

FIFTH DIVISION  
May 3, 2013

No. 1-12-0785

**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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ESTATE OF JAMES W. REILLY,	)	Appeal from the
	)	Circuit Court of
Deceased.	)	Cook County.
	)	
FIFTH THIRD BANK and RICHARD REILLY,	)	
	)	
Petitioners-Appellees,	)	
	)	
v.	)	No. 03 P 1770
	)	
AURORA BUSTAMANTE,	)	
	)	
Respondent-Appellant,	)	
	)	
and	)	
	)	
GERALD HARPLING, ST. JOSEPH'S SCHOOL FOR	)	
THE BLIND, ST. PIUS V PARISH, and THE PEOPLE	)	
OF THE STATE OF ILLINOIS, ex. rel. LISA MADIGAN,	)	
Attorney General of the State of Illinois,	)	Honorable
	)	Susan M. Coleman,
Respondents.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice McBride and Justice Taylor concurred in the judgment.

### ORDER

¶ 1 *HELD:* The Appellate Court does not have jurisdiction to review interlocutory orders of the trial court entered before petitioners' voluntary dismissal of the case which were not a procedural step in the grant of the motion for voluntary dismissal; therefore this appeal is dismissed.

¶ 2 In this case, we consider whether this court has jurisdiction to review certain orders entered by the trial court prior to the entry of petitioners' motion for voluntary dismissal. Petitioners, Fifth Third Bank and Richard Reilly, as Co-Trustees of an irrevocable trust, filed a declaratory judgment action to determine right and title to funds purportedly held by the Trust and to request instructions on how to distribute the funds. Respondent, Aurora Bustamante, appeals from the circuit court's grant of petitioners' motion for voluntary dismissal without prejudice pursuant to section 2-1009 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1009 (West 2010)). On appeal, respondent contends that: 1) the circuit court had no jurisdiction over petitioners' request for declaratory judgment regarding ownership of the trust assets; 2) petitioners' request for declaratory judgment was in fact a trust contest and thus time-barred by the probate statute of limitations or *res judicata*; 3) petitioners' declaratory judgment action was precluded by *res judicata* from an earlier summary judgment entered in another case; and 4) the trial court's orders are void. For the reasons that follow, we affirm the grant of petitioners' motion for voluntary dismissal and dismiss the appeal.

### ¶ 3 BACKGROUND

¶ 4 Briefly stated, decedent James W. Reilly died on December 13, 2002. On October 13,

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1993, decedent, and siblings, Mary and Arthur, established three living trusts: 1) the James W. Reilly Living Trust u/a/d October 13, 1993; 2) a living trust for Arthur; and 3) a living trust for Mary. The decedent acted as the initial trustee of all three trusts. When the three trusts were created, decedent, Mary and Arthur transferred complete ownership interest in their joint home, located at 6134 N. Oketo in Chicago, Illinois, to Arthur's trust. Mary and Arthur both passed away in 1997. Shortly after Arthur's death, attorney Michael Hirschtick began acting as decedent's counsel. During Hirschtick's relationship with the decedent, a Warranty Deed was recorded for the Oketo property on June 16, 1998, which purported to transfer complete ownership of the property from Arthur's trust to the decedent's trust, making the decedent's trust the sole and exclusive owner of the real estate. The deed was prepared by Hirschtick and signed by decedent, but was apparently unsupported by consideration.

¶ 5 On April 16, 1999, decedent married respondent, Aurora Bustamante, his caretaker. A judgment for dissolution of marriage was entered on June 11, 2001, and Hirschtick acted as decedent's counsel during the divorce. On May 17, 2001, decedent executed a restatement to the decedent's trust which named Hirschtick as successor trustee of the decedent's trust and directed that the trust estate pass upon decedent's death to respondent (75%) and Hirschtick (25%).

¶ 6 Approximately one month later, decedent and respondent executed a marital settlement agreement as part of their divorce, which indicated that respondent "is a contingent beneficiary of a three-fourth interest upon the death of [decedent]," and that [decedent] agrees not to change the beneficiary designation or purposely dilute the trust."

¶ 7 Subsequently, on June 7, 2002, the Circuit Court of Cook County declared decedent to be

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a disabled person, and appointed Eldercare Guardianship, Inc. (Eldercare) as guardian of decedent's estate. Eldercare prepared a proposed restatement (2002 Restatement) of the decedent's trust on decedent's behalf, substituting certain charities as beneficiaries of the decedent's trust in place of Hirschtick, namely: 1) St. Joseph's School for the Blind and 2) St. Pius V Parish. In the 2002 Restatement, Eldercare nominated decedent's nephew, Richard Reilly (petitioner), as successor trustee of the decedent's trust.

¶ 8 After the decedent's death on April 28, 2003, the Oketo property was sold for \$280,000, resulting in net proceeds to the decedent's trust of \$258,387.55. The decedent's trust has and continues to retain the sale proceeds.

