SIXTH DIVISION
June 1, 2018

No. 1-17-0046

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE ESTATE OF RHEA WERNER, Deceased	)	Appeal from the
	)	Circuit Court
(LESLIE J. NANBERG, Executor of the Estate of Rhea Werner, Deceased,	)	of Cook County.
	)	
Petitioner-Appellant,	)	
	)	No. 14 P 003140
v.	)	
	)	
RONALD S. WILD,	)	Honorable
	)	Mary Ellen Coghlan,
Respondent-Appellee.)	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** The petitioner estate waived its argument on appeal that the circuit court's partial denial of its petition for citation to recover assets from respondent was against the manifest weight of the evidence. Waiver aside, the circuit court properly determined that the petitioner failed in its burden to establish a *prima facie* case that the property at issue belonged to the decedent's estate at the time of her death. In addition, we find the doctrine of election does not apply in this case.

¶ 2 Leslie Nanberg, as the executor of the estate of decedent, Rhea Werner (the Estate), filed a petition for citation to recover assets from respondent, Ronald Wild, the decedent's live-in partner of 30 years. After an evidentiary hearing, the circuit court determined the Estate failed to present a *prima facie* case that decedent owned the contested property at the time of her death,

and so denied the petition for that personal property which had been bequeathed in the will to decedent's children and Nanberg. We affirm.

¶ 3 BACKGROUND

¶ 4 Decedent passed away on May 16, 2013, leaving a will which was admitted to probate on June 2, 2014. The will included specific bequests of certain items of personal property to be distributed to decedent's children and Nanberg, her brother. Before her death, decedent lived with Wild for 30 years. Wild maintained possession of the items of personal property identified in the specific bequests in decedent's will.

¶ 5 On June 18, 2014, the Estate sent Wild correspondence requesting the surrender of the personal property decedent bequeathed to her children and Nanberg. The correspondence also requested that Wild repay $55,000 to the Estate for a loan decedent made to Wild in 1984. Wild neither surrendered the property nor repaid the $55,000 loan.

¶ 6 On July 2, 2014, the Estate filed a petition for citation to recover assets under section 16-1(a) of the Illinois Probate Act of 1975 (755 ILCS 5/16-1(a) (West 2014)). Wild was served with the second alias citation to recover assets on November 3, 2014.

¶ 7 On December 8, 2014, Wild filed a common law claim for care, asserting that he was decedent's sole caregiver during her illness, which entitled him to a minimum of $135,780.00 from the Estate for his services. Wild also filed a petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code (11 U.S.C. §701 *et seq.*), which stayed the probate proceedings until a January 12, 2016 agreed order entered in the bankruptcy court declared certain personal property was not included in the debtor's bankruptcy estate. The bankruptcy court found that the dispute should proceed in the probate division of the circuit court. *In re Ronald Sheldon Wild*, No. 14-4305 (Bankr. N.D. Ill. Jan. 12, 2016).

¶ 8 The Estate moved for partial summary judgment on the petition for citation to recover assets on March 11, 2016, arguing Wild (1) did not contest the will, which specifically identified the assets of the Estate; (2) never claimed the assets at issue as his own during bankruptcy proceedings; (3) did not object to a motion to preserve the assets of the estate; (4) never presented evidence that he purchased any of the assets decedent bequeathed to her children and Nanberg; and (5) testified in a sworn interview with the bankruptcy trustee that he was in possession of the assets at issue, which he was holding for decedent's heirs. The circuit court denied the Estate's summary judgment motion on July 26, 2016 and its motion to reconsider on August 9, 2016.

¶ 9 The citation proceeded to an evidentiary hearing beginning on November 28, 2016. Wild testified on direct examination that he received and read a copy of decedent's will seven weeks after she passed away. He acknowledged that he was in possession of the assets decedent bequeathed to him. He also was in possession of the assets bequeathed to decedent's children, but stated he purchased those items. In the midst of Wild's testimony, counsel for the Estate moved pursuant to the doctrine of election that Wild be ordered to turn over all the items of personal property identified in the will that he claimed to own and have in his possession. The circuit court sustained Wild's objection to the motion.

