

No. 1-13-1641

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

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
KIM MATSON O'MALLEY n/k/a KIM)	Cook County.
GODFREY,)	
)	No. 01 D 14530
Petitioner-Appellee,)	
)	Honorable
and)	Patricia Logue,
)	Judge Presiding.
PAUL R. O'MALLEY,)	
)	
Respondent-Appellant.)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* When a trial court orders the creation of an escrow account, its action is not necessarily the entry of a preliminary injunction.

¶ 2 Petitioner Kim Matson O'Malley (Kim), now known as Kim Godfrey, filed a petition to dissolve her marriage to respondent Paul R. O'Malley (Paul). The parties signed a marital settlement agreement (MSA) and the trial court entered a judgment dissolving the marriage and included the MSA. After the entry of the judgment, the parties continued to litigate the terms of

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the marital settlement agreement, including terms related to the disposition of the former marital residence. After the former marital residence was sold, the trial court ordered the net proceeds of the sale be held in an escrow account pending a hearing to determine the distribution of the funds pursuant to the judgment. Paul filed multiple motions for the purpose of vacating the order establishing the escrow account and desired to dissolve its existence. Paul filed the most recent motion 11 months after the trial court entered the order establishing the escrow. Paul appeals the denial of this latest motion. For the reasons set forth below, we dismiss the appeal for lack of subject matter jurisdiction.

¶ 3

BACKGROUND

¶ 4 The parties were married on November 19, 1983. Kim gave birth to two children, the first in 1986 and the second in 1989, both of whom are now emancipated. Irreconcilable differences arose between the parties, leading to a breakdown of the marriage. In 2001, Kim filed a petition for dissolution of marriage. The parties executed a marital settlement agreement, dated July 16, 2003, which concerned, among other things, the "rights of each party in and to the property, income, or estate which either of them now owns or may hereafter acquire, including a division of all marital and non-marital property." On July 16, 2003, the trial court entered a judgment dissolving the marriage (the judgment), incorporating the MSA. The judgment provided that Paul and Kim would retain title and interest in the former marital residence (the residence) as tenants in common, but that Paul would maintain exclusive possession. The judgment directed Paul either to place the residence on the market for sale or to buy out Kim's interest before September 1, 2007.

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¶ 5 On November 16, 2009, more than two years after the date on which Paul had been directed either to place the residence on the market for sale or buy out Kim's interest, Kim filed a petition for rule to show cause against Paul and to modify the judgment. The petition alleges that Paul failed to place the residence on the market before the end of September 2007, and that Kim was forced to perform the necessary work of preparing and listing the residence for sale. The petition also alleges that Paul intentionally hindered the sale of the residence. The petition requested the trial court to issue a rule against Paul requiring him to show cause why he should not be held in indirect civil contempt for failing to comply with the judgment for dissolution. It also requested a modification of the judgment by terminating Paul's exclusive possession of the residence, to name Kim as the sole negotiator on any contracts for the sale of the residence, and to allow Kim the sole right to select and contract with a realtor of her choosing.

¶ 6 On January 5, 2012, the trial court entered an order finding that the petition showed a *prima facie* case of indirect civil contempt, and issued a rule against Paul to show cause why he should not be held in contempt of court for failing to comply with the terms of the judgment of dissolution. The court scheduled a March 13, 2012, hearing. The day before the scheduled hearing, Paul filed a motion for summary judgment, arguing that there was "no evidence that supports a finding" that Paul could be held in civil contempt for noncompliance with the judgment. On April 20, 2012, Kim filed a motion to strike the motion for summary judgment, arguing that the motion for summary judgment was "[i]n fact an untimely [section] 2-615 motion attacking the sufficiency of the pleadings." On May 18, 2012, before the court could rule on the motions, the parties executed a sales contract for the sale of the residence. On May 29, 2012, the

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trial court ordered that "[a]ny and all proceeds of sale of [the] former marital residence shall be held in escrow ***. Both parties shall execute the necessary documentation to establish that account."

¶ 7 On June 25, 2012, Paul filed a motion to vacate the May 29, 2012, order. In the motion, Paul referred to the escrow account as the granting of a "preliminary injunction." On July 2, 2012, the trial court denied the motion and again ordered Paul to "sign the escrow and W-9 forms and any and all necessary documents *** within 48 hours or by noon on July 5, 2012."

