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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED J. BIANCO, as Plan
Administrator to the Estate of Gaston &
Snow est Gaston & Snow,

Plaintiff - Appellee,

v.

ROBERT A. ERKINS; et al.,

Defendants - Appellants,

GREGORY TODD ERKINS; et al.,

Defendant-intervenors -
Appellants.

No. 02-35909

D.C. No. MC-00-05065-
BLW/LMB

MEMORANDUM*

ALFRED J. BIANCO, as Plan
Administrator to the Estate of Gaston &
Snow est Gaston & Snow,

Plaintiff - Appellee,

v.

MARLA GOSS; et al.,

No. 02-35910

D.C. No. MC-00-05065-
BLW/LMB

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Defendant-intervenors -
Appellants.

ALFRED J. BIANCO, as Plan
Administrator to the Estate of Gaston &
Snow est Gaston & Snow,

Plaintiff - Appellee,

v.

ROBERT A. ERKINS; et al.,

Defendants - Appellants,

and

GREGORY TODD ERKINS; et al.,

Defendant-intervenors.

No. 02-35932

D.C. No. CV-00-05065-BLW

Appeal from the United States District Court
for the District of Idaho

B. Lynn Winmill, District Judge, Presiding

Argued and Submitted May 6, 2009
Seattle, Washington

Before: WARDLAW, PAEZ, and N.R. SMITH, Circuit Judges.

Robert A. and Bernardine Erkins (the Erkins) and their adult children appeal
the district court's (1) denial of their Motion to Set Aside the U.S. Marshal Sale for

inadequate notice, (2) imposition of attorney fees and costs, and (3) contempt ruling against Robert Randolph Erkins. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for further proceedings .

1. We review a district court’s denial of a motion to set aside a U.S. Marshal’s sale for abuse of discretion. *Bank of America, NT & SA v. PENGWIN*, 175 F.3d 1109, 1118 (9th Cir. 1999) (citation omitted). Reviewing for abuse of discretion, we affirm the district court.

Notice is constitutionally adequate if it is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Dusenbery v. United States*, 534 U.S. 161, 168 (2002) (quotation and citation omitted). Prior to the hearing, execution proceedings and scheduled sale, the Erkins children filed an Expedited Motion for Rule 62(f) Stay requesting the court to stay the Marshal’s sale of the personal property. Having acknowledged that they received actual notice of the intended sale of the personal property, the Erkins children received constitutionally adequate notice of the sale.

Notice is adequate under Idaho Code § 11-302(2) “by publishing a copy thereof at least one (1) week, and not more than two (2) weeks, in a newspaper

published in the county, if there be one.” The notice of the U.S. Marshal’s sale was published in the Idaho Statesman on February 4, 2002. The statute is clear and unambiguous. Under the statute, notice need not be published *daily*, and it need not be published for more than two weeks. Therefore, such notice was adequate under Idaho law.

Rule 5(b) of the Federal Rules of Civil Procedure governs the serving and filing of pleadings and other papers. *See* Fed. R. Civ. P. 5. Rule 69, however, governs the execution of a judgment. *See* Fed. R. Civ. P. 69. Rule 69 provides that “[a] money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located.” Therefore, the procedures to be followed when applying for and serving a writ of execution are governed by Rule 69 and service under Rule 5(b) was not required. The district court therefore did not abuse its discretion in denying the Erkins’s motion to set aside the sale.

2. We review for an abuse of discretion both the district court’s award of costs, *see Dawson v. Seattle*, 435 F.3d 1054, 1070 (9th Cir. 2006) and attorneys’ fees, *see Johnson v. Columbia Prop. Anchorage, LP*, 437 F.3d 894, 898 (9th Cir. 2006). We review de novo the court’s authority to award costs, *see United States*

ex rel. Newsham v. 337 Lockheed Missiles & Space Co., 190 F.3d 963, 968 (9th Cir. 1999), and the question whether a state statute permits attorneys fees, *see O'Hara v. Teamsters Union Local No. 856*, 151 F.3d 1152, 1157 (9th Cir. 1998). The district court concluded that under Idaho Code §§ 12-120(3) and (5), Bianco was entitled to \$160,486.13 in attorney fees from the Erkins parents, \$19,835.37 in attorney fees from the Erkins children, and \$82,168.83 in costs from the Erkins.

The Erkins's first contend that Bianco's request for fees was untimely. We disagree. Idaho Code § 12-120, the statute pursuant to which Bianco sought fees, does not address the time within which a motion for postjudgment fees must be filed. More importantly, Bianco sought an award for postjudgment attorneys' fees and costs incurred in attempting to collect on a judgment, not an award of fees as a prevailing party that would be subject to the federal or local rules requiring that requests be made within fourteen days. *See Fed. R. Civ. P. 54(d)(2)*. We agree with the district court that under the circumstances of this case, Bianco's motion for an award of attorneys' fees was not time-barred.

Second, the Erkins contend that, under Idaho Code § 12-120(5), Bianco is not entitled to attorneys' fees incurred in postjudgment disputes with the Erkins parents. Again, we disagree. Adopting the interpretation of § 12-120(5) suggested by the Erkins would contravene the language and purpose of the statute, which

makes clear that judgment creditors may recover attorneys' fees incurred in collecting on a judgment when fees were awarded in the underlying action for collection on an account.

We are persuaded, however, by the Erkins's third argument, which is that § 12-120 did not authorize the award of attorneys' fees against the Erkins children because these fees were incurred defending against a third-party claim pursuant to Idaho Code § 11-203. Fees incurred in the proceeding to determine whether the personal property that Bianco seized, and sought to sell, rightfully belonged to the Erkins children—and therefore could not be used to satisfy the judgment against the Erkins parents—involved a third-party action that asserted rights not at issue in the underlying action. Thus, these fees were not incurred in “attempting to collect on the judgment” under § 12-120. Moreover, the language and purpose of Idaho Code § 11-203, which expressly addresses third-party rights to property levied under a writ of execution, makes no mention of fees – only costs. We therefore decline to adopt the district court's broad reading of §§ 12-120(3) and (5), reverse the district court's award of fees against the Erkins children, and remand so that the court may correct the judgment.

3. We look to the intended effects of a court's punishment to determine the nature of a contempt proceeding. *United States v. Powers*, 629 F.2d 619, 626 (9th

Cir. 1980). “If the purpose [of the contempt order] is to punish a past violation of a court order, the contempt is criminal.” *Portland Feminist Women’s Health Ctr. v. Advocates for Life, Inc.*, 877 F.2d 787, 790 (9th Cir. 1989). The district court found Robert Randolph Erkins in contempt for violating an order of the court and imposed a \$5,000 sanction. This sanction is punitive, seeks to vindicate the authority of the court, and does not terminate upon compliance with the court’s order. Therefore, the court’s finding of contempt is criminal in nature. *See Powers*, 629 F.2d at 627. Because the district court’s contempt finding was criminal in nature, it was required to comply with the procedural requirements of Rule 42 of the Federal Rules of Criminal Procedure. *See id.* at 624. The district court failed to follow the Rule 42 procedures. Therefore, we reverse the district court’s contempt finding and the imposition of the \$5,000 sanction.

The parties shall each bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED.