

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).

2011 IL App (4th) 100991-U

Filed 8/29/11

NO. 4-10-0991

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Estate of DANYELLE OSBORNE, Deceased,)	Appeal from
TAMY SMITH, Administrator of the Estate of)	Circuit Court of
DANYELLE OSBORNE, Deceased,)	Champaign County
Petitioner-Appellee,)	No. 00F340
v.)	
ROBERT SMITH,)	Honorable
Respondent-Appellant.)	Brian L. McPheters,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

- ¶ 1 *Held:* A respondent may not plead a counterclaim after the judgment, in a contempt proceeding, and such a purported "counterclaim" does not allow the respondent to avoid a statutory period of limitation.
- ¶ 2 Respondent, Robert Smith, appeals from a judgment in which the trial court awarded him \$3,000 in child support out of the estate of Danyelle Osborne, deceased. He contends that this award is inadequate. Petitioner, Tamy Smith, the administrator of the estate, does not appeal, although she disagrees with respondent's argument that he is entitled to a greater award of child support. We conclude that respondent is not entitled to a greater amount of child support, because the period of limitation in section 18-12(b) of the Probate Act of 1975 (Probate Act) (755 ILCS 5/18-12(b) (West 2008)) should have barred him from making any claim at all against the estate. Since his claim for child support was not truly a counterclaim within the meaning of section 13-207

of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/13–207 (West 2008)), section 13–207 did not exempt him from the deadline in section 18–12(b). Considering, however, that petitioner does not appeal, we affirm the trial court's judgment.

¶ 3

I. BACKGROUND

¶ 4

A. The Judicial Enforcement of an Administrative Support Order

¶ 5

On August 11, 2000, the Illinois Department of Public Aid (Department) filed a complaint against respondent to enforce an administrative support order. See 305 ILCS 5/10–15 (West 2000). According to the complaint, respondent was the noncustodial parent of Alexandra Smith, born on October 25, 1996, and on January 26, 2000, the Department issued to him an administrative support order requiring him to pay child support for Alexandra, not only ongoing support but overdue support. See 305 ILCS 5/10–11 (West 2000). By the terms of the administrative support order, respondent was to pay current support in the amount of \$208.20 twice a month, and he also was to pay \$41.64 twice a month on an arrearage of \$3,584.72. The complaint alleged that as of August 10, 2000, respondent should have made payments totaling \$3,123, but he had made payments totaling only \$925.20, leaving a current arrearage of \$5,782.52. The complaint requested the court to (1) enter a judgment for the support arrearage, (2) order respondent to pay the arrearage immediately, and (3) order him to obey the administrative support order.

¶ 6

On December 14, 2000, the trial court granted the relief that the Department requested in its complaint, except for the immediate payment of the arrearage in full. The court entered a uniform order for support, in which the court found respondent to be \$6,863.32 in arrears and in which the court ordered him to make current support payments in the amount of \$208 twice a month and arrearage payments in the amount of \$41.64 twice a month. Also, on December 29, 2000, the

court issued a withholding order.

¶ 7 B. Danyelle Osborne's Petition for a Rule To Show Cause

¶ 8 On February 14, 2001, the custodial parent, Danyelle Osborne, filed a petition for a rule to show cause. In her petition, she alleged that respondent had failed to obey the trial court's order of December 14, 2000, to pay current support in the amount of \$208.20 twice a month and to pay \$41.40 twice a month toward the arrearage. According to Osborne's petition, respondent was in arrears in excess of \$1,608.60 for the period of November 2, 2000, through January 31, 2001, and the total arrearage was now \$8,471.92 plus statutory interest.

¶ 9 On February 19, 2001, the trial court issued to respondent the requested rule to show cause, and on November 2, 2001, after several continuances, the court held a hearing on the rule to show cause. Evidently, in the hearing, respondent presented evidence that his income had decreased, because the court modified the current child-support payments to \$100 twice a month and the arrearage payments to \$20 twice a month. (The court found the current arrearage to be \$12,219.52.) Nevertheless, considering that respondent had made no child-support payments at all since November 2000 and considering that he had received income during the intervening months, out of which he could have paid some child support, the court was unconvinced that the missed payments were entirely beyond his control. Consequently, the court found him to be in indirect civil contempt for willfully and contumaciously failing to pay child support as previously ordered. The court ordered respondent's incarceration in the county jail, but the court stayed the incarceration until November 21, 2001, at 8:30 a.m., at which time he could avoid incarceration by presenting evidence that he had purged himself of the contempt. This purgation could be effected by paying \$250 toward the arrearage and by resuming current child-support payments. The court set forth these provisions

in a written order, entered on November 7, 2001, and in the order, the court reserved the issue of attorney fees.

¶ 10 On November 21, 2001, respondent presented the trial court with receipts verifying that he had purged himself of the contempt. Accordingly, the court vacated the order of incarceration.

