2015 IL App (2d) 141152-U
No. 2-14-1152
Order filed May 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF JEAN L. WILBER,	)	Appeal from the Circuit Court
	)	of Kane County.
	)	
	)	
	)	No. 13-P-523
	)	
	)	
	)	
	)	
(Diana Law, Public Guardian of Kane County,	)	Honorable
Petitioner-Appellee v. Mary M. Feiden,	)	Joseph M. Grady,
Respondent-Appellant).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied the appellant's motion for substitution of judge as of right, which was brought over a year after the guardianship was commenced and after the court made substantive rulings; this court vacated the trial court's order granting the appellee's petition to execute estate planning documents and to sell real estate where the order was void because the court lacked jurisdiction over necessary parties.

¶ 2 This litigation arises from a guardianship proceeding. The appellant, Mary M. Feiden (Feiden), co-guardian of the person of Jean L. Wilber (Wilber), a disabled person (now deceased), appeals from an order allowing the appellee, the Public Guardian of Kane County,

Diana Law (Law), to sell certain real estate that was held in trust and to execute an estate plan on behalf of the ward. Additionally, Feiden appeals from an order denying her motion for substitution of judge. For the reasons that follow, we affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 Feiden was Wilber's close friend. On September 9, 2013, Feiden filed a "Petition for Appointment of Guardian for Disabled Person," naming Wilber as the alleged disabled person. On September 10, 2013, the court appointed a guardian *ad litem* for Wilber. On October 1, 2013, the court appointed Law as the temporary guardian of Wilber's person and estate. On December 3, 2013, the court entered an order providing that Law "has authority to act for [Wilber] in her capacity as trustee of her revocable living trust in order to secure her accounts and pay her bills." On May 21, 2014, pursuant to an agreed order between Feiden and Law, Law was appointed the plenary guardian of Wilber's estate and co-plenary guardian of her person, along with Feiden.

¶ 5 On September 15, 2014, Law filed a "Petition for Estate Planning and to Sell Real Estate." She organized her petition into two "counts." In "count I," she alleged that Wilber had executed the "Jean Wilber Trust" (Trust) on February 15, 2002, which was "amended and restated" on October 7, 2002, and was further amended on October 13, 2005, and July 30, 2008. Law further alleged that Wilber met with Attorney Mark Shea on September 24, 2013, "with the intent of amending and restating her trust and executing a new will naming new trustees and executors and specifically removing [Feiden] in any and all capacities." Law further alleged that Wilber "approved the amended and restated trust and new will" and that she had an appointment to meet with Shea to execute the documents. According to Law's allegations, Wilber suffered a debilitating brain bleed the day before she was to execute the documents and became

hospitalized and incapacitated. Law sought permission to execute the documents on Wilber's behalf.

¶ 6 "Count II" of Law's petition was titled "Sale of Real Estate." Law alleged that Wilber, as trustee of the Trust, was the record title owner of certain real property located in Montgomery, Illinois. Law requested permission to withdraw the real property from the trust to sell it. The property was improved with a home. Law also requested permission to sell all of the personal property that was inside the home.

¶ 7 The record contains an affidavit of Attorney Mark Shea dated September 30, 2013. In the affidavit, Shea averred as follows. He was contacted earlier in September 2013 by Wilber in connection with the preparation of "certain estate planning documents" that included power of attorney forms for property and health care. Shea met with Wilber on September 24, 2013, who expressed that she wanted one Janice Coleman to act as her agent for health care and Coleman's husband, Randy, to be the successor agent for health care. Wilber desired that one Carolyn Pennington act as her agent for property with Carolyn's husband, Jerry, to act as the successor agent for property. Shea dropped off an envelope to Wilber on September 26, 2013, that contained, "among other items," draft power of attorney forms, as she had requested. Those power of attorney forms were never executed.

¶ 8 According to the Trust, as variously amended and restated, Wilber was the trustee. However, if she became incompetent, one Helen Warning was named as the successor trustee, or, if Warning were unable or unwilling to act, Feiden was named as successor trustee. Feiden, along with others, was also a beneficiary upon Wilber's death. Law gave five of the named beneficiaries, including Feiden, notice of her petition for estate planning and to sell real estate. She also gave Wilber notice, but she did not give the named successor trustee, Warning, notice.

¶ 9 On October 23, 2014, Feiden filed a document titled "Combined Motion to Strike and Dismiss and for Involuntary Dismissal of Petition for Estate Planning and to Sell Real Estate." She purported to bring this motion pursuant to sections 2-615, 2-619, and 2-619.1 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615, 2-619, 2-619.1 (West 2012). Under the heading "Statement of Facts Common to All Counts," Feiden alleged that the estate plan that Law sought permission to execute was essentially a revocation of Wilber's existing will and trust and that the court was without authority or jurisdiction, because the successor trustee, Warning, was not before the court. The next section of Feiden's motion was titled "Count I: Involuntary Dismissal of Count I of the Petition for Estate Planning and to Sell Real Estate Pursuant to 735 ILCS 5/2-619." Feiden alleged as an "affirmative matter" section 11a-18(d) of the Probate Act of 1975 (Act), which provides in relevant part that a "guardian of the estate shall have no authority to revoke a trust that is revocable by the ward." Feiden further alleged that the proposed estate plan that Law sought permission to execute was a revocation of the existing estate plan in violation of section 11a-18(d).