¶ 8 On July 16, 2012, the parties completed closing on the sale of the residence, and the proceeds were held in the escrow account, pursuant to the trial court's order. The sale price for the residence was \$614,120.82. On July 24, 2012, the trial court granted partial distribution of the proceeds to the parties, \$150,000 to Kim and \$150,000 to Paul, leaving the balance of \$314,120.82 in the escrow account. On August 1, 2012, Paul filed a motion to reconsider the denial of his motion to vacate the May 29, 2012, order. Before the trial court ruled on this motion, Paul filed a second motion to vacate the escrow account, again referring to it as a preliminary injunction, and requested a distribution of the escrow funds. On November 1, 2012, Paul filed an "emergency" motion to dissolve the escrow account and report settlement progress. On November 5, 2012, the trial court denied Paul's emergency motion. On December 26, 2012, Paul filed a motion to dismiss count I of the petition for the rule to show cause pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), arguing that it failed to state a valid claim. The trial court denied Paul's motion on March 26, 2013.

¶ 9 On April 24, 2013, Paul filed a motion to reconsider. On the same date, Paul again filed a

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motion for dissolution of the escrow account, again referring to it as a preliminary injunction, and for distribution of the funds. On April 29, 2013, the trial court denied both of Paul's motions.

The trial court found that "[Paul's] motions do not address the court's rulings at face value and as explained by the court, are in substantial respects repetitive of past motions and, in any event, are not persuasive."

¶ 10 On May 28, 2013, Paul filed a notice of appeal, appealing the April 29, 2013, order denying his motion to reconsider and his motion for dissolution.¹

¶ 11 ANALYSIS

¶ 12 The major issue on appeal is whether the trial court's creation of a real estate escrow account is a preliminary injunction. If it was not a preliminary injunction, its creation is not an appealable interlocutory order under Illinois Supreme Court Rule 307(a) (eff. July 1, 2013), and this court lacks the subject matter jurisdiction to hear this appeal. For the following reasons, we find that the creation of the escrow account was not a preliminary injunction, and dismiss the appeal for lack of subject matter jurisdiction.

¶ 13 Illinois Supreme Court Rule 307(a)(1) states that "[a]n appeal may be taken to the Appellate Court from an interlocutory order of court: granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. July 1, 2013).

¶ 14 "An injunction has been defined as a 'judicial process, by which a party is required to do a

¹ There is some contention as to whether Paul is in fact appealing the April 29, 2013, order. The notice, which reads "notice of interlocutory appeal," does not appear in the record on appeal, but it is included in the appendix to Paul's appellant brief. The notice states that Paul is appealing the April 29, 2013 order. However, in the body of Paul's brief, he alternatively states that he is also appealing the order of May 29, 2012, which created the escrow account.

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particular thing, or to refrain from doing a particular thing.' " *In re Marriage of Tetzlaff*, 304 Ill. App. 3d 1030, 1036 (1999) (quoting *In re a Minor*, 127 Ill. 2d 247, 261 (1989)). "The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits of the case." *Callis, Papa, Jackstadt, & Halloran, P.C. v. Norfolk & Western Ry. Co.*, 195 Ill. 2d 356, 365 (2001).

¶ 15 Paul argues that the trial court's May 29, 2012, order amounts to an improper prejudgment equitable attachment, and that such an order qualifies as a preliminary injunction for purposes of Rule 307(a). However, the trial court order to create an escrow account under the facts of this case is not a preliminary injunction, and is therefore not appealable under Rule 307(a).

¶ 16 "To determine what constitutes an appealable injunctive order under Rule 307(a)(1) we look at the substance of the action, not its form." *In re a Minor*, 127 Ill. 2d at 260. "Tests and definitions regarding which orders are interlocutory or appealable must be considered in light of facts and relief sought in each case." *In re Marriage of Meyer*, 197 Ill. App. 3d 975, 978 (1990). Generally, a trial court ordering an escrow to hold monies until those monies are distributed by court order are not appealable orders under Rule 307(a)(1). *People v. Philip Morris, Inc.*, 198 Ill. 2d 87, 102 (2001). "The most common reason for denying an appeal from such orders is that they are merely interim orders, designed to preserve a fund until rights to it can be established; they are not orders establishing such rights." *Philip Morris*, 198 Ill. 2d at 102 (citing *In re Estate of Basile*, 32 Ill. App. 3d 618, 620 (1975)).

