

Nos. 1-10-3809, 1-11-1831 (Consolidated)

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ESTATE OF ELMER H. BROWN, Deceased,)	APPEAL FROM THE
)	CIRCUIT COURT
Petitioner-Appellee,)	OF COOK COUNTY
)	
)	
v.)	No. 07 P 7817
)	
ICMA RETIREMENT CORPORATION,)	
)	HONORABLE
Respondent-Appellant)	HENRY A. BUDZINSKI and
)	MARY ELLEN COGHLAN,
(Barbara Paradise, Respondent).)	JUDGES PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly awarded damages as a part of a citation to recover assets hearing held pursuant to the Probate Act of 1975 (755 ILCS 5/16-1 (West 2010)), and properly denied certifying the parties' bystander's reports where there was no transcript of proceedings and respondent was not present for all hearing dates purportedly memorialized in the purported bystander's report.

¶ 2 This is an appeal from the circuit court's order awarding damages after a citation to recover assets hearing conducted pursuant to the Probate Act of 1975 (Probate Act) (755 ILCS

1-10-3809, 1-11-1831 (Consolidated)

5/16-1 (West 2010)). Respondent-Appellant ICMA Retirement Corporation (ICMA-RC) argues that the trial court erred as a matter of law when it awarded damages to petitioner-appellee, the Estate of Elmer H. Brown, deceased (Estate), following the hearing. ICMA-RC also contends that the trial court erred in failing to certify a bystander's report. However, because ICMA-RC's counsel did not request a hearing to dispute the discrepancies in the bystander's report, we find these arguments lack merit. We affirm.

¶ 3

BACKGROUND

¶ 4 The record shows that an estate was opened in the circuit court for Elmer H. Brown, the decedent, with George Brown (Brown) appointed as the administrator. Brown filed a petition for issuance of a citation to recover assets with the circuit court. The petition named the Retirement Plan for the Chicago Transit Authority (CTA), ICMA-RC, and Barbara Paradise as respondents.¹ The petition alleged in pertinent part:

"On information and belief ICMA-RC wrongfully released this account to respondent, Barbara Paradise, when said funds rightfully belonged to the Estate of Elmer H. Brown. Petitioner believes that Respondent, ICMA-RC, wrongfully disbursed funds from the decedent's Retirement Plan 305954 to Barbara Paradise. WHEREFORE, Petitioner requests: (a) That Respondent, ICMA-RC, be cited to show cause why it should not be ordered to deliver all information that is in Respondent's possession or control regarding the Retirement Plan 305954 herein above mentioned. (b) That an order be entered herein ordering Respondent, ICMA-RC to deliver to the Administrator forthwith

¹Barbara Paradise is not a party to the instant appeal.

1-10-3809, 1-11-1831 (Consolidated)

any items determined to be in the possession or control of Respondent and that belong to the Estate of Elmer H. Brown and for judgment for the value of any funds determined to have been disbursed by Respondent."

¶ 5 On August 21, 2008, the circuit court issued a citation against all named respondents, returnable on October 2, 2008. All respondents were served with notice.

¶ 6 On September 23, 2010, the trial court held an evidentiary hearing on the citation proceeding. No court reporter was present and there is no transcript of the proceedings in the record. The order specified that the court heard testimony from Paradise and Tamara Kaiden, document examiner, before ordering the matter continued to October 21, 2010, on which date the matter was again continued to November 10, 2010.

¶ 7 On November 10, 2010, the Estate presented a motion for ruling on the citation, asking the court to rule on the citation based upon the testimony and evidence presented at the hearing on September 23, 2010. The court denied the motion and ordered ICMA-RC to appear in person or through counsel on November 23, 2010, for a continuation of the hearing. No court reporter was present and there is no transcript of the proceedings for this date in the record.

¶ 8 On November 23, 2010, the court entered an order ruling in favor of the Estate and against all respondents on the petition. Again, there was no court reporter present and there is no transcript of the proceedings in the record. In the order, the court stated: (1) the citation is granted; (2) judgment is entered in favor of the Estate and against all respondents; (3) the funds being held by the retirement plan for CTA employees should be turned over to the estate; (4) the change of beneficiary forms presented at the hearing were not signed by the decedent but were

1-10-3809, 1-11-1831 (Consolidated)

forgeries, as testified to by the document analyst during the hearing and that the document paid to Paradise by ICMA-RC was flawed; and (5) each respondent is only responsible in satisfying the judgment based upon the amount being originally held.

¶ 9 ICMA-RC filed a timely appeal to this court on December 22, 2010. Paradise filed a posttrial motion for reconsideration on December 23, 2010. The circuit court initially determined it lacked jurisdiction to hear Paradise's posttrial motion because of ICMA-RC's filed notice of appeal. The circuit court denied Paradise's motion to reconsider on June 22, 2011. ICMA-RC filed a second notice of appeal on June 24, 2011. On July 13, 2011, this court granted ICMA-RC's motion to consolidate the two appeals. Although the appeals were consolidated, the parties engaged in more proceedings.