¶ 10 The next section of the motion was titled "Count II: Motion to Strike and Dismiss Count I of the Petition for Estate Planning and to Sell Real Estate pursuant to 735 ILCS 5/2-615." In this section, Feiden alleged that Law's motion was "based upon conclusory allegations of fact and law which are not supported by specific facts." More particularly, Feiden alleged that Shea's affidavit referred only to powers of attorney and did not reference a will or trust. Feiden alleged that Shea failed to state that Wilber approved the proposed estate planning documents as drafted over one year prior to Law's motion.

¶ 11 The last section of Feiden's motion was titled "Count III: Motion to Strike and Dismiss Count II of the Petition for Estate Planning and to Sell Real Estate Pursuant to 735 ILCS 5/2-

615." In this section of her motion, Feiden alleged that assets of a ward that are held in trust are not part of the guardianship estate so Law was not entitled to control the trust assets. Feiden further alleged that because Warning, as successor trustee, was not before the court, it was without authority "to do anything with the assets held in trust."

¶ 12 The record shows that Feiden's motion was set for a hearing. The court entertained the parties' arguments and denied the motion. The court then considered Law's petition to execute the new estate planning documents and to sell the real estate. Feiden interjected that she wanted to file an answer and conduct discovery before Law's petition was heard. However, the court indicated that it did not want to delay the matter and granted Law's petition. Feiden then filed a "posttrial motion" pursuant to section 2-1203 of the Code. The court treated the "posttrial motion" as a motion to reconsider and denied it.

¶ 13 Prior to the hearing date on Feiden's "Combined Motion to Strike and Dismiss," she filed a motion for substitution of judge as a matter of right. That motion was heard and denied on October 23, 2014. Feiden filed a timely appeal.

¶ 14 II. ANALYSIS

¶ 15 Feiden contends that the trial court erroneously denied her motion for substitution of judge as of right. She brought that motion pursuant to section 2-1001(a)(2) of the Code (735 ILCS 5/2-1001(a)(2) (West 2012)), which provides that a party is entitled to one substitution of judge without cause and as a matter of right when the motion is brought before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case. We consider this issue first, because orders entered after a motion for substitution of judge is wrongfully denied are void. *In re Marriage of Paclik*, 371 Ill. App. 3d 890, 896 (2007). The issue of whether there has been a ruling on a substantial issue in the case is a question of law that

we review *de novo*. *Paclik*, 371 Ill. App. 3d at 895. Feiden recognizes that many orders had already been entered in this case before she filed the motion; however, she maintains that, because those orders were entered by agreement of the parties, the judge did not actually make any rulings. While it is true that an agreed order is not a judicial determination of the parties' rights, but is, rather, a recordation of the parties' agreement (*Advance Iron Works, Inc. v. ECD Lincolnshire Theatre, L.L.C.*, 339 Ill. App. 3d 882, 887 (2003)), even in the absence of any substantive ruling, a motion for substitution of judge can be denied where the movant has had the opportunity to form an opinion as to the judge's reaction to her claims. *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004). A motion for substitution of judge must be brought at the earliest practical moment to prohibit a litigant from judge shopping. *Gay*, 353 Ill. App. 3d at 343. Here, Feiden filed her petition for guardianship in September 2013 but waited until October 20, 2014, to ask for a substitution of judge, which was after Law filed her petition for estate planning and to sell the real estate. Moreover, it is clear from reviewing the common law record that the judge had made substantive rulings, not all of which were agreed to by Feiden. The appointment of Law as temporary guardian of Wilber's person and estate was one such order. The appointment of a guardian *ad litem* and an order granting Law the power to place Wilber in a psychiatric facility with the ability to agree to the administration of psychotropic medications were others. Accordingly, the motion for substitution of judge was properly denied.

¶ 16 Next, Feiden argues that the court erred in denying her motion to dismiss and that the court erroneously granted Law's petition without affording her the opportunity to answer, conduct discovery, and adduce evidence at a hearing. Before we address these contentions, we must sort out the procedural tangle created by Feiden's "Combined Motion to Strike and Dismiss," as it has led both parties astray concerning the proper standard of review. Motions to

dismiss pursuant to sections 2-615 and 2-619 of the Code attack pleadings. *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 407 (2005). Section 2-603 of the Code (735 ILCS 5/2-603 (West 2012)) defines a pleading as a cause of action, counterclaim, defense, or reply. Pleadings consist of a party's formal allegations of his claims or defenses. *Wolff*, 355 Ill. App. 3d at 407. On the other hand, a motion is an application to the court for a ruling or an order in a pending case. *Wolff*, 355 Ill. App. 3d at 407. Here, Law's petition was a motion, as it was an application to the court for a ruling or an order in a pending case. See *In re Marriage of Engst*, 2014 IL App (4th) 131078, ¶ 21 (motion for temporary relief in the form of exclusive possession of the marital residence was a motion, not a pleading). Consequently, Law's motion was not subject to dismissal pursuant to either section 2-615 or 2-619. In *Wolff*, we held that a section 2-615 motion to dismiss a motion to reconsider was a procedural nullity. *Wolff*, 355 Ill. App. 3d at 407. In the present case, however, as Feiden substantively alleged facts constituting objections to Law's motion, we will construe her motion to strike and dismiss as objections. Therefore, to be clear: we are not reviewing the trial court's denial of Feiden's motion but the court's granting of Law's motion, which we review for an abuse of discretion. *Perry v. Estate of Carpenter*, 396 Ill. App. 3d 77, 81 (2009).

