

2011 IL App (1st) 101102-U  
No. 1-10-1102

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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DAVID DELISIO, Beneficiary and Co-Trustee of the Delisio Family Revocable Trust,	)	
	)	
	)	
Plaintiff-Appellee,	)	Appeal from the
	)	Circuit Court of
v.	)	Cook County.
	)	
PATRICIA FRAIN and SANDRA FITZSIMMONS, Beneficiaries and Co-Trustees of the Delisio Family Revocable Trust,	)	No. 08 CH 04854
	)	)
	)	Honorable
Defendants-Appellees.	)	Daniel A. Riley,
	)	Judge Presiding.
	)	
(Gayle Delisio, Beneficiary of the Delisio Family Revocable Trust,	)	
	)	
Intervenor-Appellant.)	)	
	)	

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JUSTICE ROBERT E. GORDON delivered the judgment of the court.  
Presiding Justice Garcia and Justice Cahill concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where trial court's order was not a final order, appellate court lacked jurisdiction to hear appeal.
- ¶ 2 This case arises from a contentious dispute between five siblings regarding the handling of a trust in which three of the siblings were trustees and all five siblings were beneficiaries.

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Plaintiff David Delisio, a cotrustee, brought suit against defendants Patricia Frain and Sandra Fitzsimmons, also cotrustees, seeking an accounting of trust expenses, alleging improper expenditures by Patricia and Sandra, and seeking their removal as cotrustees. In turn, Patricia and Sandra petitioned the trial court to remove David as a cotrustee, requested an accounting for the time in which he was in control of the trust assets, and attempted to rescind an amendment to the trust based on David's actions. *Pro se* appellant Gayle Delisio,<sup>1</sup> one of the beneficiaries, received permission to intervene in the case and filed a number of motions, including a motion seeking to remove Patricia and Sandra as cotrustees and a motion seeking an accounting from them. After a trial in which the trial court considered the numerous petitions and motions filed, the court found that all three cotrustees, David, Patricia, and Sandra, breached their duties in various ways and appointed an independent trustee. Gayle appeals, arguing that the trial court's decision was improper. We dismiss this appeal for lack of jurisdiction.

¶ 3

### BACKGROUND

¶ 4 Although the parties have wildly divergent interpretations of the actions at issue here, we recite the factual claims made chronologically in order to have the most complete picture of the conflict between the parties that we can obtain. We note that in her brief, Gayle refers to documents and events not found in the record, but we limit our review to that which is contained in the record on appeal.

¶ 5 On December 20, 1993, Thomas Mike Delisio and Gloria Ella Delisio executed the

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<sup>1</sup> Gayle is referred to as Gayle Delisio, Gayle Delisio-Laney, and Gayle Laney. We refer to her as Gayle Delisio, which is the name used in her appellate brief.

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Delisio Family Revocable Trust (the trust) as settlors and trustees. The trust provided that during their lifetimes, the income from the trust estate was to be used for the benefit of Thomas and Gloria but, upon their death, the trust terminated and the principal was to be divided among the couple's adult children: Patricia, Sandra, Gayle, David, and Michael. The trust further provided that if either Thomas or Gloria became unwilling or unable to serve as cotrustee, the other would be sole trustee. If the remaining became unwilling or unable to serve as trustee, Patricia would be named first successor trustee, followed by Sandra as the second successor trustee. Paragraph 8.2 of the trust defined "inability of trustee to serve":

“Any person acting or named to act in a Trustee capacity shall be considered unable to act or continue to act, and shall cease to act as Trustee when the person's regularly attending physician has certified that such person does not have the physical or mental capacity to manage his or her financial affairs.”

Paragraph 8.5A provided that “[a]ll actions by the Trustees shall be taken only by unanimous decision of the Trustee(s) then serving.” The trust also provided that it would be governed by Florida law.

¶ 6 On July 14, 2004, Gloria was diagnosed with cancer, at which point all of her children traveled to Florida to visit her. The next day, David began taking care of the personal affairs of Gloria and Thomas under a power of attorney. Gloria died on January 13, 2005.

