

No. 1-12-2692

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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<i>In re</i> ESTATE OF BENEDICT BENJAMIN,	)	
Deceased,	)	
	)	
	)	
(SHEILA POLCYN, as administrator of the Estate	)	Appeal from the
of Benedict Benjamin,	)	Circuit Court of
	)	Cook County, Illinois
Petitioner-Appellee,	)	
	)	
v.	)	No. 2008 P 5511
	)	
	)	Honorable
	)	James G. Riley,
DONALD BENJAMIN,	)	Judge Presiding.
	)	
Respondent-Appellant).	)	

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JUSTICE TAYLOR delivered the judgment of the court.  
Presiding Justice McBride and Justice Palmer concurred in the judgment.

ORDER

¶ 1 HELD: Where the court made factual findings appellant submitted a fraudulent will to the court, the subsequent restraining orders were not an abuse of its discretion.

¶ 2 Respondent, Donald Benjamin, seeks reversal of an order of the probate court temporarily enjoining him from accessing certain bank accounts held by his late father, Benedict Benjamin (decedent).

### ¶ 3 BACKGROUND

¶ 4 A few months prior to decedent's death, decedent named respondent as the sole beneficiary of certain transfer on death accounts that he kept with Wells Fargo Advisors, LLC (the Wells Fargo accounts). After decedent's death, the administrator of his estate, Sheila Polyn, alleged that respondent procured this change of beneficiary through fraud and undue influence. She further alleged that respondent had previously attempted to liquidate funds in those accounts in contravention of court order. She therefore sought a temporary injunction prohibiting respondent from accessing the Wells Fargo accounts until he provided an account of all funds he received from the estate and reimbursed the estate for any funds improperly taken. The court granted this motion and denied respondent's motion to dissolve the injunction. Respondent now appeals. For the reasons that follow, we affirm and remand.

¶ 5 Initially we consider the procedural history of the litigation. Benedict Benjamin died on July 28, 2008 leaving two heirs, his son, Donald Benjamin and his daughter, Denise Buten. By order of the court, on September 15, 2008, the will of Benedict Benjamin dated June 30, 2008 was admitted to probate and respondent was appointed representative of the estate. Respondent was named the sole beneficiary of decedent's estate in the will presented to the court. On September 15, 2008, Denise Buten filed a verified complaint seeking relief against the estate of Benedict Benjamin and Donald Benjamin and to contest the validity of decedent's alleged will.

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Eventually a will contest trial was held on June 18 and 19, 2012. Following the trial, the court entered an order dated July 10, 2012, in which it found the purported will was neither the true expression of the intent of the decedent nor the last expression of the decedent. The court also found that respondent committed fraud and declared that the document previously admitted to record and probate as the last will of Benedict Benjamin did not constitute the lawful and valid last will and testament of decedent. Respondent was required to file an account of the estate by August 7, 2012. The order also revoked respondent's letters of office and appointed Sheila Polcyn as independent administrator of the estate.

¶ 6 On June 28, 2012, Buten filed a petition for citation to recover the decedent's transfer on death accounts at Wells Fargo Advisors, LLC. These accounts were the result of change of beneficiary forms that were executed on January 30, 2008 and March 18, 2008, naming respondent as beneficiary. She alleged that respondent procured and arranged for the change of beneficiary in such a way as to give rise to a presumption of undue influence. She also alleged that due to decedent's infirmities and advancing age, respondent deceived decedent into executing said documents, resulting in respondent gaining control of decedent's estate. The petition further alleged that respondent misappropriated thousands of dollars from decedent's estate. The petition sought the reconveyance to the estate of all moneys obtained by respondent from the estate. After a hearing was held on July 10, 2012, a second order was entered by the court which allowed Buten's citation to recover assets.

¶ 7 On August 22, 2012, Buten filed a motion for temporary injunction and accounting in which she alleged that respondent, in violation of the order entered July 10, 2012, attempted to

liquidate the assets in one of the Wells Fargo accounts three days later, on July 13, 2012. She alleged that it was necessary for the court to order Wells Fargo Advisors not to transfer or make any disposition of any funds or other property in its possession currently owned by respondent or previously owned by decedent. She also alleged that without the protection of an injunction, an irreparable injury would occur to her and to the estate, that being the dissipation of the funds by respondent. She further alleged that respondent had already dissipated several hundred thousand dollars from the accounts and an extreme risk existed that respondent would irretrievably spend or transfer the assets in the accounts. The petition sought an injunction prohibiting respondent access to the Wells Fargo accounts and an accounting of all funds received by respondent from decedent's estate.