¶ 17 Feiden initially asserts that the order allowing Law to execute the new will and trust and to sell the real estate was void because the court lacked jurisdiction over the beneficiaries and the trustee of Wilber's trust. Feiden maintains that the trustee and the beneficiaries were necessary parties. Law responds that the Act does not require that she give those persons notice; that Feiden adequately represented the trustee's interest; and that Feiden should have filed a third-party action naming the trustee and beneficiaries if she believed they were necessary parties.

¶ 18 Our supreme court long ago recognized the law with respect to trust property and guardianships. In *Scanlan v. Cobb*, 85 Ill. 296, 1877 WL 9545 *3, the court held that the general rule in suits respecting trust property is that the trustee and the beneficiaries are necessary parties, because the trustee has the legal interest and the beneficiaries have the equitable and ultimate interest to be affected by the decree.

¶ 19 Feiden relies on *In re Estate of Ostern*, 2014 IL App (2d) 131236. In *Ostern*, the respondents, who were the guardians of the disabled ward's person and estate, filed a motion to create the "Ostern" trust for the ward. *Ostern*, 2014 IL App (2d) 131236, ¶ 4. The trial court granted the motion but specifically excluded Kimberly Gerard as a beneficiary on the ground that she had been found guilty of financial exploitation of the ward. *Ostern*, 2014 IL App (2d) 131236, ¶ 5. Then the petitioners, Gerard's children, filed a motion to vacate the order and to dissolve the Ostern trust on the basis that the ward had a preexisting will and trust naming them as beneficiaries. *Ostern*, 2014 IL App (2d) 131236, ¶ 6. The petitioners argued that, although Gerard was given notice of the motion to create the Ostern trust, they were necessary parties who were not notified. *Ostern*, 2014 IL App (2d) 131236, ¶ 7. Accordingly, they argued, the order creating the Ostern trust was void. *Ostern*, 2014 IL App (2d) 131236, ¶ 16. This court agreed with the petitioners and held that the respondents' failure to notify the petitioners rendered the order creating the Ostern trust void for lack of jurisdiction over the necessary parties. *Ostern*, 2014 IL App (2d) 131236, ¶ 19.

¶ 20 Law attempts to distinguish *Ostern* on the basis that notice to the respondents in that case was necessary because they were "contingent beneficiaries" whose interests would have been foreclosed. We fail to see the distinction. Here, the new will and trust that Law sought to execute eliminated certain beneficiaries, changed the successor trustee, and altered the shares of

other beneficiaries. Law also argues that *Ostern* is inapplicable because the trustee is not an equitable beneficiary. However, as we said above, the trustee is a necessary party as the trustee has legal title. Particularly troubling are the facts that Wilber saw Shea over a year prior to when Law sought permission to execute the new documents, and Shea's affidavit makes no mention of the will and trust as having been what Wilber contemplated.

¶ 21 Law next argues, relying on *Schlosser v. Schlosser*, 218 Ill. App. 3d 943 (1991), that Feiden adequately represented the trustee's interest, because in seeking to dismiss her petition, Feiden made the exact arguments that the trustee would have made. In *Schlosser*, the court stated that one exception to the rule that beneficiaries are necessary parties is where others who are before the court afford them actual and efficient representation. *Schlosser*, 218 Ill. App. 3d at 947. There is no factual basis in the record for the assumption that Feiden made the arguments that the trustee would have made. Nor is there any basis for the legal assumption that a trustee's interest, which is legal title, can be represented by another. The exception in *Schlosser* pertained only to beneficiaries. *Schlosser*, 218 Ill. App. 3d at 947. *Ohlheiser v. Shepherd*, 84 Ill. App. 2d 83, 90 (1967), makes it clear that *in personam* jurisdiction of a trustee is essential to the court's power to determine controversies with respect to the establishment and enforcement of trusts.

¶ 22 With respect to Law's argument that it was incumbent on Feiden to file a third-party action against the trustee and the absent beneficiaries, we point out again that Law's petition was a motion, so there was no basis upon which Feiden could have brought a third-party complaint. Accordingly, we hold that Warning, the successor trustee, and the absent beneficiaries were necessary parties and should have been given notice of Law's petition. Because the order granting Law's motion was void for lack of jurisdiction over those persons, we need not consider Feiden's remaining arguments.

¶ 23 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part and vacated in part.

¶ 24 Affirmed in part; vacated in part.