

No. 1-11-0712

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IN THE APPELLATE  
COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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<i>IN RE:</i>	)	Appeal from the
	)	Circuit Court of
ESTATE OF LEIKA CAMACHO,	)	Cook County.
	)	
Plaintiff-Appellant.	)	No. 06 P 4209
	)	
	)	The Honorable
	)	Arthur C. Perivolidis,
	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Sterba and Pucinski concurred in the judgment.

**ORDER**

*HELD:* Trial court's denial of petition for attorney fees and discharge of bank's liability regarding funds was proper where attorney did not have client's consent to proceed with cause and where any potential legal claim over funds did not belong to attorney.

¶ 1 Plaintiff-appellant Estate of Leika Camacho, represented by attorney Sal Indomenico (Indomenico), appeals from an order entered by a probate court denying a petition for attorney

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fees and otherwise discharging Northern Trust Bank (NTB) for all other liability in the underlying matter. Indomenico asks that we reverse that decision, finding NTB liable for the improper distribution of funds, ordering it to redeposit the funds at issue and pay his attorney fees. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 In May 2006, a guardianship was created on behalf of Leika Camacho, who lives in Puerto Rico. Camacho, a minor at the time, was an heir to the estate of her deceased father, which had entered into a settlement with a hospital regarding his wrongful death. Pursuant to this guardianship, Camacho's mother, Ana Iris Negron, who also resided in Puerto Rico, was appointed by the court as Camacho's guardian. Indomenico represented Camacho's estate during the probate proceedings.

¶ 4 On June 27, 2006, after the probate court approved the settlement, \$30,321.98 was deposited into an account at NTB bearing Camacho's name. The provisions of this account indicated that the funds were to be held subject to further court order or to be released to Camacho when she attained majority, which was to be on December 19, 2009. Also on June 27, 2006, a guardianship bond was purchased in the amount of \$45,000, naming Negron as the representative and principal, and listing Great American Insurance Company as the surety. Ultimately, pursuant to a court order of August 31, 2006, the account created at NTB was entitled, "Leika Camacho A Minor – No Withdrawal Without Court Order."

¶ 5 On May 26, 2009, six months before Camacho attained majority, NTB issued a cashier's check made payable to her in the amount of \$33,497.87, the total amount of the estate account.

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On June 1, 2009, Camacho and Negron opened a joint bank account at Banco Popular in Puerto Rico. Also on that date, Camacho endorsed the cashier's check from NTB and deposited it entirely in that joint bank account at Banco Popular.

¶ 6 Two weeks later, on June 16, 2009, two withdrawals were made from the joint bank account at Banco Popular. Although the signatures on the withdrawal slips (which are included in the record) are illegible, the withdrawals were in the amounts of \$800 and \$25,002.23. Banco Popular disbursed the funds from the account, and the account was then closed.

¶ 7 Beginning on July 15, 2010, Indomenico initiated court hearings regarding the funds, which he claimed were "missing." In the following months, NTB was ordered to, and provided, copies of all documentation concerning the transfer of the funds; it served subpoenas for records upon Banco Popular's branch in Puerto Rico and its headquarters in Rosemont, Illinois. Meanwhile, Indomenico also filed a petition for attorney fees and costs. In this, he asserted that NTB had improperly released the funds in violation of court order and, since there is no "evidence or proof that the minor received said funds," NTB "must return all of said funds to the account." Regarding his actual fees, Indomenico claimed that, in addition to having paid \$940 in bond costs for the estate for which he had not been reimbursed, NTB's improper release has caused him to "attend numerous court hearings which would not have occurred," as well as complete other legal work between July and December 2010 to track the funds, in an amount totaling \$5,950.

¶ 8 The trial court held a hearing on Indomenico's fee petition. In explaining his position, Indomenico told the court that, as the fiduciary of the estate, he was "obligated to protect the

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minor and that's why" he has pursued the cause. He also informed the court that he has made several unsuccessful attempts to contact both Camacho and her mother and, because he has been unable, he has turned his actions toward NTB in an effort to have NTB redeposit the funds into the estate's account. For its part, NTB argued that all Indomenico had to do was contact his client, who is now an adult, to verify that she had received the funds which had, essentially, been released to her, albeit a few months early, as evidenced by her signature on the cashier's check and her deposit into Banco Popular. NTB further noted that, because neither Camacho nor her mother have contacted Indomenico to pursue a case against it for an alleged loss of funds, Indomenico's claim that the funds are "missing" is only speculation.