¶ 10 Wild continued to testify that he did not have receipts for the purchase of any of the items at issue. During his bankruptcy proceedings, Wild did not identify any of the contested items as his own personal property. Finally, Wild identified an insurance policy covering the contested assets, which named both him and decedent as insureds.

¶ 11 On cross-examination, Wild testified that he had a short conversation with decedent prior to her death and she expressed to him that "she took care of me in her will." He stated that the

will he read after decedent's death did not reflect what they had discussed. Wild described in general terms how, where, and when he purchased each of the contested assets. He also explained that when decedent moved into his home in 1983, she preferred her own furniture and that he gave his furniture to her children or placed it in storage. When questioned why he did not return two Duckworth bowls to the executor, Wild responded that in 1996, one of decedent's children needed money to pay for a school computer program. He offered to pay for the Duckworth pieces in cash so that decedent could pay for her child's school program. Wild further stated he did not have receipts for the contested items because "[s]ome of these purchases were made 30 years ago" and "some of them were made 25 years ago."

¶ 12 Next, decedent's daughter, Bari Zaki, testified she acted as her mother's attorney-in-fact under a power of attorney for property. She recalled that Wild gave her two chairs when decedent moved in with him. After decedent passed away, Zaki, in the presence of Wild, removed from decedent's apartment personal property including a large container of jewelry made by decedent, clothing, knitting yarn, and glassware. She did not remove any of the contested property.

¶ 13 Nanberg testified regarding receipts from decedent's purchases of contested photographs from a New York gallery. The receipts were addressed to decedent at her Chicago address. When counsel for the Estate attempted to admit them into evidence, the circuit court sustained Wild's objection. The record does not include a basis for the objection.

¶ 14 Counsel for the Estate then read the evidence deposition of Elizabeth Hutchinson into the record. Hutchinson testified that in 1990, she worked as a registrar at the Fraenkel Gallery in San Francisco. The registrar controlled the inventory of the gallery and prepared invoices as part of the regular course of business. A Fraenkel Gallery invoice from July 1990 for the sale of two

Irving Penn photographs listed decedent as the addressee. Because decedent's address was on the invoice, it was Hutchinson's "expectation" that decedent was the purchaser and that there was "nothing *** to indicate *** that the purchaser [was] anyone other than [decedent]." On cross-examination, Hutchinson testified that she had no independent recollection of decedent purchasing the photographs, but stated decedent "definitely was the purchaser from Fraenkel Gallery." Hutchinson explained, however, that decedent "may have sold the pieces; she may have purchased them with the intent of selling them, she may not have; I have no idea." Hutchinson also stated that she did not know whether decedent paid for the photographs. The circuit court admitted the Fraenkel Gallery receipt into evidence.

¶ 15 Stephanie Pierce, a manager of client services for JMB Insurance Agency, testified regarding two insurance policies that listed Wild and decedent as the insureds and covered the contested assets. The policies, issued from September 28, 2012 to September 28, 2013 and October 24, 2013 to October 24, 2014, included "fine arts and excess liability coverage." Pierce did not recall receiving valuations for any of the identified items contained in the policies.

¶ 16 After Pierce's testimony, Wild moved for judgment in his favor on the Estate's petition for citation to recover assets. The Estate requested 14 days to respond to Wild's motion. The circuit court denied the Estate's request and ordered it to file a written response the following day, stating "[t]he gist of [Wild's] motion is that you have completely failed to establish that the Estate owns any of the items you are seeking to recover from the citation respondent." The court stated that the Estate "didn't prove at all any evidence that the Estate owns the items that you are seeking to recover."

¶ 17 In its written response, the Estate reiterated its argument that the doctrine of election estopped Wild from accepting the benefits bequeathed to him while at the same time challenging

the dispositions made to other legatees. Essentially, the Estate argued that because Wild accepted the bequests from decedent's will for which he previously had no claim, including a Cartier watch, 200,000 frequent flyer miles, and decedent's car, he therefore was precluded from contesting the dispositions made of his purported property to the other legatees. The Estate also argued that it laid a proper foundation for receipts showing decedent purchased some of the contested items in question and that Wild knowingly omitted the assets of the Estate in his bankruptcy filings.