¶ 9 On February 28, 2003, after decedent's death, decedent's friend Gerald Harpling filed a "Petition for Probate of Will and for Letters Testamentary." A probate estate was opened for decedent and the court declared the following individuals as heirs of decedent: 1) Marcella O'Connell, decedent's niece; 2) Dorothy Batten, decedent's niece; 3) Kenneth Reilly, decedent's nephew; and 4) Richard Reilly, decedent's nephew.

¶ 10 The decedent's will was filed with the circuit court on March 12, 2003. Under the trust, as set forth in the 2002 Restatement, decedent's heirs received no portion of the trust estate. The trust estate was primarily distributed to a residual trust for respondent's benefit (75%) and the remainder distributed equally outright to St. Joseph (12.5%) and St. Pius (12.5%).

¶ 11 Following decedent's death, the circuit court accepted Eldercare's selection of Richard as successor trustee of decedent's trust. Fifth Third Bank became co-trustee of the decedent's trust with Richard shortly thereafter.

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¶ 12 On September 12, 2003, during the administration of decedent's estate, three of decedent's heirs (Dorothy Batten, Marcella O'Connell, and Kenneth Reilly) filed a complaint in a supplemental proceeding to contest the decedent's trust. Named as defendants in the proceeding were: 1) Harpling, in his capacity as executor of decedent's estate; 2) the co-trustees (petitioners); 3) respondent; 4) St. Pius; 5) St. Joseph; and 6) the Attorney General for the State of Illinois. The heirs challenged the validity of the 2002 Restatement and any prior version of the decedent's trust in which respondent and Hirschtick were named as beneficiaries. Respondent filed a motion for summary judgment on October 20, 2004. An agreed order was entered on December 16, 2004, which granted respondent's summary judgment motion and allowed the heirs to voluntarily dismiss the remaining counts in their complaint.

¶ 13 Subsequently, on May 22, 2009, petitioners filed a petition for instructions in the circuit court, in an attempt to resolve the dispute over the Warranty Deed. With leave of court, petitioners amended their petition for instructions twice, filing: 1) an amendment to the petition for instructions to include a prayer for interpleader pursuant to section 2-409 of the Code (735 ILCS 5/2-409 (West 2010)) on January 4, 2010; and 2) a petition for declaratory judgment on March 30, 2011. In their petition for declaratory judgment, petitioners alleged that a *bona fide* dispute existed as to the proper owner of the sale proceeds, and sought a declaration that the sale proceeds properly belonged in decedent's trust.

¶ 14 On January 24, 2011, respondent filed a petition for order to show cause, alleging that petitioners ceased making monthly beneficiary payments to her and that they owed her \$210,000 from the decedent's trust. The circuit court denied respondent's petition for rule to show cause after

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a hearing on May 16, 2011.

¶ 15 Separately, respondent filed a motion to strike the co-trustees' petition for declaratory judgment due to a lack of subject matter jurisdiction and *res judicata*. A hearing was held on June 21, 2011, after which the circuit court denied respondent's motion. The circuit court found that the issue raised by the petition for declaratory judgment concerned the proper ownership of sale proceeds and had nothing to do with the issues posed by the will and trust contest filed in the 2003 proceeding, and that the 2003 proceeding had no *res judicata* effect on the current proceedings. The court further found that it had general jurisdiction to hear petitioners' declaratory judgment action. The circuit court also denied respondent's counsel's request to certify for interlocutory appeal.

¶ 16 Subsequently, on February 27, 2012, petitioners filed a motion for voluntary dismissal without prejudice as a matter of right, pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2010)). The circuit court granted petitioners' motion and dismissed the petition for declaratory judgment without prejudice. Respondent now appeals from that order.

#### ¶ 17 ANALYSIS

¶ 18 On appeal, respondent contends that: 1) the circuit court had no jurisdiction over petitioners' request for declaratory judgment regarding ownership of the trust assets; 2) petitioners' request for declaratory judgment was in fact a trust contest and thus time-barred by the probate statute of limitations or *res judicata*; 3) petitioners' declaratory judgment action was precluded by *res judicata* from an earlier summary judgment entered in another case; and 4) the trial court's orders are void.

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¶ 19 However, as this is an appeal from the grant of petitioners' motion for voluntary dismissal under section 2-1009 of the Code, our only inquiry is whether the trial court properly granted petitioners' motion to voluntarily dismiss.

¶ 20 Petitioners filed a motion for voluntary dismissal pursuant to section 2-1009 of the Code and it is from that order that respondent appeals. The voluntary dismissal section provides in pertinent part:

"2-1009. Voluntary dismissal. (a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without prejudice, by order filed in the cause." 735 ILCS 5/2-1009 (West 2010).

¶ 21 That section allows a plaintiff to dismiss an action at any time before trial or a hearing begins. This is an absolute right and is not tempered by any discretionary language in the statute. *Kendle v. Village of Downers Grove*, 156 Ill. App. 3d 545, 550 (1987). When notice is given and proper costs paid, a plaintiff's right to a voluntary dismissal without prejudice prior to trial or hearing is absolute, and the court has no discretion to deny plaintiff's motion for dismissal. *Kendle*, 156 Ill. App. 3d at 550.