¶ 8 On August 28, 2012, the successor administrator/petitioner Sheila Polcyn brought an emergency verified petition for injunction in which she claimed respondent failed to file the account that the court had ordered him to file by August 7, 2012. Respondent filed a partial account covering August 2008 - September 2011. Based upon this partial account petitioner alleged respondent dissipated, wasted or used for his own benefit sums totaling \$273,630.05. The account included disbursements of \$35,103.94 paid to respondent personally, \$68,370.60 paid to respondent's attorney, and \$39,426.83 paid to various contractors, as well as disbursements to several utilities. Thus, petitioner alleged respondent wasted and personally enjoyed sums of the estate. Petitioner further alleged respondent tried to liquidate funds in the Wells Fargo accounts three days after an order against him was entered and that a temporary restraining order freezing those accounts would not harm respondent and would preserve the

status quo. Petitioner also alleged the estate would be immediately and irreparably damaged if respondent were not enjoined from dissipating and transferring funds of the estate. The petition sought a restraining order prohibiting respondent from accessing the Wells Fargo accounts and prohibiting Wells Fargo Advisors, LLC, from disbursing any funds in said accounts until an account is filed and approved by the court and any and all assets which have been transferred, wasted or dissipated by respondent in his title as executor have been reimbursed to the estate.

¶ 9 On August 28, 2012, acting on petitioner's emergency verified motion for injunction, the circuit court entered a temporary restraining order against respondent and required that respondent file an account by September 17, 2012. The court found that respondent had failed to file an account per court order; that the petitioner/administrator was likely to be successful in showing respondent wasted or personally enjoyed substantial funds from this estate; the estate would be immediately and irreparably damaged if respondent was not enjoined from dissipating and transferring funds, it appeared from respondent's prior actions that notice would cause respondent to accelerate the transactions that will damage the estate; and petitioner had no adequate remedy at law to protect the estate's interests if respondent was not restrained from concealing assets, dissipating assets, and depriving the estate of its rightful assets.

¶ 10 On September 17, 2012, respondent filed a motion to dissolve the temporary restraining order entered on August 28, 2012. Respondent alleged that petitioner had made no showing of immediate and irreparable harm which is required for the issuance of an injunction. Respondent further alleged that injunctive relief would not preserve the status quo but would rather alter the status quo in favor of petitioner. Respondent alleged that the injunction would deny him access to

his assets and would constitute an equitable attachment which is not allowed in Illinois. On September 17, 2012, the circuit court denied respondent's motion, and required an account be filed, this time by October 4, 2012. From that order respondent appeals. The question of whether the accounts titled in respondent's name at Wells Fargo Advisors, LLC, are rightfully his or whether such accounts should be returned to the estate is still pending before the circuit court.

¶ 11 ANALYSIS

¶ 12 This is an interlocutory appeal brought by respondent as a matter of right under Illinois Supreme Court Rule 307 S.Ct. R. 307 (eff. Jan. 1, 2003). Respondent appeals the court's order of September 17, 2012, which denied his motion to dissolve injunctions created by orders entered on August 28 and September 17, 2012. On appeal, respondent argues, as he did before the trial court, that there was no showing of a need for a temporary restraining order and that the preliminary injunction comprised an equitable prejudgment attachment contrary to Illinois case law. Petitioner argues that due to the prior fraud that respondent perpetrated upon the court a temporary restraining order and preliminary injunction are necessary to maintain the status quo and are needed to properly continue to deny respondent access to decedent's estate.

¶ 13 The purpose of a preliminary injunction is to preserve the status quo.

"A preliminary injunction is issued to preserve the status quo until the trial court may consider the merits of the case. In ruling on a motion for such relief, controverted facts or the merits of the case are not decided. In reviewing the discretion exercised by the trial court, an appellate court may decide only whether the petitioner has demonstrated a *prima facie* case that there is a fair question as to the existence of the rights claimed; that the

circumstances lead to a reasonable belief that they probably will be entitled to the relief sought, if the evidence sustains the allegations of the petition; and that matters should be kept in status quo until the case can be decided on its merit. In sum, the only question before us is whether there was a sufficient showing to sustain the order of the trial court."

