

No. 1-12-2782

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| <i>In re</i> GUARDIANSHIP OF FLORENCE PONTARELLI,) | Appeal from the |
| Alleged Disabled Adult (Florence Pontarelli,) | Circuit Court of |
| Respondent-Appellee v. Louis Cosmano,) | Cook County. |
| Petitioner-Appellant)) | |
|) | 11 P 4296 |
| (MICHEL PONTARELLI) | |
| Intervenor-Appellee,) | The Honorable |
| as Power of Attorney for Florence). ¹) | Lynne Kawamoto, |
|) | Judge Presiding. |

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court dismissed the guardianship petition in this case without prejudice. The judgment therefore was not final for the purposes of appeal because petitioner had the capability of refiling the action. This court dismissed the appeal for lack of jurisdiction.

¶ 2 This appeal arises from a trial court judgment dismissing without prejudice Louise Cosmano's petition for guardianship over her stepmother, Florence Pontarelli, because there was already an established power of attorney (POA) in place and the trial court determined Louise

¹ Although Michel never formally moved to intervene in this matter, her attorney filed an appearance on her behalf; leave to intervene was implicitly granted. Michel is the only party to have filed a response appeal as power of attorney for Florence.

failed to sufficiently allege abuse of the POA. On appeal, Louise argues the motion to dismiss was "procedurally deficient," and the presence of a POA does not preclude a guardianship from being established. Louise also argues the trial court abused its discretion in denying her the right to amend her guardianship petition. We dismiss this case for lack of jurisdiction.

¶ 3

BACKGROUND

¶ 4 Florence, who is in her mid-80s, was married to Raymond Pontarelli for almost 40 years until he died in June 2011. Before marrying Florence, Raymond had four of his own children, including Louise, but he apparently left much of his estate to Florence. A month after Raymond's death, on July 25, 2011, Louise filed a petition for guardianship of Florence alleging Florence had suffered from a stroke, dementia, and legal blindness, all of which made her disabled so that she was unable to take care of herself and her property. Louise added that within hours of Raymond's death, \$30,000 had been withdrawn from the couple's joint account, and Louise feared Florence was either a "crime victim or the subject of undue influence." Based on the foregoing, Louise requested to serve as guardian of Florence's estate; she later orally requested to be guardian of Florence's person, as well. The court appointed a guardian *ad litem* (GAL), and an attorney represented Florence in the guardianship proceeding. A trial judge not otherwise involved with this case entered an "agreed order" between Florence and Louise. Among other things, the order stated "all agents pursuant to said power of attorney agree not to act," even though the order failed to identify the specific POA. Per the order, Florence also agreed to a medical examination by a doctor of Louise's choosing.

¶ 5 The GAL interviewed Florence in July and August 2011, and according to the report, Florence was "adamant" that if anyone were to act as her guardian, it should be Florence's blood-related niece Michel Pontarelli (who was once married to Florence's stepson Robert Pontarelli)

or her other niece. Florence did not want her deceased husband's children making decisions for her. The GAL also noted that Florence displayed significant memory problems and consequently concluded she lacked the capacity to make most personal and all financial decisions. The physician appointed at Louise's behest largely corroborated these conclusions following an evaluation of Florence. He concluded Florence suffered from dementia. A neuropsychologist later secured by Florence and Michel also evaluated Florence and stated she did not have dementia or Alzheimer's, but that she would benefit from medical and financial "decision making." Nonetheless, the neuropsychologist stated Florence had "sufficient cognitive capacity to be a participant" in those matters and retained "capacity to designate a surrogate decision maker herself." Per the neuropsychologist's report, Florence stated again that she wanted Michel to make property and healthcare decisions for her. Another psychiatrist's affidavit stated Florence was capable of making decisions with the help of others.

¶ 6 Michel was not present for the hearing on the agreed order and alleged she had no notice of the proceedings. Upon receiving such notice, however, Michel filed an appearance in the matter as agent for Florence, a motion to vacate the agreed order, as well as a motion to dismiss the petition for guardianship because she was already the designated POA for Florence's health and property. Michel added that Florence's GAL was in agreement that dismissing the petition was consistent with Florence's wishes. Throughout the proceedings, Florence and Michel retained separate counsel, and the GAL also remained a participant. Florence joined in the motion to dismiss and attached documents executed in 1991 and 2001 identifying Michel as the successor power of attorney for Florence in the event of Raymond's death. A healthcare and property POA, which Florence executed in July 2011, also identified Michel as the primary POA and revoked all previous POAs. The 2011 POAs stated that if a guardian were to be appointed,

Florence would nominate Michel. In addition to these documents, Florence also attached two complaints she filed in fall 2011 against Louise, and others, alleging that Louise had mismanaged funds from Florence's company/trust and borrowed some \$65,000 without repayment. Florence asserted the pending litigation also precluded Louise from being Florence's guardian and challenged allegations that she was disabled. In responsive pleadings, Michel also attached the POA documents (which she had already attached to her motion to vacate the agreed order) and asserted that Louise failed to set forth any basis for setting aside her POA. Although the motion to dismiss did not cite statutory authority, it was clear to the parties and the court that it was brought under section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2012)), which allows for dismissal where an affirmative matter defeats the claim.

¶ 7 In responsive pleadings, Louise did not concede the validity of the POA, but she also did not necessarily challenge its validity either. In addition, Louise filed a motion for leave to file an amended petition, but did not specify what she intended to amend.