¶ 11 C. Petitioner's Petition for a Rule To Show Cause

¶ 12 On September 18, 2006, petitioner filed a motion to substitute herself for Danyelle Osborne in this case. According to the motion, Osborne died on October 31, 2005, and petitioner was the administrator of her estate.

¶ 13 Also on September 18, 2006, petitioner filed a petition for a rule to show cause, in which she alleged that respondent had failed to make the child-support payments required by the order of November 7, 2001, and that he presently was \$17,731.80 in arrears.

¶ 14 On September 20, 2006, the trial court issued the requested rule to show cause, and after a couple of continuances, the court held a show-cause hearing on November 30, 2006. Again the court found respondent to be in indirect civil contempt for his failure to pay child support. The court determined the arrearage to be \$17,731.80. Nevertheless, the docket entry of November 30, 2006, contains no purge provision. Instead, it says: "Court reserves sanctions and attorney fees until further order of the court."

¶ 15 D. Petitioner's Motions for Sanctions and Attorney Fees

¶ 16 On May 2, 2007, petitioner filed a motion "for the imposition of sanctions on the pending Rule to Show Cause previously reserved by [the trial court] on November 30, 2006." In support of her motion, she alleged that "[s]ince the entry of the Court's order reserving sanctions

nothing ha[d] been paid toward the existing arrearages determined by the Court."

¶ 17 Also on May 2, 2007, petitioner filed a motion for attorney fees.

¶ 18 E. Respondent's Counterpetition for Child Support

¶ 19 On November 6, 2007, respondent filed a pleading entitled "Counter Petition for Child Support Pursuant to 750 ILCS 5/510(e)." In this pleading, he alleged that after Osborne's death, he became the sole custodian of Alexandra Smith and that he now provided for all her needs. Upon information and belief, he alleged that the only asset of Osborne's estate was the "uncollected child support arrearage in this cause." On the authority of section 510(e) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/510(e) (West 2006)), he requested the trial court to "order the Estate of Danyelle Osborne to pay as and for prospective child support the amount of the arrearage determined by the Court and currently outstanding as an offset against the arrearage herein." In other words, he proposed that the estate pay him prospective child support in the form of a discharge of his own indebtedness to the estate for overdue child support.

¶ 20 On December 7, 2007, petitioner filed a memorandum in opposition to respondent's counterpetition for child support. In her memorandum, she began by observing that Danyelle Osborne's date of death was October 31, 2005, and that respondent had filed his counterpetition more than two years after her death. Consequently, petitioner argued the trial court should deny respondent's counterpetition for essentially three reasons. First, section 2-608(b) of the Procedure Code (735 ILCS 5/2-608(b) (West 2006)) provided that the counterclaim was to be "a part of the answer." Respondent's counterpetition was not part of an answer; respondent filed it long after an answer would have been due. Second, under section 2-609 of the Procedure Code (735 ILCS 5/2-609 (West 2006)), supplemental pleadings had to be filed within a reasonable time and with the

court's permission. See also Ill. S. Ct. R. 182(a) (eff. Jan. 1, 1967) ("Any subsequent pleadings allowed or ordered shall be filed at such time as the court may order.") According to petitioner, the court never gave respondent permission to file the counterpetition, and he did not file it within a reasonable time, either. Third, section 18–12(b) of the Probate Act (755 ILCS 5/18–12(b) (West 2006)) barred all claims against an estate two years after the decedent's death.

¶ 21 Initially, the trial court granted petitioner's motion to dismiss respondent's counterpetition for child support, but on April 24, 2009, after respondent filed a motion for reconsideration, the court changed its mind and denied the motion to dismiss the counterpetition. The court held, however, on the authority of section 18–12(b) (755 ILCS 5/18–12(b) (West 2006)), that respondent could claim child support from the estate only for the period of two years after Osborne's death.

¶ 22 On January 15, 2010, the trial court decided that, given the size of the estate and the other factors in section 505 of the Marriage Act (750 ILCS 5/505 (West 2008)), \$125 per month for 24 months would be a reasonable award of child support to respondent, to offset the amount of child support he owed the estate. Therefore, the court awarded respondent \$3,000 in child support against Osborne's estate ($\$125 \times 24 = \$3,000$), to be applied as an offset against the child support and statutory interest that respondent owed the estate.

¶ 23 Respondent appealed, but on September 2, 2010, this court dismissed the appeal for lack of subject-matter jurisdiction because petitioner's motion for sanctions was still pending, making the appeal interlocutory, and the trial court had made no finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). *Smith v. Smith*, No. 4–10–0130, slip order at 3 (September 2, 2010) (unpublished order under Supreme Court Rule 23).