¶ 17 In marital dissolution proceedings, the trial court may grant temporary relief in the nature

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of temporary maintenance or child support, preliminary injunctions, or "other appropriate temporary relief." *In re Marriage of Meyer*, 197 Ill. App. 3d at 978 (citing 750 ILCS 5/501(a) (West 1990)). "Section 501(a)(3) is an *all-inclusive* provision which allows a party to move for any other appropriate temporary relief, such as temporary custody; [temporary] exclusive possession of the marital residence; [temporary] *sequestration of assets*; and temporary attorney fees." (Emphases added.) *In re Marriage of Meyer*, 197 Ill. App. 3d at 978. "Temporary relief afforded under section 501 is often in the form of *neither a temporary restraining order nor a preliminary injunction*." (Emphasis added.) *In re Marriage of Meyer*, 197 Ill. App. 3d at 978. In dissolution of marriage cases, issues concerning property disposition or division are related parts of the petition for dissolution. *In re Marriage of Meyer*, 197 Ill. App. 3d at 978. The Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/101 *et seq.*) (the Act) therefore "discourages piecemeal appeals in the absence of some compelling reason." *In re Marriage of Meyer*, 197 Ill. App. 3d at 978.

¶ 18 In *In re Marriage of Tetzlaff*, the trial court ordered the petitioner's counsel to place \$35,000 of a \$65,000 interim attorney fee award into an escrow account. *In re Marriage of Tetzlaff*, 304 Ill. App. 3d at 1031. The trial court's order granting interim attorney fees to counsel did not state whether the fees were earned or prospective. *In re Marriage of Tetzlaff*, 304 Ill. App. 3d at 1034. One week after the trial court granted counsel interim attorney fees, counsel moved to withdraw the funds. *In re Marriage of Tetzlaff*, 304 Ill. App. 3d at 1035. The parties disagreed about whether the fees awarded were earned or prospective, and the trial court ordered the fees deposited into an escrow account until the distribution of the fees could be determined.

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In re Marriage of Tetzlaff, 304 Ill. App. 3d at 1035.

¶ 19 Counsel filed a notice of interlocutory appeal, pursuant to Rule 307, claiming an appeal as a matter of right. *In re Marriage of Tetzlaff*, 304 Ill. App. 3d at 1035. On appeal, this court examined whether the trial court's order requiring the deposit of the funds into an escrow account was an injunctive order. *In re Marriage of Tetzlaff*, 304 Ill. App. 3d at 1036. We determined that the escrow order was not an injunction, but "merely a modification of the court's previous interim attorney fee award and the court's response to changing circumstances, namely, the withdrawal of [counsel]." *In re Marriage of Tetzlaff*, 304 Ill. App. 3d at 1038. Section 501(c-1)(2) (750 ILCS 5/501(c-1)(2) (West 1996)) of the Act states that "[a]ny portion of any interim award [of attorney fees] shall be remitted back to the appropriate party or parties, or, alternatively, to successor counsel, as the court determines and directs, after notice." Counsel argued that the trial court should not have modified its fee award until the end of the case, arguing that the Act allows for review of fee awards at the conclusion of a case, but we held that interpreting the Act in that way would interfere with the trial court's "inherent power to modify its own orders." *In re Marriage of Tetzlaff*, 304 Ill. App. 3d at 1038. We found that the order to deposit the funds into an escrow account was "similar to interim or temporary orders entered in dissolution proceedings wherein relief was granted but not found to be injunctive in nature for purposes of appeal." *In re Marriage of Tetzlaff*, 304 Ill. App. 3d at 1039 (citing *In re Marriage of Johnston*, 206 Ill. App. 3d 262, 264 (1990) (trial court's order requiring the retirement board of the firemen's annuity and benefit fund to comply with qualified domestic relations order entered by the court awarding a portion of the husband's pension to the wife for her lifetime was not

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injunctive, and therefore not immediately appealable under Rule 307(a)), and *In re T.M.*, 302 Ill. App. 3d 33, 40 (1998) (trial court's order modifying a prior supervised visitation order allowing the father supervised overnight visits with his children and stepchildren was not injunctive, and therefore not appealable under Rule 307(a)).