¶ 9 The trial court agreed with NTB. It concluded from the evidence that "the money is safe, sitting in Puerto Rico." In addition, the court noted that the estate is "closed" and, as Camacho is undeniably "now an adult" whose competency has not been questioned, there is essentially no way that Indomenico could proceed with his case against NTB without her. It further noted that Camacho had attained majority "a long time ago" and had never contacted Indomenico about a potential cause of action. Accordingly, the court denied the fee petition, but ordered NTB to reimburse Indomenico the \$940 he has paid out for the surety bond. The court then discharged NTB from the cause, holding that Camacho "[has] the money, it's down there [in Puerto Rico]."

¶ 10

#### ANALYSIS

¶ 11 We begin our analysis of this cause with a notation for the record. Indomenico raises two issues in his brief on appeal. The first deals with NTB, which we will address herein. The second, however, is asserted against Great American Insurance Company, the surety to the

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\$45,000 bond obtained by the estate in June 2006. In his brief, Indomenico claims that "Great American Insurance Company should be held liable for the improper withdrawal of funds" because, as the surety, it was "responsible for any funds that were misapplied or wasted." Several months after he wrote his brief on appeal, Indomenico filed in our Court a motion to dismiss Great American Insurance Company from this cause "pursuant to stipulation and agreement to all parties." On April 9, 2012, our Court granted this motion. Accordingly, with the concession of the appellant, Great American Insurance Company is no longer a party to this appeal and, thus, we need not address Indomenico's claims regarding the surety.

¶ 12 This leaves, therefore, only Indomenico's claim against NTB. His argument in his brief on appeal, which amounts to only two pages, is that the trial court "improperly discharged" NTB of all liability as to the estate. Indomenico cites one case for the proposition that courts have discretion in protecting wards against the unlawful dissipation of their property, claims that the funds in the instant cause "are now missing," and insists that Negron "has since disappeared with the money." He then ends his argument by stating that the court's determination that NTB "is not liable for [the] missing funds is against the manifest weight of the evidence."

¶ 13 We begin with the standard of review which, as NTB points out, is a bit muddled. Procedurally, Indomenico is appealing the trial court's order in this cause denying his petition for attorney fees. Accordingly, he is, essentially, raising this—the denial of his request for fees—as an issue on appeal. The standard of review we employ in causes questioning a trial court's decision regarding attorney fees is abuse of discretion. See *Dubey v. Public Storage, Inc.*, 395 Ill. App. 3d 342, 361 (2009); see also *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill. App. 3d

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1013, 1026 (2010). Substantively, however, Indomenico does not argue in his brief for his requested fees but, rather, directs his claims solely against the propriety of the court's decision to discharge NTB from any liability toward the estate.<sup>1</sup> In probate cases such as the instant one, the function of the reviewing court is limited in that we may only determine whether the probate court was warranted in finding as it did. See *In re Estate of Elson*, 120 Ill. App. 3d 649, 655 (1983); accord *In re Estate of Kirk*, 292 Ill. App. 3d 914, 919 (1997). Thus, all reasonable presumptions are made in favor of the probate court and the appellant has the burden to affirmatively show the alleged error. See *Estate of Vail v. First of America Trust Co.*, 309 Ill. App. 3d 435, 438 (1999); accord *Kirk*, 292 Ill. App. 3d at 919; *Elson*, 120 Ill. App. 3d at 655. In this context, the standard of review we employ is manifest weight of the evidence, as we will not overturn the probate court's judgment unless its findings are clearly and palpably contrary thereto. See *Vail*, 309 Ill. App. 3d at 438; *Kirk*, 292 Ill. App. 3d at 919; *Elson*, 120 Ill. App. 3d at 655 (appellate court may not reverse simply because it disagrees; instead, opposite conclusion must clearly be evident).