¶ 7 On or around January 20, 2005, David asked attorney Stephen T. Ullman to visit Thomas' home to discuss Thomas' estate. David, Patricia, Sandra, and Thomas were present at the

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meeting with Ullman. According to Patricia and Sandra, “[o]n the date of the visit of Attorney Ullman, Thomas \*\*\* was very despondent over the death of his late wife, barely a week before said meeting.” Thomas was also inattentive and nearly deaf, making him unable to listen or contribute to the meeting, and David spoke for Thomas during the meeting. During the meeting, Sandra and Patricia discovered that Patricia was named as the successor trustee in the trust. David said that since he was “ ‘[t]aking care’ ” of Thomas’ affairs, he should be named trustee. Patricia objected, stating that she wished to remain named as trustee. Thomas did not state any desire to change the trustee.

¶ 8 On February 9, 2005, Thomas amended the trust. The amendment provided that “the powers to revoke, amend, withdraw, and change beneficiaries or Trustees, reserved thereunder to the Grantors, shall not be exercisable by the surviving Grantor acting alone upon the death of the other Grantor.” The amendment further provided that “the Trustee from this point forward shall be” Thomas, Patricia, Sandra, and David, or their survivors. The amendment also listed three properties owned by the trust and stated that each property would be distributed outright upon the death of Thomas and Gloria to the assigned beneficiary: Gayle was assigned a home in Valparaiso, Indiana, Patricia was assigned a home in Orland Park, Illinois, and David was assigned the family’s vacation home in Walkerton, Indiana (the Koontz Lake property).

¶ 9 According to David, Thomas became ill in February 2005 and spent 15 hours per day in bed. From that time until his death, Thomas was unable to effectively act as a trustee. During that time, David managed the trust “without incident” in consultation with Patricia and Sandra.

¶ 10 In May 2006, James Frain, Patricia’s son, moved in with Thomas to care for him, since he

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was becoming less independent. David and James worked out an arrangement in which James was paid \$350 per week to care for Thomas. According to Patricia and Sandra, on January 24, 2007, David and James started to argue “sometime around 1:00 A.M. At the time Carol Delisio, Mike Delisio’s wife[,] went to Thomas \*\*\*, and told him that David was threatening that if James stayed he would not stay [in the house]. Thomas \*\*\* expressed a desire for James to stay. Upon hearing Thomas[’] \*\*\* wishes, David went ballistic, and stormed out of the house later that day.” As a result of the incident, David informed Patricia and Sandra that he was “ ‘[s]evering’ all ties to his father’s estate,” and wrote a note stating: “ ‘Today January 24, 2007, I am turning over every item, financial and real estate relating to my father’s estate to Sandy Fitzsimmons. I sever any and all ties to my father’s estate and to my family in general.’ ”

¶ 11 According to Patricia and Sandra, shortly after January 24, 2007, David took affirmative steps to prevent anyone from using the Koontz Lake property that was assigned to him in the amendment. “When Michael Delisio went to the property in March, 2007, he found a note on the door stating ‘I’ve changed the locks, your keys won’t work, you don’t have to deal with me anymore.’ From that time no other member of the family has accessed the Koontz Lake property.” Gayle confirmed that David changed the locks and would not provide the other family members with keys.

¶ 12 Thomas died on August 15, 2007.

¶ 13 On February 7, 2008, David filed a two-count verified complaint against Patricia and Sandra. The complaint alleged that after David turned the trust’s accounts over to Patricia and Sandra in January 2007, David attempted to manage the trust with them, but they were not

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cooperative. Between January 2007, when Patricia and Sandra took control of the assets of the trust, and the filing of the complaint in February 2008, the trust's assets diminished by approximately \$104,000. The complaint further alleged that David repeatedly asked for an accounting as was required by the trust, "but Patricia and Sandra have refused to adequately account for the funds."

¶ 14 The complaint alleged that the trust owned a piece of real estate in Florida, which the trustees agreed should be sold. However, the trustees were unable to agree on what improvements should be made prior to placing the property for sale. The complaint alleged that Sandra intended to fly to Florida to make improvements that had not been agreed to by all of the trustees and alleged that the assets of the trust would be irreversibly diminished if Sandra was permitted to invest the liquid assets of the trust in the Florida property, given the "current market conditions." Accordingly, in count I of the complaint, David sought a temporary restraining order and, ultimately, a preliminary injunction "enjoining any trustees from spending any funds of the Trust on any improvements to the property in Florida without the written consent of all co-trustees."

¶ 15 Count II of the complaint sought an accounting detailing all expenses paid from the assets of the trust. The complaint alleged that in the time since Patricia<sup>2</sup> gained control of the trust

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<sup>2</sup> Count II makes no reference to Sandra being in control of the trust assets, but does reallege the allegations of count I, which alleged that "Patricia and Sandra took control of the assets of the Trust." From the record, it appears that Patricia managed the daily affairs of the trust.