¶ 24 On November 23, 2010, the parties appeared before the trial court at a hearing on petitioner's motion for sanctions. By agreement of the parties, the court entered a judgment in the amount of \$1,837.50 in the estate's favor "for fees related to the child support." The petitioner represented to the trial court that the estate no longer was seeking sanctions.

¶ 25 On December 18, 2010, respondent again appealed from the trial court's decision to award him child support only in the amount of \$125 per month for 24 months. Petitioner, however, has not appealed.

¶ 26 II. ANALYSIS

¶ 27 As we have stated, on January 15, 2010, the trial court awarded respondent \$3,000 in child support out of the estate. Because this judgment was unfavorable to petitioner (as administrator of the estate) and because she has not appealed, we lack authority to overturn the judgment. See *City of Wilmington v. Industrial Comm'n*, 52 Ill. 2d 587, 591 (1972); *Cleys v. Village of Palatine*, 89 Ill. App. 3d 630, 635 (1980).

¶ 28 Nevertheless, in evaluating respondent's contention that the amount and duration of child support that the trial court awarded him out of Osborne's estate were too small, we necessarily must consider, *de novo*, whether statutory law entitles him to any child support at all out of the estate, in view of the expiration of the period of limitation in section 18–12(b) of the Probate Code (755 ILCS 5/18–12(b) (West 2008)). See *Solon v. Midwest Medical Records Ass'n*, 236 Ill. 2d 433, 439 (2010) (Questions of statutory construction are reviewed *de novo*.) If, under the law, his entitlement to the \$3,000 in child support from the estate derives only from petitioner's choice not to appeal, it necessarily follows that he has no right to a greater amount of child support. In other words, if the law entitled him to *no support at all* from the estate (and if he would receive no support

but for petitioner's decision not to appeal), it logically follows that the trial court did not err in declining his request for *more* support.

¶ 29 Admittedly, a custodial parent can petition the court for an award of child support out of the deceased parent's estate—but there is a time limit for doing so. Section 510(e) of the Marriage Act provides:

"The right to petition for support *** under [s]ection[] 505 [(750 ILCS 5/505 (West 2008))] is not extinguished by the death of a parent. Upon a petition filed before or after a parent's death, the court may award sums of money out of the decedent's estate for the child's support *** as equity may require. The time within which a claim may be filed against the estate of a decedent under [s]ection[] 505 *** shall be governed by the provisions of the Probate Act of 1975 [(755 ILCS 5/1–1 through 30–3 (West 2008))] as a barrable, noncontingent claim." 750 ILCS 5/510(e) (West 2006).

Section 505, referenced in the quoted text, is the section of the Marriage Act entitled "Child support; contempt; penalties," and provides that "[t]he court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable and necessary for his support" and which sets down guidelines and factors for determining the amount of support. 750 ILCS 5/505(a)(1), (a)(2) (West 2008). As section 510(e) says, the custodial parent does not lose the right to petition for child support pursuant to section 505 just because the other parent dies. Nevertheless, this right does not last forever. A claim against the deceased parent's estate for child support is subject to the same filing deadline as other barrable, noncontingent claims against the estate.

¶ 30 Section 18–12 of the Probate Act (755 ILCS 5/18–12 (West 2008)) sets down time limits for the filing of claims against an estate. It provides as follows:

"(a) Every claim against the estate of a decedent, except expenses of administration and surviving spouse's or child's award, is barred as to all of the decedent's estate if:

(1) Notice is given to the claimant as provided in Section 18–3 [(755 ILCS 5/18–3 (West 2008))] and the claimant does not file a claim with the representative or the court on or before the date stated in the notice; or

(2) Notice of disallowance is given to the claimant as provided in Section 18–11 [(755 ILCS 5/18–11 (West 2008))] and the claimant does not file a claim with the court on or before the date stated in the notice; or

(3) The claimant or the claimant's address is not known to or reasonably ascertainable by the representative and the claimant does not file a claim with the representative or the court on or before the date stated in the published notice as provided in Section 18–3 [(755 ILCS 5/18–3 (West 2008))].

(b) Unless sooner barred under subsection (a) of this Section,

all claims which could have been barred under this Section are, in any event, barred 2 years after decedent's death, whether or not letters of office are issued upon the estate of the decedent." 755 ILCS 5/18-12(a), (b) (West 2008).

¶ 31 Because respondent never was given a notice pursuant to section 18-3 or 18-11 (755 ILCS 5/18-3, 18-11 (West 2008)), subsection (a) of section 18-12 is inapplicable. Nevertheless, subsection (b) provides that a claim that could have been barred under subsection (a) (if the required notice had been given) is, in any event, barred two years after the date of the decedent's death, regardless of whether letters testamentary or letters of administration were issued. 755 ILCS 5/18-12(b) (West 2008).