¶ 14 Therefore, we are dealing with two different issues on appeal and two different standards of review: abuse of discretion regarding a review of the denial Indomenico's fee request and manifest weight regarding a review of the discharge of NTB's liability. Pursuant to the record, we find that Indomenico cannot prevail on either claim under either standard.

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<sup>1</sup>Indomenico eventually alludes to the decision regarding his fee request briefly at the very end of his reply brief. While not presenting a full argument, he states that "the court can exercise its equitable powers in ordering that fees be paid by" NTB. For this reason, and because, as we have stated, Indomenico is appealing from a trial court decision directly related to his attorney fee request, we address that herein.

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¶ 15 We turn first to the issue of the trial court's decision to discharge NTB from any liability to the estate. Again, Indomenico claims that this was improper since NTB violated a court order and, because of that, some wrongdoing occurred which caused Camacho's money to go missing.

¶ 16 However, as the trial court indicated, Indomenico simply does not have standing to bring the instant cause of action. This is because a cause of action against NTB, if any here, belongs to Camacho and not Indomenico.

¶ 17 It is true that Indomenico was the attorney for the estate, and, thus, owed a fiduciary duty to protect that estate and the interests of its heirs, namely, Camacho, who was a minor and for whom the estate was created. See *In re Estate of Lis*, 365 Ill. App. 3d 1, 17 (2006) (attorney representing estate owes first and only allegiance to estate); see, e.g., *Kirk*, 292 Ill. App. 3d at 918; 755 ILCS 5/16-1(a) (West 2010) (representative of estate may file petition to have court order citation of anyone whom representative believes concealed or converted property of estate). On May 26, 2009, NTB released the funds to Camacho via a cashier's check, which the record clearly shows she endorsed and deposited in a separate bank account at Banco Popular bearing her name. In June 2009, two withdrawals were made from that account, by whom it remains unknown, and the account was closed. Camacho then attained majority on December 19, 2009. At this point, the only asset that comprised the estate which Indomenico represented had been disposed of, and the object of the estate—Camacho—was now an adult.

¶ 18 Standing, which is required to institute a lawsuit, requires some injury in fact to a legally cognizable interest. See *Fitch v. McDermott, Will and Emery, LLP*, 401 Ill. App. 3d 1006, 1028 (2010) (citing *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999)). It prevents those who have

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no real interest in a controversy from bringing a meritless lawsuit by ensuring that issues are raised by those with a real interest in the outcome of the controversy at hand. See *Fitch*, 401 Ill. App. 3d at 1028. Based on this, any cause of action against NTB, or anyone else for that matter, regarding the distribution of the estate's assets belongs to Camacho. All the parties concede that she is an adult, and her capacity has never been questioned. Critically, here, Indomenico did not begin his attempts to locate the "missing" funds or pursue this cause against NTB until July 15, 2010—some seven months *after* Camacho attained majority. And, admittedly, Indomenico began doing so on Camacho's behalf without either her knowledge or her consent. To the contrary, the record is clear that Camacho has never authorized Indomenico to file the underlying cause in the probate court against NTB regarding the disbursement of the funds owed to her, nor the instant appeal from the trial court's determination that she has received those funds. Clearly, by this late stage, with Camacho having become a legal adult, with the funds having been disbursed, and with no complaint from Camacho that she has not received the funds, Indomenico, as the representative of the defunct estate, has no legally cognizable interest and, more specifically, no real interest in a controversy against NTB. As the trial court found here, Indomenico cannot proceed with a case against NTB under these circumstances because it belongs to the now-adult Camacho.

¶ 19 Even if Indomenico had standing to pursue this cause, he fails to prove that the trial court's decision to discharge NTB from liability was improper. Again, Indomenico, as the appellant here, has the burden to affirmatively show error in that the probate court's judgment was against the manifest weight of the evidence presented. See *Vail*, 309 Ill. App. 3d at 438;

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*Kirk*, 292 Ill. App. 3d at 919; *Elson*, 120 Ill. App. 3d at 655. He has not met his burden.