¶ 18 At a November 30, 2016 hearing, the circuit court partially granted and denied the Estate's petition for citation to recover assets. The court stated the Estate had the burden to prove the personal property at issue belonged to decedent at the time of her death. The court found "[t]here has not been one shred of evidence, credible evidence that the decedent owned anything in this estate except for the vehicle." The court continued, "Just because a decedent puts something in the will, that is not evidence that the decedent owns the property or has the right to the property." The court ordered Wild to return his vehicle to the Estate because he admitted the car belonged to decedent, but denied the Estate's petition as to the remaining assets. The court also clarified that this matter proceeded as a citation hearing and not a will contest and, therefore, the doctrine of election was inapplicable. The court stated, "[t]his matter has nothing to do with whether or not the respondent agreed with the terms of the will or not."

¶ 19 On December 5, 2016, the circuit court entered a written order denying the Estate's petition and Wild's care claim, stating the order "is final and appealable pursuant to Illinois Supreme Court Rule 304(a)+(b) as to both the citation and care claim." On December 21, 2016, the Estate moved for turnover of assets, again arguing that Wild is estopped from asserting any

claim to the assets of the Estate based on the doctrine of election. The court denied the Estate's motion on January 4, 2017. This appeal followed.

¶ 20 ANALYSIS

¶ 21 The Estate argues that the circuit court erred when it denied the Estate's partial summary judgment motion because Wild failed to contest the will within six months of its admittance to probate. The Estate contends that once the six-month statutory period to contest the will expired, Wild was precluded from contesting the ownership of tangible personal property specifically identified in the will. The Estate also argues the doctrine of election applies because prior to the citation proceeding, Wild accepted bequests from decedent's will, which barred him from challenging any bequests made to decedent's other legatees.

¶ 22 As a preliminary matter, we note that Wild has not filed a responsive brief. We will consider this appeal under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 23 We also must comment on the Estate's brief filed with this court, which does not contain an appendix as required by Illinois Supreme Court Rule 341(h)(9) (eff. Jan. 1, 2016). The Estate has also run afoul of Illinois Supreme Court Rule 342(a) (eff. Jan. 1, 2005), which requires the appellant to provide in the appendix a table of contents to the record on appeal. Supreme court rules are not mere suggestions; they are rules that must be followed. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. "Where an appellant's brief fails to comply with supreme court rules, this court has the inherent authority to dismiss the appeal." *Epstein v. Galuska*, 362 Ill. App. 3d 36, 42 (2005). We recognize, however, that striking a brief for failure to comply with supreme court rules is a harsh sanction. *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005);

People v. Thomas, 364 Ill. App. 3d 91, 97 (2006). Here, the missing appendix does not materially impede our review because the issues and record are straightforward.

¶ 24 Furthermore, we consider whether we have jurisdiction to consider the merits of the appeal under Illinois Supreme Court Rule 304(b)(1) (eff. Mar. 8, 2016). See *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994) ("[T]he appellate court has an independent duty to consider its jurisdiction before proceeding to the merits of the case"). The circuit court included both Rule 304(a) and (b) language in its December 5, 2016 order, but the Estate claims this court has jurisdiction under Rule 304(a). Rule 304(b)(1) permits an immediate appeal without the requisite Rule 304(a) language of any "judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party." Ill. S. Ct. R. 304(b)(1) (eff. Mar. 8, 2016). Rule 304(b)(1) is intended to promote efficiency and certainty by allowing the immediate appeal of some issues resolved during lengthy procedures associated with the administration of estates. See *In re Estate of Mueller*, 275 Ill. App. 3d 128, 139 (1995). "Without the Rule 304(b)(1) exception, an appeal would have to be brought after an estate was closed, the result of which might require reopening the estate and marshaling assets that have already been distributed." *Stephen v. Huckaba*, 361 Ill. App. 3d 1047, 1051 (2005). Here, the court's December 5, 2016 order finally determined the Estate's petition for citation to recover assets, thereby constituting a final and appealable order sufficient to confer jurisdiction on this court. Ill. S. Ct. R. 304(b)(1) (eff. Mar. 8, 2016); see also *In re Estate of Pawlinski*, 407 Ill. App. 3d 957, 962-63 (2011).