¶ 10 On July 28, 2011 ICMA-RC filed a proposed bystander's report of multiple hearings culminating in the court's November 23, 2010 order. On August 29, 2011, the Estate filed a "Proposed Alternative Report of Proceedings." On September 23, 2011, Judge Mary Ellen Coghlan presided over a hearing on ICMA-RC's motion to certify its bystander's report. A court reporter transcribed the proceedings on that day. ICMA-RC argued it wanted to present the court with "all the evidence that would have been before Judge Budzinski so that the appellate court knows that there was not some other evidence that's sort of out there that's not apparent from the face of the judgment." The parties disagreed as to the content of their respective bystander's reports. The trial judge found that Supreme Court Rule 323 (eff. Dec. 13, 2005) would not allow her to certify either bystander's report. In reaching this conclusion, the circuit court judge reasoned that she did not hear the proceeding, and because there was no transcript

1-10-3809, 1-11-1831 (Consolidated)

and the parties did not agree as to what the report of the proceedings should include. The court then denied ICMA-RC's motion to certify the bystander's report and did not certify any proposed reports.

¶ 11

DISCUSSION

¶ 12 At issue in this appeal is whether the circuit court erred as a matter of law by using a citation proceeding to award damages to the Estate. ICMA-RC argues "a citation proceeding is an inappropriate forum for making an imposition of liability or imposing damages, and that the Probate Act (755 ILCS 5/16-1 (West 2010)) does not contemplate the use of a citation proceeding other than to obtain information from a party that is neither in possession of the contested property nor has concealed, converted or embezzled [the contested property]." We find this argument misapprehends the relevant statute and the facts presented in this case. The Probate Act states in pertinent part:

"(a) Upon the filing of a petition therefor by the representative or by any other person interested in the estate or, in the case of an estate of a ward by any other person, the court shall order a citation to issue for the appearance before it of any person whom the petitioner believes (1) to have concealed, converted or embezzled or to have in his possession or control any personal property, books of account, papers or evidences of debt or title to lands which belonged to a person whose estate is being administered in that court or which belongs to his estate or to his representative or (2) to have information or knowledge withheld by the respondent from the representative and needed by the representative for the recovery of any property by suit or otherwise. The petition shall

1-10-3809, 1-11-1831 (Consolidated)

contain a request for the relief sought." 755 ILCS 5/16-1(a) (West 2010).

¶ 13 The Probate Act's section on citations does not limit the parties who may be compelled to appear during a proceeding as ICMA-RC asserts. ICMA-RC argues that the Probate Act's section on citations limits the parties the trial court may compel to appear to those "that [are] neither in possession of the contested property nor h[ave] concealed, converted or embezzled [the contested property]". 755 ILCS 5/16-1(a)(1) (West 2010). In addition, the Probate Act clearly allows the trial court to also "have information or knowledge withheld by the respondent from the representative and needed by the representative for the recovery of any property by suit or otherwise." 755 ILCS 5/16-1(a)(2) (West 2010). Further, ICMA-RC mistakenly interprets the plain language of section 5/16-1(a) of the Probate Act as demonstrating the purpose of a citation proceeding is to obtain the return of the estate's property from an individual who is in possession of the property. 755 ILCS 5/16-1(a) (West 2010). Section 5/16-1 (a) of the Probate Act clearly states the citation is to:

"[i]ssue for *the appearance before it* of any person the petitioner *believes* to have concealed, converted or embezzled...*or* (2) to have information or knowledge withheld by the respondent from the representative." (Emphases added.) *Id.*

Nowhere in section 5/16-1 of the Probate Act does it state a citation proceeding has a limited purpose to obtain the return of property as ICMA-RC argues.

¶ 14 In this case, the court properly conducted a hearing on the citation to recover the proceeds from the decedent's retirement plans from ICMA-RC. The Probate Act requires that "[t]he petition shall contain a request for the relief sought." *In re Estate of Shugart*, 81 Ill. App. 3d 538,

1-10-3809, 1-11-1831 (Consolidated)

540 (1980). The right and title to property may be determined by the court, when the petition affords the respondent an opportunity to prepare:

"Where the petitioner seeks to have the right and title to property determined by the court, the petition must be sufficient to state a cause of action and to afford the respondent an opportunity to prepare a defense." *Id.*