¶ 20 NTB has conceded that it disbursed the funds early, by approximately six months, in contravention of a court order. However, despite this fact, Indomenico fails to show any harm ensued from this mistaken release. That is, the evidence is indisputable that NTB released the funds directly to Camacho, who was age 17½, via a cashier's check. Camacho then opened a bank account at Banco Popular in Puerto Rico. She endorsed the cashier's check from NTB and deposited it in its entirety into her bank account at Banco Popular. While it is true that the bank account was a joint one, Camacho opened it with Negrón, her mother, who was also her court appointed guardian and who had been assisting in the maintenance of Camacho's estate (such as securing the surety bond, etc.). Most critically, Camacho has never asserted a claim against anyone for the improper withdrawal of the funds. See, e.g., *In re Estate of Kirk*, 242 Ill. App. 3d 68 (1993) (trial court's decision found not to be against manifest weight of evidence where claimant could not show that the manner in which estate was handled caused any harm).

¶ 21 From all this, it is apparent to us, as it was to the trial court, that there is no evidence of fraud or wrongdoing here. Contrary to Indomenico's assertions, the fact that the funds were later withdrawn from Camacho's joint account at Banco Popular and his inability to contact Camacho or Negrón do not prove that a fraud occurred regarding the estate or that NTB participated in it, but amount only to speculation. It is well established that fraud must be established by the party asserting it through clear and convincing evidence. See *All American Roofing, Inc. v. Zurich American Ins. Co.*, 404 Ill. App. 3d 438, 451 (2010). In particular, damage is an essential element of fraud and, while an exact amount need not necessarily be asserted, such damage may

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not be predicated on speculation, hypothesis or whim. See *Dloogatch v. Brincat*, 396 Ill. App. 3d 842, 851 (2009). Here, while it is true that the funds were withdrawn from Camacho's Banco Popular account in two transactions, that is all the evidence presented. That is, the withdrawal slips show only that: that the funds were withdrawn. They do not show how the funds were spent, who received the funds or who benefitted from the funds. Moreover, the withdrawal slips are illegible; they do not even show who withdrew the funds. It could very well be that Camacho withdrew the funds, or that the funds were withdrawn and then given to Camacho, directly or indirectly. Ultimately, the bank documents in the record show that NTB released the funds to the appropriate person, Camacho (the cashier's check), that Camacho received the funds (the check's endorsement and the deposit of the entire amount into her account at Banco Popular), and that she used them (the withdrawals from her account). Without more, Indomenico fails to provide any proof that would render the trial court's conclusion that Camacho has received the funds and that NTB is therefore not liable in this matter clearly and palpably against the manifest weight of the evidence.

¶ 22 Finally, we turn to the trial court's decision to deny Indomenico's petition for attorney fees. Again, we note that Indomenico fails to address this issue, as he presents no legal citation or factual references regarding fees in his brief on appeal. In addition, we find no such legal or factual basis would exist to render such an award here. That is, legally, while it may be true that the attorney for the estate of a minor has a fiduciary duty toward that minor (see, *e.g.*, *Szymakowski v. Szymakowski*, 185 Ill App. 3d 746 (1989)), Indomenico provides us with no case law or statute to indicate that this fiduciary duty continues after the minor becomes an adult,

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thereby allowing the attorney to continue representing the estate and pursuing claims on its behalf without that adult's consent or knowledge. Moreover, factually, the record shows that Indomenico, by his own admission in his fee petition, did not begin pursuing the underlying cause against NTB here with regard to Camacho's estate until July 15, 2010, after Camacho had attained majority and, again by his own admission, without Camacho's knowledge or consent. The trial court did order that NTB reimburse Indomenico \$940 for the surety bond; we find this to be proper, as Indomenico made payments on the bond as the representative of the estate. However, based on all the remaining evidence before us, we do not find that the trial court abused its discretion in deciding not to award Indomenico the remaining \$5,950 in fees he sought from NTB for his work thereafter regarding this cause.

¶ 23

#### CONCLUSION

¶ 24 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 25 Affirmed.