*Dixon Association For Retarded Citizens, v. Thompson*, 91 Ill. 2d 518 (1982) (citing *City of Chicago v. Airline Canteen Services, Inc.* 64 Ill. App. 3d 417, 432-22 (1978)).

Courts will only grant preliminary injunctions if the party seeking the injunction can establish that it has a protectable right, that it will suffer irreparable harm if injunctive relief is not granted, that its remedy at law is inadequate, and that there is a likelihood of success on the merits.

*Houseknecht v. Zagel*, 112 Ill. App. 3d 284, 291-92 (1983); *Jacob v. C & M Video, Inc.*, 248 Ill. App. 3d 654, 664 (1993). The party seeking relief is not required to make out a case which would entitle him to relief on the merits, rather, he need only show that he raises a "fair question" about the existence of his right and that the court should preserve the status quo until the case can be decided on the merits. *Buzz Barton & Associates, Inc., v. Giannone*, 108 Ill. 2d 373, 382 (1985).

¶ 14 In evaluating these factors, we are mindful that the scope of review in an interlocutory appeal is normally limited to determining whether the trial court abused its discretion in granting or refusing the requested interlocutory relief. *Zurich Insurance Co., v. Raymark Industries, Inc.*, 213 Ill. App. 3d 591, 594 (1991); *Best Coin-op, Inc., v. Old Willow Falls Condominium Association*, 120 Ill. App. 3d 830 (1983); *Chicago Health Clubs, Inc v. Picur*, 124 Ill. 2d 1, 7-8 (1991) (on appeal from the grant of a preliminary injunction, an appellate court is to consider

whether the circuit court abused its discretion in evaluating the relevant considerations and granting the preliminary injunction).

¶ 15 In this case, we find the trial court did not abuse its discretion in finding that the required elements for a preliminary injunction were met. In the order entered September 17, 2012, the court found that respondent committed fraud granting him access to all assets of the estate. As executor, respondent has failed to explain \$273,630.05 of disbursements from the estate. He has also failed to file an account per the trial court's order entered July 10, 2012. The court determined that the petitioner/administrator showed a likelihood of prevailing on the merits of the underlying cause of action. The court noted the administrator is likely to be successful in showing that respondent wasted or personally enjoyed substantial funds from the estate and respondent will ultimately be ordered to return substantial funds to this estate. The court found that the administrator would suffer irreparable harm if respondent is not enjoined from dissipating and transferring assets of the estate which he may have previously transferred to one of his accounts at Wells Fargo Advisors, LLC., where the entirety had been previously held by the decedent. The court further found the estate would be irreparably harmed if respondent is not enjoined from dissipating and transferring his funds at Wells Fargo Advisors, LLC., where the entirety of the accounts had been previously held by the decedent, which will likely be needed to reimburse the estate for any breaches of fiduciary duty committed by respondent. The court further found the administrator had no adequate remedy at law to protect the estate's interest if respondent is not denied access to the estate. Moreover, the court found that respondent would not be damaged by the injunction and the injunction would preserve the status quo until the



underlying action was decided.

¶ 16 Thus, the court made numerous findings prior to establishing the restraining order, the controlling two of which were its conclusions that (1) based on respondent's past fraudulent conduct the court could not assure itself that the funds will be properly accounted for, and (2) the funds of the estate are likely to be in danger of dissipation. The court found respondent submitted a fraudulent will and committed a fraud upon the court. Based on the findings of the court we feel this to be a sufficient showing of the necessity of an injunction and thus the court was justified in entering restraining orders. *Houseknecht v. Zagel*, 112 Ill. App. 3d at 291-92, *Jacob v. C & M Video, Inc.*, 248 Ill. App. 3d at 664; (courts will only grant preliminary injunctions if the party seeking the injunction can establish that it has a protectable right, that it will suffer irreparable harm if injunctive relief is not granted, that its remedy at law is inadequate, and that there is a likelihood of success on the merits).

