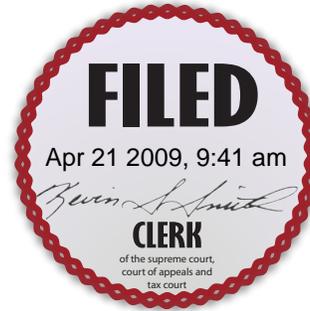


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ANGELA FOSTER,)

Appellant-Plaintiff,)

vs.)

No. 04A05-0809-CV-562)

THE ESTATE OF DARLENE SHOEMAKER,)
DECEASED, JAMES SHOEMAKER,)
PERSONAL REPRESENTATIVE,)

Appellee-Defendant.)

APPEAL FROM THE BENTON CIRCUIT COURT
The Honorable Rex W. Kepner, Judge
Cause No. 04C01-0805-ES-21

April 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Angela Foster (“Foster”) appeals an order of the Benton Circuit Court refusing to dismiss probate proceedings initiated by James Shoemaker (“Shoemaker”) as personal representative of the intestate estate of decedent Darlene Shoemaker (“the Estate”), and directing Foster to return checking account funds to the Estate. We affirm.

Issues

Foster presents three issues for review:

- I. Whether the probate court was required to grant Foster’s motion to dismiss the petition for administration of an estate because Foster had previously collected estate property pursuant to a small estate affidavit procedure;
- II. Whether the probate court lacked authority to issue an order compelling Foster and her brother to return to the Estate funds collected pursuant to the small estate affidavit procedure; and
- III. Whether the probate court had authority to order the payment of medical bills that were not timely filed.

Facts and Procedural History

Darlene Shoemaker died intestate on September 5, 2007, survived by her husband, Shoemaker, her daughter, Foster, and her son, Rodney Winebrenner (“Winebrenner”). She left an estate consisting of a checking account of \$26,000 and a 1999 Buick automobile valued at \$4,890.

On May 12, 2008, Foster executed a small estate affidavit, according to Indiana Code Section 29-1-8-1,¹ and presented it to the Farmers and Merchants Bank of Boswell, Indiana.

¹ Indiana Code Section 29-1-8-1, applicable to estates having a gross value of \$50,000 or less, provides that,

The bank released \$26,000 to Foster, who retained \$6,500 and distributed \$13,000 to Shoemaker and \$6,500 to Winebrenner.

Nine days later, on May 21, 2008, Shoemaker filed his “Petition for Issuance of Letters and Leave to Administer Intestate Estate with Court Supervision.” (App. 25.) The probable value of the estate was listed as \$30,890 (consisting of the \$26,000 checking account and the Buick valued at \$4,890).² The probate court immediately appointed Shoemaker the personal representative of the Estate.

On May 28, 2008, Foster filed her motion to dismiss the petition for administration, contending that Shoemaker’s action was “precluded by another legal proceeding & laches.” (App. 19.) Foster also filed a motion requesting that the probate court compel Shoemaker to deliver the Buick to Foster for a sale and distribution of proceeds. Shoemaker responded with a motion that the probate court compel Foster and Winebrenner to return to the Estate the checking account funds distributed to them. The probate court conducted a hearing on September 8, 2008.

At the hearing, Shoemaker asserted his intention to claim from the Estate his surviving spouse allowance of \$25,000. See Ind. Code § 29-1-4-1. Shoemaker also contended that a portion of Darlene’s funeral bills and several of her medical bills remained unpaid. Foster

forty-five days after the death of a decedent, one indebted to the decedent or having property belonging to the decedent, may make payment to an heir of the decedent, pursuant to an affidavit complying with certain statutory requirements.

Indiana Code Section 29-1-8-2 provides in relevant part: “Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.”

² Foster’s affidavit also valued the Estate property at \$30,890.

also appeared at the hearing. She did not contest Shoemaker's right to his surviving spouse allowance, but opposed a request for an order that she and Winebrenner be compelled to return the checking account funds to the Estate.

On September 10, 2008, the probate court issued an order denying Foster's motion to dismiss and compelling Foster and Winebrenner each to return the previously distributed checking account funds. Foster appeals.

Discussion and Decision

I. Motion to Dismiss

Foster requested that the probate court dismiss proceedings initiated by Shoemaker because "there cannot be two legal proceedings seeking the same result" and she executed her affidavit before Shoemaker filed his petition for administration so that her "proceeding ... prior in time ... must take priority." (App. 20.) On appeal following the denial of her motion for dismissal, Foster claims that "the earliest of the procedures encountered ... is entitled to preference [as] a matter of equity, fairness, fair play, impartiality, and even handedness." Appellant's Brief at 13.

Foster further asserts that she was entitled to proceed with the distribution of the Estate, as opposed to Shoemaker, under the authority of Indiana Trial Rule 12(B)(8), which provides for a defense to an action when "the same action [is] pending in another state court of this state." However, the affidavit executed by Foster does not constitute an "action pending in another court of this state." As reflected by the chronological case summary and the argument of the parties at the hearing, the first court action regarding the Estate filed in a

court of this state was Shoemaker's petition of May 21, 2008. Foster was not entitled to dismissal of Shoemaker's petition pursuant to Indiana Trial Rule 12(B)(8).

II. Motion to Compel

Foster complains that the probate court erroneously ordered her to return checking account funds to the Estate. She does not cite any authority to support the proposition that the probate court is precluded from ordering the tender of Estate assets to the Estate. Indeed, Foster filed a competing motion to compel requesting that the trial court order Shoemaker to surrender the Buick for sale and distribution of the proceeds.

We observe that Indiana Code Section 29-1-8-2 provides, in relevant part, that "[a]ny person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right." Foster presents no argument that this statutory provision would be inapplicable to her.

III. Medical Bills

Foster also suggests that the probate court improperly ordered the payment of untimely medical bills.³ Although the probate court order is not a model of clarity, and refers to unpaid medical bills, the order does not specifically direct the payment of any claim, with the exception of the surviving spouse allowance. Indeed, the probate court recognized that the Estate is likely insolvent. The parties have uniformly represented that the value of the Estate

³ Indiana Code Section 29-1-14-1 requires that claims against an estate be submitted within nine months of the decedent's death.

is \$30,890. After the deduction of the \$25,000 surviving spouse allowance, only \$5,890 remains for the payment of any costs of administration or funeral costs. The probate court recognized that, should there be a remaining balance, Shoemaker would be entitled to 50%, Foster would be entitled to 25%, and Winebrenner would be entitled to 25%. However, the probate court apparently anticipated that the funeral costs and costs of administration would exceed the \$5,890 net estate value, and stopped short of ordering a specific payment to any creditor or heir. Foster has not demonstrated reversible error in this regard.

Affirmed.

DARDEN, J., and ROBB, J., concur.