ICMA-RC contends that liability may not be determined during a citation hearing and that separate legal action is warranted to first determine liability. Similarly, in the case of *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 250 (2006),² the respondent claimed that although article XVI of the Probate Act (755 ILCS 5/16-1 (West 2010)) vests the circuit court with the authority to return assets to an estate, the article did not confer jurisdiction on the court to litigate "collateral" claims such as undue influence and breach of fiduciary duty brought against him; therefore, the court erred in entering judgment against him for damages. The appellate court found respondent was incorrect, and affirmed the trial court's decision to impose liability and collect damages in a citation to recover hearing. *Hoellen*, 367 Ill. App. 3d at 250. In recovery proceedings, a circuit court is authorized to:

"(determine all questions of title, claims of adverse title and the right of property and may *enter such orders and judgment as the case requires.*)" (Emphasis added). *Id.*

²This case was distinguished by *In re Estate of Wilson*, 389 Ill. App. 3d 771, 779 (2009), for the proposition that a motion for substitution of judge for cause must make a threshold showing of prejudice to warrant transfer to another judge for a hearing. This proposition is not at issue in this case.

1-10-3809, 1-11-1831 (Consolidated)

(quoting 755 ILCS 5/16-1(d) (West 2010)).

¶ 15 Therefore, we find that the circuit court properly entered a finding of liability in favor of the Estate in seeking recovery of the pension funds from ICMA-RC during the citation to recover proceeding, and that no separate hearing to determine ICMA-RC's liability was necessary.

¶ 16 Also at issue is whether the court erred in finding ICMA-RC liable to the Estate for the recovery of the funds. ICMA-RC argues the Estate did not point to any evidence in the record that ICMA-RC concealed, converted or embezzled the proceeds of the fund or that ICMA-RC possesses the funds. ICMA-RC concedes neither party engaged a court reporter to transcribe the proceedings leading up to the entry of the final order. However, the burden is not on the Estate to provide a complete record or to show where ICMA-RC concealed, converted or embezzled the proceeds. The case law is well established in requiring that the appellant (ICMA-RC) has the

"burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 390-91 (1984).

¶ 17 ICMA-RC failed to provide a transcript of the hearing to support its claim of error. The trial court therefore was unable to certify bystander's reports, and consequentially this court has insufficient record to evaluate respondent's claims. Consequently, this court must assume the

1-10-3809, 1-11-1831 (Consolidated)

trial court entered the correct ruling. *Id.*

¶ 18 Further, we address whether the court erred in refusing to certify a bystander's report pursuant to Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). ICMA-RC contends the circuit court erred in refusing to certify a bystander's report pursuant to Supreme Court Rule 323.

Specifically, ICMA-RC argues that Rule 323(c) does not provide the trial court the option of flatly denying certification of a report. In support of its contention, ICMA-RC improperly relies upon *Jacobo v. Vandervere*, 401 Ill. App. 3d 712, 713 (2010). First, ICMA-RC cannot properly cite *Vandervere*, as the portion of the opinion cited to is part of the procedural posture reviewing an unpublished Rule 23 order from the same case, and therefore, may not be cited as precedent by any party except in the limited circumstances allowed under Illinois Supreme Court Rule 23(e)(1) (eff. July 1, 2011). *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 17. Second, even if the *Vandervere* citation could serve as precedent, that court's ruling precludes a judge from flatly denying certification of a bystander's report where the court "could not recall the specific basis upon which it denied defendant's motion***." *Vandervere*, 401 Ill. App. 3d at 713. Here, the trial court denied the certification due to conflicting bystander's reports presented by the two parties, along with the nonexistence of a written transcript of the proceedings. ICMA-RC was not present except on the last day of the proceedings, the day the final order was entered by the trial court; therefore, ICMA-RC could not draft an accurate bystander's report. Third, Rule 323 codifies prior common law that states when a trial court exercises its discretion to refuse to certify a bystander's report, the burden then falls on the appellant to move for a hearing on the matter. See *Feldman v. Munizzo*, 16 Ill. App. 2d 58, 63-64 (1957). If the appellant requests to

1-10-3809, 1-11-1831 (Consolidated)

have witnesses testify on particular points, the court should hear their testimony. *Id.* at 64. The court must work to clarify any points of contention only after the appellant's request to present witnesses. *Id.* In the record before us, ICMA-RC did not request a hearing after the trial court concluded that it would not certify the bystander's report. Additionally, the record contains no evidence that the trial court erred in denying the certification of the bystander's report. The fact that ICMA-RC did not request a hearing, did not participate in all of the proceedings which its proposed bystander's report purported to memorialize, and was only present on the day the trial court entered its final order buttress our conclusion that the trial court properly entered its judgment against ICMA-RC and denied the certification of the proposed bystander's report.

¶ 19

CONCLUSION

¶ 20 In sum, we find that the trial court properly entered judgment against ICMA-RC after the citation hearing, including an award of damages. Additionally, we find that the trial court did not err in denying certification of the proposed bystander's report where ICMA-RC had the burden to request a hearing, which it failed to do after the trial court denied its motion. For the reasons set forth herein, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.