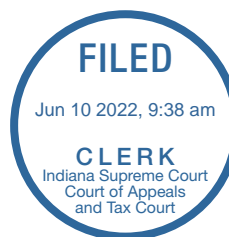


## MEMORANDUM DECISION

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

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In the Matter of the Estate of  
Charles C. Allen, Deceased.

Dorothy McIntyre,  
*Appellant-Plaintiff,*

v.

Donna J. Allen, Delores Wilson,  
Steve Allen, Roger Allen, and  
Jimmy Allen,  
*Appellees-Defendants.*

June 10, 2022

Court of Appeals Case No.  
21A-PL-2110

Appeal from the Hendricks  
Superior Court

The Honorable Robert W. Freese,  
Judge

The Honorable Christopher L.  
Burnham, Senior Judge

Trial Court Cause No.  
32D01-2101-PL-12

**Weissmann, Judge.**

[1] In this contested probate case, the trial court entered a purported default judgment against Dorothy McIntyre based on her failure to respond to a cross-motion for summary judgment filed by Delores Wilson, Steven Allen, Roger Allen, and Jimmy Allen (collectively, the Allens). Because the entry of summary judgment by default is prohibited by the Indiana Trial Rules, we reverse and remand for a decision on the merits of the parties' competing summary judgment motions.

## Facts

[2] Prior to his death in 2015, Charles Allen executed a last will and testament that disposed of his Brownsburg condominium as follows: a life estate to his wife, Elizabeth McIntyre, and the remainder interest to his former wife's nieces and nephews—the Allens. After Elizabeth's death in 2020, the executor of Charles' will presented the will for probate,<sup>1</sup> and Elizabeth's surviving daughter-in-law, Dorothy, filed a petition in opposition.<sup>2</sup>

[3] Dorothy claimed Charles' will could not be probated because it was not presented for probate within three years of Charles' death, as required by Indiana Code § 29-1-7-15.1(g). Therefore, according to Dorothy, the

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<sup>1</sup> The wills' executor, Donna Allen, was a party to all proceedings below but has not appeared in this appeal.

<sup>2</sup> Dorothy also filed a petition for appointment as personal representative of Charles' estate, which the trial court granted. In her petition, Dorothy alleged that Elizabeth's estate was the sole heir of Charles' estate.

condominium should be distributed to Elizabeth's estate under the Indiana rules of intestate succession, as if Charles' will did not exist.

- [4] The Allens claimed that, under Indiana Code § 29-1-7-15.1(h), the three-year deadline did not apply because Charles' will was presented for probate for the sole purpose of transferring title to the condominium. Therefore, according to the Allens, the condominium should be distributed to Delores, Steve, Roger, and Jimmy under the terms of Charles' will.
- [5] The parties agreed that there were no factual disputes, only questions of law, and they filed a set of stipulated facts with the trial court. Dorothy then filed a motion for summary judgment, to which the Allens responded in opposition. Their response, however, included a cross-motion for summary judgment, to which Dorothy did not respond.
- [6] Eventually, the Allens filed a Trial Rule 55 motion for default judgment against Dorothy based on her failure to respond to their cross-motion for summary judgment. The next day, the trial court entered the following order:

### **DEFAULT JUDGMENT**

This matter having come before the court on cross-motion (sic) by the defendants for default judgment against the plaintiff, and the court having found that the plaintiff has failed to answer or otherwise defend against the motion (sic), that the defendants have complied with the notice and service requirements of Trial Rule 55, and the court having further found that the plaintiff is not in the military service and is not an infant or incompetent, it is

ORDERED, ADJUDGED AND DECREED that judgment is entered for the defendants, granting their motion for summary judgment, denying the plaintiff's motion for summary judgment, granting judicial recognition that the defendants (sic) became the indefeasible owners of Charles Allen's condominium upon the death of his wife, revoking the letters of administration granted to Dorothy McIntyre and closing Charles Allen's estate.

App. Vol. II, p. 44. Dorothy filed a Trial Rule 60(B) motion for relief from this judgment, which the trial court denied. This appeal followed.

## Discussion and Decision

- [7] Dorothy argues that the trial court erred in entering default judgment against her, in part, because she was not required to respond to the Allens' cross-motion for summary judgment. The Allens primarily argue that Dorothy waived this claim by failing to present it in her Trial Rule 60(B) motion. Though both parties characterize the trial court's order as a default judgment entered under Trial Rule 55, the trial court's order resolved the parties' summary judgment motions. It therefore is governed by Trial Rule 56.
- [8] Though designated as a "Default Judgment," the decretal language of the trial court's order provides that "judgment is entered for the defendants, *granting their motion for summary judgment*, [and] *denying the plaintiff's motion for summary judgment . . .*" App. Vol. II, p. 44 (emphasis added). The order also awards the exact relief requested in the Allens' cross-motion for summary judgment: judicial recognition that Delores, Steve, Roger, and Jimmy own the condominium; revocation of Dorothy's letters of administration; and the

closure of Charles' estate. *Compare id.* at 41 (cross-motion) *with id.* at 44 (order). The Allens even recognize that “[t]he default judgment did not impose a sanction on [Dorothy] in a traditional sense – it only decided pending cross-motions for summary judgment.” Appellees’ Br. p. 24.

[9] The Indiana Trial Rules prohibit the entry of summary judgment by default. Ind. Trial Rule 56(C) (“Summary judgment shall not be granted as of course because the opposing party fails to offer opposing affidavits or evidence . . . .”). A party is not required to respond to a motion for summary judgment, and a trial court is not required to grant one that goes unopposed. *Murphy v. Curtis*, 930 N.E.2d 1228, 1233-34 (Ind. Ct. App. 2010). To the contrary, “a party who fails to timely respond to a motion for summary judgment may still have summary judgment entered in [their] favor.” *Id.* at 1234; *see* T.R. 56(B) (“When any party has moved for summary judgment, the court may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party.”).

[10] “In other words, summary judgment is awarded on the merits of the motion, not on technicalities.” *Murphy*, 930 N.E.2d at 1233. The trial court erred by denying Dorothy’s motion for summary judgment and granting the Allens’ cross-motion for summary judgment based on Dorothy’s failure to respond to the latter. Accordingly, we reverse the trial court’s judgment and remand for a decision on the merits of the parties’ competing summary judgment motions.

Robb, J., and Pyle, J., concur.