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assets, she had not provided an adequate accounting to the beneficiaries or cotrustees. The complaint further alleged that on January 23, 2008, Patricia provided a partial list of expenditures, but did not include specific information concerning amounts expended for a number of items including “air fares, salaries and reimbursements for days off from work.” The complaint alleged that the list provided by Patricia included numerous unauthorized expenditures, including a payment to Sandra of \$26,000 that was not approved by all trustees. In addition to the accounting, count II sought a temporary restraining order and, ultimately, a preliminary injunction “enjoining any trustees from spending or releasing any assets of the Trust without the written consent of all co-trustees.”

¶ 16 On February 19, 2008, the court ordered that all trustees were enjoined from making any disbursement from the trust without the unanimous consent of all trustees until the hearing on the preliminary injunction, which was set for February 28, 2008. On February 28, 2008, the court entered a preliminary injunction enjoining all trustees from making any disbursement from the trust without the unanimous consent of all trustees until the court made a determination on the issue of the accounting.

¶ 17 On July 17, 2008, Gayle filed a *pro se* petition to intervene, which was granted on July 22, 2008, because she was a beneficiary of the trust and the decision would affect her rights.

¶ 18 On July 22, 2008, David filed an emergency motion to remove Patricia and Sandra from their positions as cotrustees of the trust. The motion claimed that despite repeated requests, Patricia and Sandra have not provided an accounting. The motion further claimed that Patricia and Sandra refused to endorse a check, in the amount of approximately \$104,000, issued to the

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trust by Allstate<sup>3</sup> on January 11, 2008, causing the check to become void and incurring additional fees to have the check reissued by Allstate. The check was reissued on May 8, 2008, but not endorsed until after June 5, 2008, causing the trust to lose at least six months of interest that could have been earned from the money. Additionally, no tax return has been filed on the trust's behalf for 2006 or 2007 and the motion claims that Patricia and Sandra refuse to cooperate and provide documents to David for the preparation of the returns. Patricia and Sandra also refused to transfer specific parcels of real estate to the assigned beneficiaries as required in the trust document, preventing Gayle from selling her home. Finally, the motion claimed Patricia distributed \$26,000 to Sandra without anyone's consent and without the approval of Ken Kredens, an attorney who was attempting to resolve the parties' dispute. The motion claimed that Patricia and Sandra acted in a manner contrary to the direction of the trust to the detriment of the trust and its beneficiaries.

¶ 19 Also on July 22, 2008, Gayle filed a motion seeking disbursement of the trust funds, an immediate accounting, and removal of Sandra and Patricia as trustees.

¶ 20 On August 6, 2008, Patricia and Sandra filed a number of documents with the court. First, they filed a response to David's motion to remove them as trustees, including an accounting that they attached. The response included a statement that they had executed deeds to the properties assigned to Gayle and Patricia, but had not executed the deed for David's property, since there was some question as to whether he was entitled to the Koontz Lake property. Patricia and Sandra also denied any intentional delay in endorsing the check, saying that if there

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<sup>3</sup> The check appears to have been the proceeds from a life insurance policy.

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was any delay, it was due to the logistical difficulties in meeting with Kredens, given their geographical distance and the fact that they were all “busy people.” Patricia and Sandra further claimed that they had no knowledge that the tax returns had not been prepared and were “precluded from filing said returns without the cooperation of [David] because he still retain[ed] information for said preparation.” They also claimed that Kredens had approved the distribution of \$26,000 to Sandra and that if any money was “lost,” it was the fault of David, who spent an excessive amount of money.

¶ 21 Next, Patricia and Sandra filed a petition to rescind or reform the amendment to the trust. They recounted the meeting with Ullman, culminating in Thomas’ February 9, 2005, amendment of the trust, naming Thomas, David, Patricia, and Sandra as cotrustees of the trust and adding a provision stating that “the powers to revoke, amend, withdraw, and change beneficiaries or Trustees, reserved thereunder to the Grantors, shall not be exercisable by the surviving Grantor acting alone upon the death of the other Grantor.” The petition claimed that this provision made the trust irrevocable and resulted in the requirement that the agreement of all trustees was required for any action by the trust, effectively giving any of the three children “a veto over their father’s affairs.” As a result, Thomas “lost effective control over his property, and was completely deprived of a great deal of the capacity to make financial decisions for himself.”

