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2013 IL App (3d) 120429-U

Order filed August 2, 2013

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
JASON M. KMETTY,)	Will County, Illinois,
)	
Petitioner-Appellant,)	
)	Appeal No. 3-12-0429
and)	Circuit No. 09-D-2327
)	
HEATHER DAWN STONER,)	
a/k/a HEATHER DAWN KMETTY,)	Honorable
)	John C. Anderson and Brian E. Barrett,
Respondent-Appellee.)	Judges, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice Schmidt dissented.

ORDER

¶ 1 *Held:* In a case in which the mother of a minor filed a motion for appointment of special administrator so she could file a wrongful death action against the minor's father, the circuit court granted the motion despite the fact that the mother was in arrears on her child support obligation. The appellate court affirmed, holding that the arrearage did not create a conflict of interest that would prevent the mother from serving as special administrator.

¶ 2 The respondent, Heather Dawn Stoner, a/k/a Heather Dawn Kmetty, filed a motion for appointment of special administrator because she intended to file a wrongful death claim against

the petitioner, Jason M. Kmetty, on behalf of the parties' deceased minor daughter. The circuit court granted Heather's motion, and Jason appealed. On appeal, Jason argues that the circuit court erred when it granted Heather's motion. We affirm.

¶ 3

FACTS

¶ 4 Jason obtained a divorce from Heather in Indiana in 1999. Heather was ordered to pay monthly child support to Jason for the parties' four children. In 2009, Jason filed a petition for back and current child support, alleging that Heather never paid him child support such that an arrearage existed in the amount of nearly \$100,000. A default judgment was entered against Heather in January 2011. Heather's attempt at vacating that default judgment was unsuccessful.

¶ 5 In October 2011, one of the parties' daughters committed suicide. In December 2011, Heather filed a motion for appointment of special administrator. In that motion, Heather stated that she intended to file a wrongful death action against Jason on behalf of their deceased minor daughter. Heather alleged that their daughter was in Jason's custody at the time of her death, that Jason had beaten their daughter prior to her death, and that Jason's actions were a direct and proximate cause of their daughter's death.

¶ 6 The circuit court held a hearing on Heather's motion in May 2012. Counsel for Jason argued only that Heather should not be appointed special administrator because she had a conflict due to her child support arrearage. After hearing arguments, the circuit court ruled that Heather was in the best position to be the administrator, despite the delinquency. Accordingly, the court granted Heather's motion, and Jason appealed. We affirm.

¶ 7

ANALYSIS

¶ 8 On appeal, Jason argues that the circuit court erred when it granted Heather's motion.

Jason contends that the court misconstrued the law in arriving at its decision. Specifically, Jason argues that Heather cannot serve as the special administrator because she has a conflict of interest due to her child support arrearage.

¶ 9 In relevant part, section 2.1 of the Wrongful Death Act provides:

"In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under this Act, and after such notice to the party's heirs or legatees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action." 740 ILCS 180/2.1 (West 2010).

Further, section 2 of the Act provides:

"Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person." 740 ILCS 180/2 (West 2010).

¶ 10 As Jason correctly notes, case law exists for the proposition that "[a] noncustodial, natural parent may maintain an action on behalf of a minor child provided that it is in the best interests of the child and that there is no conflict of interest." *Stevenson v. Hawthorne Elementary School, East St. Louis School District No. 189*, 144 Ill. 2d 294, 301 (1991); see also *Roodhouse v. Roodhouse*, 132 Ill. 360, 362 (1890); *In re Estate of McFadden*, 2011 IL App (2d) 101157, ¶ 22.