¶ 8 The court granted Michel's motion to vacate the provision relating to the suspension of her POA that was in the agreed order. In the course of proceedings, Florence stated on the record through her attorney that she did not want Michel's authority as POA suspended and denied any allegations of financial exploitation. On March 21, 2012, following argument by the parties, the trial court held that on the pleadings, Michel's status as Florence's POA defeated the guardianship petition and, accordingly, the court dismissed the case with prejudice. The court also denied Louise's motion to file an amended petition. Louise filed a motion to reconsider in which she alleged *inter alia* that Michel had abused her authority as power of attorney by mismanaging funds and acting contrary to Florence's wishes. Louise also stated the dismissal of

the case "with prejudice" was inappropriate in the context of guardianship proceedings. After considering the motion, the court dismissed the case but this time without prejudice.

¶ 9 This timely appeal followed.

¶ 10 ANALYSIS

¶ 11 Louise challenges the dismissal of her guardianship petition and denial of her motion to amend. Michel responds that this court lacks subject matter jurisdiction to consider the merits of Louise's appeal because the trial court dismissed the guardianship petition without prejudice, giving Louise the ability to refile the action, and making the order nonfinal. We agree.

¶ 12 In a dismissal order, the language, "without prejudice," clearly manifests the intent of the trial court that the order not be considered final and appealable. *In re Tiona W.*, 341 Ill. App 3d 615, 620 (2003), relying on *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982) (which also notes that subject to certain exceptions, under Illinois Supreme Court rules the appellate court lacks jurisdiction to review nonfinal orders). Those words also signal the trial court's intent to allow a plaintiff to refile the action. *DeLuna v. Treister*, 185 Ill. 2d 565, 576 (1999).

¶ 13 In this case, the trial court dismissed the petition after discovering that Michel already was POA for Florence. Under the Illinois Power of Attorney Act (Act), an individual (the "principal") has the right to "appoint an agent to make property, financial, personal, and health care decisions for the individual." 755 ILCS 45/2-1 (West 2012). This appointment may endure "throughout the principal's lifetime, including during periods of disability," and the principal is entitled to "have confidence that third parties will honor the agent's authority at all times." *Id.* Section 2-10 of the Act (755 ILCS 45/2-10 (West 2012)) specifically states that "[a]bsent court order directing a guardian to exercise powers of the principal under the agency, a guardian will have no power, duty or liability with respect to any property subject to the agency or any

personal or health care matters covered by the agency." Thus, once a valid POA has been executed, a guardian cannot exercise authority over matters that are covered by the POA even if the principal has become incompetent. *In re Hatsuye T.*, 293 Ill. App. 3d 1046, 1050-51 (1997); see also 755 ILCS 5/11a-17(c), 11a-18(e) (West 2012) (absent a court order under the Act, a guardian has no power, duty, or liability regarding healthcare or estate matters covered by the agency).

¶ 14 Here, Louise did not necessarily challenge the validity of Michel's POA over Florence – executed in 2011 and before – nor did she allege the guardianship was for matters not covered by the POA. She also did not specifically or sufficiently plead any abuse by Michel as POA.² See 755 ILCS 45/2-10 (West 2012). As pled, the POA defeated Louise's guardianship petition, warranting dismissal of the action. See *In re Detention of Duke*, 2013 IL App (1st) 121722, ¶ 11; see also 755 ILCS 5/11a-12 (West 2012) (the court may dismiss the petition if there is no basis, under section 11a-3, for appointment of a guardian). This means there was no reason for the court to grant Louise's generic and unsupported motion to amend the petition either.

¶ 15 Although the trial court did not formally reach the merits of Louise's guardianship petition (*i.e.* there was no final adjudication of Florence as disabled), by dismissing the cause without prejudice *at Louise's request*, the court did provide Louise the opportunity to refile the petition. See *International Insurance Co. v. Morton Thiokol, Inc.*, 185 Ill. App. 3d 686, 691 (1989) (noting dismissal of action was interlocutory since party could refile suit if facts changed). Nonetheless, we would question the wisdom of such an action. The record indicates

² It is worth noting that in December 2011, prior to the dismissal proceedings, Louise filed an "emergency motion to suspend powers of attorney," under section 2-10 of the Act (755 ILCS 45/2-10 (West 2012)). She alleged Michel improperly removed Florence from her nursing home in Chicago and transferred Florence to Iowa. Louise also alleged Michel had blocked the leasing of three apartments in Florence's estate, causing financial loss. A hearing was held on the motion wherein Florence and Michel countered that the nursing home had gone bankrupt and Florence wanted to move to Iowa with Michel; there, she was receiving good care and saving money. The allegations of financial loss did not appear to be otherwise supported. The court denied the motion after finding there was no emergency and insufficient allegations to otherwise satisfy section 2-10 of the Act.

Florence rather decidedly *did not want* Louise to serve as her guardian, and the POAs Florence executed provided for Michel to serve as guardian in the event one were needed. See *In re Estate of Johnson*, 303 Ill. App. 3d 696, 705 (1999) (the court must give due consideration to the preference of a disabled person in selecting a guardian and consider factors such as the guardians conflicts in discharging duties).

¶ 16 The dismissal, however, does not preclude Louise from filing an action under section 2-10 challenging the validity of the POA or identifying how Louise is an interested person, how Florence as the principal lacks the capacity to control or revoke the POA, and specifically how Michel's actions as the POA are harming or not benefiting Florence, and then if appropriate, filing a guardianship petition for someone other than Louise to be appointed. See 755 ILCS 45/2-10 (West 2012) (identifying requirements).

¶ 17 **CONCLUSION**

¶ 18 For the reasons stated, we dismiss this appeal for lack of subject matter jurisdiction.

¶ 19 Appeal Dismissed.