¶ 25 Turning to the merits of this case, the Estate seeks *de novo* review of its appeal from the circuit court's denial of its motion for partial summary judgment. However, the supreme court has held that any error in the denial of a motion for summary judgment ordinarily merges into

the final judgment. *In re Estate of Funk*, 221 Ill. 2d 30, 85 (2006). Accordingly, we only consider the merits of the court's decision to partially deny the Estate's petition for citation to recover assets following the evidentiary hearing.

¶ 26 In a citation proceeding, the court is empowered to determine the title and right of property and enter such order as the case requires. *In re Estate of Kolbinger*, 175 Ill. App. 3d 315, 322 (1988). Indeed, "the objectives of a citation proceeding are to obtain the return of personal property belonging to the estate but in the possession of, or being concealed by others, or to obtain information to recover estate property." *In re Joutsen's Estate*, 100 Ill. App. 3d 376, 380 (1981). In a citation proceeding, the petitioner must initially establish a *prima facie* case that the property at issue belongs to the decedent's estate. *In re Estate of Elias*, 408 Ill. App. 3d 301, 315 (2011) (citing *In re Estate of Casey*, 155 Ill. App. 3d 116, 121–22 (1987)). If the petitioner properly establishes a *prima facie* case, the burden then shifts to the respondent to prove his or her right to possession by clear and convincing evidence. *In re Estate of Elias*, 408 Ill. App. 3d at 315. A circuit court's finding that certain property belongs or does not belong to the estate will not be disturbed on appeal unless it is against the manifest weight of the evidence because "the court in such proceedings is authorized to determine all questions of title, claims of adverse title and property rights." *Id*. at 316. A judgment is against the manifest weight of the evidence only when " 'the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on the evidence.' " *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008) (quoting *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001)).

¶ 27 Additionally, it is well-settled that the circuit court "is in the best position to evaluate the credibility of the witnesses and to determine therefrom the facts of the case." *In re Estate of*

Lashmett, 369 Ill. App. 3d 1013, 1021 (2007); accord *Shanahan v. Bowen*, 156 Ill. App. 3d 269, 312 (1978) ("The trial court is in the best position to make a determination as to witness credibility and the weight to be afforded to the testimony."); *In re Miller's Estate*, 11 Ill. App. 3d 867, 869 (1973) ("Ordinarily, since the trial court has observed the witnesses' demeanor and is thereby better able than the reviewing court to judge their credibility, the judgment of the trial court should be affirmed unless found to be against the manifest weight of the evidence.").

¶ 28 In this case, the Estate is not challenging the circuit court's finding that it failed to establish a *prima facie* case that decedent owned the property at issue at the time of her death. Instead, the Estate argues that because Wild never contested the will within the six-month statutory period, the will became "valid for all purposes" and the property bequeathed by decedent to her children and Nanberg is therefore unassailable. The problem with the Estate's argument is that a decedent cannot bequeath personal property in a will that he or she does not own at the time of her death. In simpler terms, for example, a decedent cannot bequeath the Brooklyn Bridge to her children unless her Estate can show the decedent owned the Brooklyn Bridge at the time of her death.

¶ 29 A petition for citation to recover assets is an adversarial proceeding to determine the right and title to personal property, whether the property is the Brooklyn Bridge or artwork such as that at issue here. 755 ILCS 5/16-1 (West 2016). Indeed, the circuit court "may examine the respondent on oath whether or not the petitioner has proved the matters alleged in the petition, may hear the evidence offered by any party, may 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." 755 ILCS 5/16-1(d) (West 2016). When a decedent has no title to specific property, that property is not an asset of the estate. *In re Estate of Kolbinger*, 175 Ill. App. 3d at 322.