¶ 32 Osborne died on October 31, 2005. Therefore, section 18-12(b) (755 ILCS 5/18-12(b) (West 2008)) barred all unfiled claims against her estate as of October 31, 2007. Respondent filed his claim for child support after that deadline, on November 6, 2007.

¶ 33 Respondent contends, however, that section 13-207 of the Procedure Code (735 ILCS 5/13-207 (West 2008)) permitted him to seek an award of child support against Osborne's estate, despite the expiration of the period of limitation in section 18-12(b) (755 ILCS 5/18-12(b) (West 2008)), because he sought the child support in a counterclaim for a setoff instead of in an original claim. Section 13-207 provides: "A defendant may plead a set-off or counterclaim barred by the statute of limitation, while held and owned by him or her, to any action, the cause of which was owned by the plaintiff or person under whom he or she claims, before such set-off or counterclaim was so barred, and not otherwise." 735 ILCS 5/13-207 (West 2008).

¶ 34 The initial problem with respondent's argument is its unexamined assumption that

section 13-2070 of the Procedure Code applies to a contempt proceeding. Respondent filed his request for child support as a "counterclaim" to a petition for a rule to show cause. We have held, however, that "contempt proceedings are *sui generis*" and that "although various constitutional requirements designed to insure the fairness of judicial proceedings apply to contempt proceedings, neither the Code of Civil Procedure [citation] nor the Code of Criminal Procedure of 1963 [citation] is fully applicable to such proceedings." *In re Marriage of Betts*, 200 Ill. App. 3d 26, 48-49 (1990). We are aware of no authority for the proposition that a respondent may file a counterclaim in a contempt proceeding. When a respondent comes to court as directed by a rule to show cause, the respondent is there for one purpose and one purpose alone: to show cause why he or she should not be found to be in contempt of court. See *In re Marriage of Runge*, 102 Ill. App. 3d 356, 362 n.2 (1981) (The purpose of a rule to show cause is "solely to give the cited person the opportunity to show why he should not be held in contempt."); *People ex rel. Olsen v. Templeman*, 265 Ill. App. 369, 377 (1932) ("The reason for requiring notice and a rule to show cause in actions for contempt is to give the defendant an opportunity to show, if he can, compliance with the order.")

¶ 35 Admittedly, when we said, in *Betts*, that the Procedure Code is not "*fully* applicable" to contempt proceedings, we implied that some provisions might be applicable. (Emphasis added.) *Betts*, 200 Ill. App. 3d at 49. Section 13-207 (735 ILCS 5/13-207 (West 2008)), however, is not one of those provisions, because respondent's counterpetition is not truly a "counterclaim" within the meaning of section 13-207. Again, section 13-207 provides: "A defendant may plead a set-off or counterclaim barred by the statute of limitation ***." 735 ILCS 5/13-207 (West 2008). A "setoff" is a type of "counterclaim." Section 2-608(a) of the Procedure Code provides: "Any claim by one or more defendants against one or more plaintiffs, or against one or more codefendants, whether in

the nature of *setoff*, recoupment, cross claim or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be pleaded as a cross claim in any action, and when so pleaded *shall be called a counterclaim*." (Emphases added.) 735 ILCS 5/2–608(a) (West 2008). But this counterclaim is to be pleaded as part of the "answer" (735 ILCS 5/2–608(b) (West 2008)), and the "answer" is "[t]he first pleading by the defendant," the pleading that is filed immediately after, and in response to, the "complaint" (735 ILCS 5/2–602 (West 2008)). The petition for a rule to show cause that petitioner filed on September 18, 2006, was not the complaint. Rather, the Department filed the complaint on August 11, 2000, and the trial court entered a judgment on the complaint on December 14, 2000. We are aware of no authority for the idea that one can file a counterclaim after the judgment.

¶ 36 The case on which the trial court relied, *In re Estate of Rice*, 154 Ill. App. 3d 591-92 (1987), is distinguishable because in that case, the counterclaim preceded the judgment. The executor filed a citation to recover assets, which amounted to a complaint, and the respondent filed an answer, which included a counterclaim. *Rice*, 154 Ill. App. 3d at 592. The appellate court held, on the authority of section 13–207 of the Procedure Code (Ill. Rev. Stat. 1985, ch. 110, par. 13–207), that even though the respondent had failed to bring his action within six months after the issuance of letters of office (see Ill. Rev. Stat. 1985, ch. 110, par. 13–209; Ill. Rev. Stat. 1985, ch. 110 1/2, par. 18–12), the action was not barred by the expiration of the six-month period of limitation, because the respondent brought his action as a counterclaim. *Rice*, 154 Ill. App. 3d at 593. The appellate court never held, however, that a respondent could plead a counterclaim (1) after the judgment and (2) in a contempt proceeding.

¶ 37

III. CONCLUSION

¶ 38 For the foregoing reasons, we affirm the trial court's judgment.

¶ 39 Affirmed.