¶ 22 Count I of the petition claimed Thomas lacked testamentary capacity since he was “greatly despondent, depressed and nearly deaf” at the time he met with the attorney shortly after the death of Gloria, and never would have agreed to the amendments otherwise. Count II claimed that David exercised undue influence over Thomas. Count III claimed breach of

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fiduciary duty against David, claiming that David became Thomas' fiduciary both when he took control of Thomas and Gloria's finances and through his power of attorney. Count IV claimed that David would be unjustly enriched without the rescinding of the amendment because the amendment made him the intended recipient of the Koontz Lake property, "the former family vacation home."

¶ 23 Patricia and Sandra also filed a petition to remove David as cotrustee. The petition set forth many of the same facts as the petition to rescind the amendment to the trust. The petition additionally claimed that beginning February 9, 2005, when David became a cotrustee, David had sole control of Thomas' affairs. During that period, there was a great deal of " '[s]huffling' " of funds between accounts and David demonstrated a "strong possessory interest in his father's money." Additionally, between January 16 and January 24, 2007, shortly before writing the letter stopping his management of the trust, David withdrew \$43,000 from a checking account without explanation. The petition further claimed that in November 2004, a \$31,000 inheritance received by Gloria "somehow ended up in David's possession." David stated that he took the money because " 'Mom wanted him to have it.' " David also received another \$7,000 disbursement from the inheritance in January 2004.

¶ 24 The petition claimed that David breached his fiduciary duty through self dealing and conversion of trust property; the claim of conversion included a claim that between July 2004 and January 24, 2007, David transferred trust property to Gayle without the permission of the cotrustees and the property was never accounted for. The petition further claimed that David had abdicated his duties as trustee without "effectively inform[ing]" Patricia and Sandra of all of the

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accounts that David held in Thomas' name, "hinder[ing] the proper administration of the trust."

¶ 25 Finally, Patricia and Sandra filed a petition to compel David to provide an accounting.

The petition sought an accounting of all trust funds between February 9, 2005, and January 24, 2007, claiming that during that time, David had "exclusive control" over the trust's finances and that "[s]erious questions have arisen regarding his administration of the Trust, including the proper accounting of all Trust property."

¶ 26 On October 21, 2008, Gayle filed a number of motions and petitions with the court. She asked the court to hold Sandra and Patricia liable for attorney fees for David's attorney and to hold them personally liable for the damages they caused to the trust. Next, Gayle filed a motion claiming that Patricia and Sandra had breached their fiduciary duties through improper expenditures and refusal to provide an accurate accounting. Finally, Gayle filed a motion claiming that the trustees<sup>4</sup> violated a number of statutes concerning breach of fiduciary duty and asking the court to prohibit them from using any trust funds to pay their attorney fees.

¶ 27 On December 5, 2008, the trial court entered and continued all of the petitions and motions that were outstanding and ordered all trustees to file an accounting within 30 days. On January 6, 2009, Patricia and Sandra filed a motion to extend the deadline for the accounting, claiming that they had not been able to obtain the needed records to prepare the accounting. On January 15, 2009, the court entered an order continuing the matter until February 20, 2009, and ordering the property assigned by the trust amendment to Gayle to be listed for sale by the

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<sup>4</sup> The motion does not name the trustees, but based on her other filings, Gayle was referring to Patricia and Sandra and not to David.

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trustees at “a price to be agreed by the Trustees.”<sup>5</sup>

¶ 28 Between May 26, 2009, and August 14, 2009, Gayle filed several motions. Gayle filed a petition concerning a payment from an annuity that had been purchased by the trust; David filed a similar motion, seeking his share of the funds. Gayle also filed a petition asking the court to order David to turn over a set of keys to the Koontz Lake property, since the issue of the property’s ownership was still in dispute and all of the children were entitled to use the property until the matter was resolved. Finally, Gayle filed two petitions asking the court to hold Sandra in contempt and sanction her for not complying with court orders concerning Thomas’ and Gloria’s remains.

¶ 29 According to documents in the record, the case came before the court for trial on December 15-18 and December 21, 2009.<sup>6</sup> On January 14, 2010, the court appointed Kredens as court appointed trustee of the trust, and on January 20, 2010, Sandra and Patricia filed an emergency motion to strike the appointment of Kredens as an independent trustee. They attached affidavits from Sandra, Michael, and Patricia expressing their lack of confidence in Kredens’ ability to adequately and thoroughly perform the function of an independent trustee. The motion claimed that after the trial, the court set the matter for status on January 15, 2010. However, the case was mistakenly placed on the status call on January 14, 2010, and Patricia, Sandra, their attorney, and Michael were not present in court. David’s attorney was present and was aware of

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<sup>5</sup> The record does not contain a disposition on the motion for extension of time, but the trial court’s findings indicate that both parties filed accountings.

