursuant to section 315." Here, Prappas gave the statutory notice to the heirs on December 31, 1996. Pursuant to § 358, the heirs had to file a will contest within ninety days of that date. There is no question that the heirs' objections were filed more than ninety days after Prappas gave the statutory notice and therefore untimely under § 358. Accordingly, we hold that the trial court erred in dismissing

Kazakevich's motion to set aside the will filed on March 26, 1997, but correctly dismissed the heirs' objections filed on May 5, 1997.

Third, Boyle contends that the statute of limitations for contesting a will provided in subsection § 358(4) was tolled because Prappas failed to provide notice of his appointment as independent representative to Boyle. We disagree. Subsection 358(4) provides that a proceeding to contest a will admitted to independent probate will be barred ninety days after giving notice of the appointment to "interested parties" pursuant to § 315. An "interested party" is defined in subsection 7(3) as "an heir, devisee, beneficiary, a fiduciary of a legally incapacitated person who is an heir, devisee, or beneficiary, a fiduciary or trustee named in an instrument involved, or a special party." Boyle does not meet the definition of an "interested party" as defined in subsection 7(3). Nothing in the record indicates that Boyle was an heir of Antonoff, a fiduciary for any of her heirs, devisees or beneficiaries, or a devisee in her 1995 will. Although Boyle was named as a beneficiary and fiduciary of the 1994 will, that will was not the "instrument involved" in Prappas' petition. Furthermore, Boyle was not a "special party," defined in MCL 700.10(3); MSA 27.5010(3) as:

> . . . any of the following persons which are required to be given notice pursuant to law or supreme court rule: attorney general; foreign consul; a county or state department of social services; guardian; guardian ad litem; attorney of record of an interested party; or an attorney in fact or agent having durable power of attorney.

We also reject Boyle's contention that he was entitled to notice as an "interested person" as defined in MCL 700.7(4); MSA 27.5007(4) (subsection 7(4)). Section 315 only requires that notice be given to "interested parties," not "interested persons." Contrary to Boyle's contention, an "interested party" is not synonymous with an "interested person." Rather, subsection 7(4) defines an "interested person" as:

> an *interested party*, creditor, surety, or any other person having a property right in a trust estate or the estate of a decedent or ward which may be affected by the proceeding. Interested person includes a person nominated as a personal representative and a fiduciary representing an interested person. The meaning may vary as it relates to a particular person and shall be determined according to the particular purpose of, and matter involved in, any proceeding. [Emphasis added.]

As a result, we conclude that Boyle was not entitled to notice pursuant to § 315.

Finally, both Boyle in Docket No. 209852 and the heirs in Docket 209856 contend that the probate court initiated supervised proceedings on its own motion, pursuant to MCL 700.352(2); MSA 27.5352(2). We disagree. An independent probate proceeding can be subject to court supervision after an interested person or the independent personal representative files a petition for supervision. MCL 700.351-353; MSA 27.5351-5353. However, we find no authority for the proposition that a probate court can authorize itself to supervise an independent probate proceeding on its own motion. We also disagree with Boyle's and the heirs' proposition that the probate court considered the estate as

subject to supervised administration. In this regard, we note that the court's December 5, 1997 orders state that the estate is and remains an independent estate.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Roman S. Gribbs
/s/ Michael R. Smolenski
/s/ Hilda R. Gage

[1] Section 315 provides that within ten days after the date a person is appointed as an independent personal representative as provided in MCL 700.312; MSA 27.5312, the person shall give notice of the appointment to each "interested party" that has not executed a written waiver of notice.