¶ 17 Petitioner relies on *In re Estate of Ramlose* for the limited proposition that preliminary injunctions may be applied to prevent a fiduciary from improperly taking assets under his control. *In re Estate of Ramlose*, 344 Ill. App. 3d 564 (2003). In *Ramlose*, a trust beneficiary brought action against the trustee for an accounting and a petition for a citation to recover assets. *Id.* at 567. The trial court entered an order freezing all assets in which the trustee or his family had an interest. *Id.* at 571. On appeal, the order was found to be an abuse of discretion and against the manifest weight of the evidence. However, the court did not categorically state that a freeze order would never be appropriate. Rather, the court rested its decision upon the specific facts of the case, which differ significantly from the facts of the instant case. In particular, in *Ramlose*, the

order extended to assets not included in the petition for a citation to recover assets, and the trial court did not conduct a hearing to attempt to trace trust funds to the frozen assets. *Id.* at 574. The appellate court found due process dictated, at a bare minimum, the trial court was obligated to conduct a hearing allowing both sides to present testimonial and documentary evidence either proving or negating the allegations that the trustee illegally and fraudulently transferred funds to his personal accounts. *Id.*

¶ 18 Respondent argues that there is not a claim of misconduct on respondent's part as executor of the estate and the transfer on death accounts are respondent's lawful property and have been unlawfully frozen. Respondent, however admits he has not yet filed an account and that there have been funds disbursed which have not yet been fully documented. Unlike in *Ramlose*, in the instant case the order entered by the trial court on September 17, 2012 specifically stated that respondent or his counsel appeared; indicating that respondent had an opportunity to have been heard. Further, in the instant case the scope of the freeze order is not overbroad, as was the case in *Ramlose*.

¶ 19 Respondent nevertheless contends that the transfer on death accounts are his lawful property, and the temporary injunction constitutes an unlawful equitable attachment of that property. An equitable attachment consists of an injunction prohibiting a party from transferring, or using, his or her property under circumstances not authorized by the Illinois Attachment Act (S.H.A. ILCS 5/4-101 *et seq.*). Generally they are not permitted in Illinois. *Carriage Way Apartments v. Pojman*, 172 Ill. App. 3d. 827 (2d Dist. 1988). However, there is an exception to this rule where the plaintiff has an interest in specific funds held by the other party. *Franz v.*

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*Calaco Development Corp.*, 322 Ill. App. 3d. 941 (2d Dist. 2001); *Kurti, v. Silk Plants Etc.*

*Franchise Systems, Inc.*, 200 Ill. App. 3d. 605, 609-11 (1990). Petitioner argues that assuming *arguendo* this to be a prejudgment equitable attachment that this exception applies to the case at hand. We agree.

¶ 20 In this regard, we find the case of *American Re-Insurance Company* to be analogous. *American Re-Insurance Company v. MGIC Investment Corporation*, 73 Ill. App. 3d. 316 (1979). In *American Re-Insurance*, plaintiff and defendant entered into a re-insurance agreement, by which in return for defendant's payment of a percentage of premiums on their lease guarantee insurance policies, plaintiff would re-insure defendants for a percentage of their losses under those policies. *Id.* at 319. While the litigation was pending, the court ordered that the funds at issue be deposited with an approved trustee. *Id.* Defendants argued that the injunction entered amounted to an equitable attachment and was therefore in error. *Id.* The appellate court disagreed, holding that where the funds which are the subject of the injunction are also the subject matter of the litigation the issuance of the injunction is valid. *Id.* The court further stated that it could not agree that, by taking steps to insure that the monies are preserved until the final ruling, the trial court abused the exercise of its equitable discretion. *Id.* at 325

¶ 21 Similarly, in the present case, the trial court had the discretion and the duty to preserve the funds in controversy where the fund is the subject of the relief requested so that the ultimately successful litigant does not win a meaningless victory. *Keeshin v. Schultz*, 128 Ill. App. 2d 460, 468-69 (1970). Petitioner contends the effect of the orders from August 28 and September 17 was to restrain respondent's unlimited control over the funds and to subject it to court restrictions

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during the pendency of the litigation. We conclude that the funds of the estate are the funds in controversy and the subject matter of pending litigation. In order to maintain the status quo as to the funds of the estate, the court acted properly in enjoining respondent's activity with respect to these funds.

## ¶ 22 CONCLUSION

¶ 23 We find that the injunction was properly ordered by the court under its statutory authority in the Illinois Code of Civil Procedure to maintain the status quo during pendency of the litigation to prevent immediate and irreparable injury, loss or damage and that the record supports the conclusion of the court that good cause has been shown for issuance of the injunction restraining respondent's unlimited authority as to the funds pending final resolution of the controversy. From a review of the record, we cannot say that the trial court abused its discretion in granting the request for preliminary injunctive relief. We also remand for a determination of the status of the claims between the parties.

¶ 24 Affirmed and remanded.