<sup>6</sup> The record on appeal does not contain a report of proceedings from the trial.

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the objections to Kredens as an independent trustee but did not relay those objections to the court. The motion further claimed that Kredens was biased in favor of David and was afraid of challenging any of David's statements based on a concern for his physical safety. The motion was denied on January 29, 2010.

¶ 30 On February 12, 2010, Gayle filed a petition asking the court to consider the testimony of a witness who was unable to attend the trial. The witness would testify concerning the state of mind of Thomas following the death of Gloria. The trial court denied Gayle's motion on February 22, 2010.

¶ 31 On March 25, 2010, the trial court entered a written order containing its findings. The court noted that there were essentially two time periods at issue: (1) the time between Gloria's death on January 13, 2005, and Thomas' death on August 15, 2007; and (2) the time after Thomas' death. The court further noted that there was a great deal of conflicting testimony concerning Thomas' capacity after Gloria's death, but pointed out that Thomas was never adjudicated disabled or had a guardian appointed for his person or estate. Thomas also never expressed dissatisfaction with the level of his care or the management of his assets.

¶ 32 The court also stated that both parties submitted accountings purporting to account for all expenditures and receipts, but that neither placed into evidence any original bank statements or checks. The court found that David's accounting combined with his testimony concerning its preparation was more credible and complete than the accounting prepared by Sandra and Patricia. The court further found that David demonstrated that Sandra and Patricia's accounting failed to account for approximately \$25,000.

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¶ 33 The court then made a number of findings. With respect to the revocation of the amendment to the trust, the court found that there was no evidence introduced that could cause the court to revoke the amendment and found that Thomas was not disabled at the time of his death and was presumed to have approved of all disbursements made during his life. With respect to David, the court found that David breached his fiduciary duty as trustee when he withdrew estate money on January 23, 2007; that David resigned as trustee by his letter dated January 24, 2007; and that after that date, Patricia and Sandra no longer needed his agreement to manage the trust assets. With respect to Patricia and Sandra, the court found that they failed to present a proper accounting and were required to reimburse the trust estate for approximately \$25,000; and they failed to properly disburse or account for the money from the purchased annuity, since David did not receive any of the money, and were to reimburse the trust estate for any undistributed annuity proceeds.

¶ 34 The court ordered that each party was responsible for its own attorney fees. The court further ordered that Kredens, as independent court appointed trustee, was to: (1) take possession of Thomas' remains and arrange an internment service at the trust's expense and after proper notice to all family members; (2) make the proper distribution of any undistributed annuity proceeds; (3) complete and file any necessary tax returns; (4) periodically report to the court regarding progress toward a final distribution; and (5) petition the court for approval of all fees and expenses.

¶ 35

#### ANALYSIS

¶ 36 On appeal, Gayle raises a number of issues, including: (1) whether the trial court properly

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awarded Kredens compensation from the trust funds; (2) whether the trial court erred in accepting the accountings submitted by the parties; (3) whether the trial court ruled on all of the issues raised by Gayle; and (4) whether the trial court erred in upholding the trust amendment. We took this case under consideration on Gayle's brief and the record and have received no response from David, Patricia, or Sandra.

¶ 37 After examining the record, we find that we are unable to consider Gayle's appeal because we lack jurisdiction. Gayle claims that we have jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). Rule 301 provides that "[e]very final judgment of a circuit court in a civil case is appealable as of right." However, in the case at bar, the order that Gayle appeals is not a final order. "A judgment is considered final 'if it terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate part thereof.'" *In re Curtis B.*, 203 Ill. 2d 53, 59 (2002) (quoting *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998)). The order that Gayle appeals, containing the findings of the trial court, is not final. It contains directions to Kredens, as independent court-appointed trustee, to report to the trial court regarding progress toward a final distribution and to petition the court for approval of all fees and expenses. Thus, the rights of the parties are not yet set, and accordingly, we do not have jurisdiction to consider an appeal from the order.

¶ 38

#### CONCLUSION

¶ 39 We find that we lack jurisdiction to consider the instant appeal since the appealed order is not a final order as required by Rule 301.

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¶ 40 Appeal dismissed for lack of jurisdiction.