However, those cases cited by Jason are inapposite. *Stevenson* involved a dispute between the noncustodial father, who had filed a personal injury action on behalf of his injured minor at the same time he was in arrears on his child support obligations, and the custodial mother, who had filed a similar personal injury action 15 days later. *Stevenson*, 144 Ill. 2d at 298. The court held that the dispute had to be resolved in favor of the mother because the father could not defend against the child's delinquent-support action while also attempting to act as the minor's "next friend" in the personal injury action. *Stevenson*, 144 Ill. 2d at 301. *Roodhouse* involved a guardian's attempt to partition land in which the guardian and the minor were heirs. *Roodhouse*, 132 Ill. at 362. The court held that the minor should have been represented by separate counsel because any gain that the guardian obtained through the partition would be at the minor's expense. *Roodhouse*, 132 Ill. at 362. *McFadden* included a personal injury suit brought by the father of an injured minor at the same time the father was in arrears on his child support obligations, but the issue on appeal in which the suit was discussed involved only the validity of an attorney's lien filed by counsel for the father. *McFadden*, 2011 IL App (2d) 101157, ¶¶ 2-4, 20-25.

¶ 11 This case is unlike the cases cited by Jason. Under the Act and section 2-1 of the Probate Act of 1975 (755 ILCS 5/2-1 (West 2010)), Heather and the parties' surviving three children are eligible beneficiaries to any proceeds from a wrongful death action brought on behalf of the parties' deceased daughter. See *Johnson v. Provena St. Therese Medical Center*, 334 Ill. App. 3d 581, 589-90 (2002) (determining who is "next of kin" for purposes of beneficiary eligibility under the Act). Heather's status as one of the eligible beneficiaries in no way conflicts with the fact that she is in arrears on her child support payments, as she would not be in control of funds

to which the deceased minor would be entitled. See 740 ILCS 180/2.1 (West 2010) (appointment of a special administrator under the Act is for the sole purpose of either prosecuting or defending the wrongful death action); *Baez v. Rosenberg*, 409 Ill. App. 3d 525, 532 (2011) ("[w]hereas executors and administrators appointed under the Probate Act are given powers to collect and manage assets, pay claims and make distributions [citation], the powers and duties of a special administrator are strictly limited to those prescribed by the wrongful death statute [citation]").

¶ 12 Lastly, we also note that Jason has included an argument on appeal that Heather's counsel should be disqualified because the aforementioned conflict of interest also extends to him. Not only was this argument forfeited (see *e.g.*, *Shell Oil Co. v. Department of Revenue*, 95 Ill. 2d 541, 550 (1983) ("[i]t is axiomatic that questions not raised in the trial court are waived and may not be raised for the first time on appeal"); accord *International Insurance Co. v. City of Chicago Heights*, 268 Ill. App. 3d 289, 302-03 (1994) ("[a] party waives any objection to an alleged attorney conflict of interest if it fails to assert that conflict promptly")), it also is without merit given that no conflict of interest exists with Heather.

¶ 13 For the foregoing reasons, we hold that the circuit court did not err when it granted Heather's motion for appointment of special administrator.

¶ 14 CONCLUSION

¶ 15 The judgment of the circuit court of Will County is affirmed.

¶ 16 Affirmed.

¶ 17 JUSTICE SCHMIDT, dissenting.

¶ 18 I respectfully dissent. Heather Kmetty has a conflict with her surviving children. Those

three children are also beneficiaries of the estate of their deceased sister. Because Heather has a direct conflict with three-fourths of the beneficiaries of the decedent's estate by virtue of the delinquent child support, it makes no sense to me to appoint her as the special administrator of the deceased daughter's estate. I respectfully suggest that the majority's analysis at paragraph 11 ignores Heather's conflict with those three children, on whose behalf, in addition to her own, she is suing. As special administrator of the estate, Heather would have a fiduciary duty to the estate's beneficiaries. *In re Estate of Savio*, 388 Ill. App. 3d 242 (2009).

¶ 19 The special administrator needs to be someone other than Heather. I do agree with the majority that Jason forfeited his argument regarding the conflict of Heather's counsel by failing to raise it in the trial court. Of course, if Heather is no longer special administrator, that situation will resolve itself.

¶ 20 I would reverse the trial court's order naming Heather special administrator of the estate of her deceased daughter.