¶ 22 Here, the parties do not dispute that no trial or hearing had taken place on petitioners' declaratory judgment action to determine the right and title to funds purportedly held by the trust or their request for instructions on how to distribute the funds. Nor does respondent allege that

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there was any counterclaim pending at the time petitioners' motion was filed. See 735 ILCS 5/2-1009(a) (West 2010) (after a counterclaim has been pleaded by a defendant no dismissal may be had as to the defendant except by the defendant's consent). Thus, petitioners had an absolute right to dismiss the action and the trial court did not err in granting petitioners' motion for voluntary dismissal.

¶ 23 Respondent further contends that the trial court erred in denying her motion to strike the petition for declaratory judgment because it was time-barred under the Probate Act of 1975 (755 ILCS 5/1-1 *et seq.* (West 2010)) and barred under *res judicata* based on a ruling in an earlier proceeding which resulted in a summary judgment. She urges this court to review the substantive merits of petitioners' declaratory judgment action on those grounds. In essence, respondent is requesting this court to review the denial of her motion to dismiss petitioners' declaratory judgment action. We decline to do so.

¶ 24 It is clear that an order granting a plaintiff's motion for a voluntary dismissal is final and appealable by the defendants and also by the plaintiff to the extent that it assesses costs against him or her. *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 307 Ill. App. 3d 528, 535 (1999). However, the only proper subject on appeal is the propriety of granting a voluntary dismissal. *Saddle Signs, Inc. v. Adrian*, 272 Ill. App. 3d 132, 135 (1995). On appeal from a voluntary dismissal, defendants have the ability to argue the substantive merits of the voluntary dismissal. *Saddle Signs*, 272 Ill. App. 3d at 135. We may address the substantive merits of other non-final orders entered by a trial court prior to the granting of a voluntary dismissal only if those orders constituted a procedural step in the progression leading to the entry of the final judgment from

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which the appeal has been taken. *Valdovinos*, 307 Ill. App. 3d at 537-38.

¶ 25 Those circumstances are not present here. Respondent does not contend that the 2004 summary judgment was a procedural step leading to the voluntary dismissal of petitioners' declaratory judgment action. Additionally, her contention that such action was time-barred under the Probate Act is a substantive attack on petitioners' action itself and is not properly before this court on appeal from the grant of a voluntary motion to dismiss. Thus, we find that petitioners' motion for voluntary dismissal was properly granted as a matter of right. The other arguments raised by respondent are outside the scope of this appeal.

¶ 26 Finally, respondent contends that the trial court had no subject matter jurisdiction over petitioners' declaratory judgment action because it was time-barred by the Probate Act's limitations period (755 ILCS 5/8–1(f), 5/18-12(b) (West 2010)), and the 2004 summary judgment in the previous trust contest had *res judicata* effect. Because of its lack of subject matter jurisdiction, respondent contends that all orders related to the petition for declaratory judgment are void.

¶ 27 A reviewing court is required to satisfy itself of not only its jurisdiction but also that of the lower court in the case under review. *Gloria Gassman v. RGB Riverboat, d/b/a Grand Victoria Casino*, 329 Ill. App. 3d 224, 226 (2002). Subject matter jurisdiction refers to jurisdiction over the general class of cases to which the proceeding in question belongs. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002). With the exception of the circuit court's power to review administrative action, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution.

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*Belleville Toyota*, 199 Ill. 2d at 335. Under section 9 of article VI, that jurisdiction extends to all " 'justiciable matters.' " *Belleville Toyota*, 199 Ill. 2d at 335, (quoting Ill. Const.1970, art. VI, §9)).

¶ 28 Here, the circuit court had jurisdiction to hear and determine petitioners' claim because it was among the general class of cases - those presenting a claim under the Probate Act, a justiciable matter, to which the court's constitutionally granted original jurisdiction extends. See *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1065 (2009) (the Probate Act does not restrict the circuit court's jurisdictional authority). Thus, the limitations period contained in the Act was not a jurisdictional prerequisite to suit and the circuit court had subject matter jurisdiction over petitioners' claim.

¶ 29 The same is true of respondent's *res judicata* argument. The prior adjudication of an issue does not establish a jurisdictional bar to relitigation of that question. *Village of Maywood Board of Fire and Police Commissioners v. Department of Human Rights of the State of Illinois*, 296 Ill. App. 3d 570, 578 (1988). *Res judicata* is an affirmative defense, and unlike subject matter jurisdiction, it can be waived. *Village of Maywood*, 296 Ill. App. 3d at 578. Accordingly, we affirm the trial court's grant of voluntary dismissal without prejudice and dismiss the remainder of respondent's appeal.

### ¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we affirm the order of the circuit court granting petitioners' motion for voluntary dismissal without prejudice and dismiss the remainder of respondent's appeal.

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¶ 32 Affirmed in part; dismissed in part.