¶ 30 Here, the record shows the circuit court considered the evidence the Estate presented, including Wild's testimony, and concluded the Estate failed to establish a *prima facie* case that the decedent owned the property at issue at the time of her death. The Estate has failed to raise any argument on appeal that the circuit court's decision was against the manifest weight of the evidence. Under Rule 341(h)(7), points not argued are waived. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016). Waiver aside, a review of the record confirms the circuit court's finding that the Estate failed to present evidence establishing decedent owned the property at issue at the time of her death.

¶ 31 Furthermore, the Estate conflates the procedures for a will contest and citation proceedings when it argues that Wild failed to contest the will within the six-month statutory period. The sole object of a will contest is to invalidate a particular instrument so that the plaintiff may take under an earlier instrument or by the law of intestate succession if no earlier instrument exists. *In re Estate of Alfaro*, 301 Ill. App. 3d 500, 503 (1998). In short, a will contest challenges the validity of a will as a legal instrument. In contrast, a citation to recover assets involves the wrongful taking of property and is not considered a "claim" under the Probate Act (*In re Estate of Shandling*, 26 Ill. App. 3d 610, 612 (1975)).

¶ 32 In this case, the validity of the will is not in question. Instead, the circuit court was only called upon to determine the issue of property ownership at the time of decedent's death. We agree that the court's decision was not against the manifest weight of the evidence.

¶ 33 The Estate also argues the circuit court erred in its partial denial of the petition for citation to recover assets based on the doctrine of election, which the Estate contends barred Wild from challenging any bequests made to decedent's other legatees. The doctrine of election "is triggered in the context of wills only when there are two different benefits to which a person

is entitled, the testator did not intend the beneficiary to take both benefits, and allowing the beneficiary to claim both would be inequitable to others having claims upon the same property or fund." *In re Estate of Boyar*, 2013 IL 113655, ¶ 28. The doctrine of election requires " 'first, a plurality of gifts or two inconsistent or alternative rights or claims in property devised, the choice of one by the devisee being intended to exclude him from the benefit of the other; and second, in case the property of the devisee is disposed of by the will and he chooses to assert his right to such property against the will, that there be a fund for his benefit given by the will, which can be laid hold of to compensate the parties whose right to take under the will is defeated by the election.' " *Id*. (quoting *Bell v. Bye*, 255 Ill. 283, 285-86 (1912)). "In practice, this means, for example, that 'if a testator intending to dispose of his property, includes in the disposition, property of another person, and at the same time gives to such other person an interest in the estate of the testator, such person will not be permitted to defeat the disposition made by the will and at the same time take under it. He is put to his election whether he will retain his own property or take the benefit conferred by the will. [Citations.]' " *Id*. ¶ 29 (quoting *Carper v. Crowl*, 149 Ill. 465, 476 (1894)). "Similarly, where a devisee or legatee takes something under the will to which he would not be otherwise entitled, the doctrine of election prohibits that person from also seeking to hold property disposed of by the will to which he would be entitled if there had been no will." *Id*. ¶ 29.

¶ 34 There are two reasons why the doctrine of election is inapplicable here. First, the Estate cannot rely upon the doctrine in the context of the citation proceedings it instituted. The doctrine of election is an affirmative defense in will contests and does not arise in citation proceedings to determine "whether or not the petitioner has proved the matters alleged in the petition." 755 ILCS 5/16-1(b) (West 2016); see also *In re Estate of Boyar*, 2013 IL 113655, ¶ 33 (finding

doctrine of election is limited to will contests and challenges to trusts). Second, the Estate never established a *prima facie* case demonstrating that decedent owned the property she allegedly intended to bequeath at the time of her death. Therefore, Wild could not have taken "something under the will to which he would not be otherwise entitled," since he testified that he owned the property at issue. The Estate has not presented any evidence to the contrary.

¶ 35 CONCLUSION

¶ 36 In sum, the Estate waived its argument that the circuit court's decision to partially deny its petition for citation to recover assets was against the manifest weight of the evidence. Waiver aside, we find the circuit court's decision was not against the manifest weight of the evidence. Finally, we conclude the doctrine of election is inapplicable in this case. The judgment of the circuit court of Cook County is affirmed.

¶ 37 Affirmed.