¶ 20 Although not a dissolution of marriage case, our supreme court's decision in *People v. Philip Morris, Inc.*, 198 Ill. 2d 87 (2001), is instructive. In *Philip Morris*, the Illinois Attorney General elected to join other states in filing a lawsuit against tobacco companies to recover money spent to treat smoking-related illnesses. *Philip Morris*, 198 Ill. 2d at 90. The Attorney General hired private firms, referred to as Illinois Special Counsel, to litigate the lawsuit, and contracted to pay the firms a 10% contingency fee on the total recovery. *Philip Morris*, 198 Ill. 2d at 91. After the tobacco companies proposed a settlement agreement, the Attorney General agreed to have Illinois join the settlement agreement. *Philip Morris*, 198 Ill. 2d at 92. Subsequently, Illinois Special Counsel served notice, claiming a lien of 10% of the funds recovered from the tobacco companies as an attorney's lien on the proceeds. *Philip Morris*, 198 Ill. 2d at 93. Illinois Special Counsel moved to establish an escrow account, and the trial court ordered the State and the tobacco defendants to deposit 10% of the settlement into an escrow account, pending a decision on the merits of the lien. *Philip Morris*, 198 Ill. 2d at 93. The State appealed the grant of the escrow account under Rule 307(a), and the appellate court dismissed the appeal for lack of jurisdiction. *Philip Morris*, 198 Ill. 2d at 93.

¶ 21 In arguing before the Illinois Supreme Court, the State characterized the escrow account as injunctive relief, and argued that the trial court had no power to establish the escrow account

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because Illinois Special Counsel failed to satisfy the requirements for injunctive relief. *Philip Morris*, 198 Ill. 2d at 101. Our supreme court concluded that the escrow account was not injunctive in nature, but was an interim order. *Philip Morris*, 198 Ill. 2d at 101-02. Our supreme court found that the purpose of the escrow account was to simplify the adjudication of lien process, and that the establishment of the escrow account did not determine the merits of who was entitled to the funds. *Philip Morris*, 198 Ill. 2d at 102.

¶ 22 In the case at bar, Kim filed a petition for a rule to show cause and to *modify the judgment for dissolution* after Paul failed to comply with the terms of the judgment. Specifically, Paul failed either to place the residence on the market for sale or buy out Kim's interest in the residence before the deadline provided for in the judgment. Kim requested modification of the judgment with regards to the proceeds of the residence, and, as in *Philip Morris*, the placement of the proceeds of the sale of the residence into an escrow fund was done to simplify the adjudication of the proceeds. *Philip Morris*, 198 Ill. 2d at 102. When the trial court ordered the creation of the escrow account, it did not determine the merits of who was entitled to the proceeds. See *Philip Morris*, 198 Ill. 2d at 102. It was a temporary order.

¶ 23 Paul argues that the matter of who is entitled to the proceeds is settled because the marital settlement agreement in the judgment directed how to divide the proceeds. Paul further argues that the requirement that the proceeds be deposited into the escrow account deprives him of property to which he is entitled. Paul's argument is not persuasive because Paul's delay in selling the marital residence may cause the trial court to adjust the division of the proceeds as directed in the judgment for dissolution.

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¶ 24 Section 502(e) of the Act states that dissolution judgments are enforceable by all remedies available for the enforcement of a judgment, and, as we held in *In re Marriage of Tetzlaff*, trial courts have the inherent power to modify their judgments. *In re Marriage of Tetzlaff*, 304 Ill. App. 3d at 1038; 750 ILCS 5/502(e) (West 2010). Section 501(a) allows the trial court to grant "appropriate temporary relief" in the course of a dissolution proceeding. 750 ILCS 5/501(a)(3) (West 2010). We found in *In re Marriage of Meyer* that this is an "all-inclusive" provision that allows for relief such as the sequestration of funds. *In re Marriage of Meyer*, 197 Ill. App. 3d at 978. Therefore, the trial court was acting within its power to order proceeds to be placed into an escrow account while the trial court determines whether it will modify the dissolution judgment's provision regarding the distribution of proceeds of the residence, and was authorized to sequester the funds until it could render a final judgment. See *Philip Morris*, 198 Ill. 2d at 87 (holding that orders are not appealable if they are interim orders designed to preserve a fund until rights to it can be established). As a result, in the case at bar, the establishment of an escrow account was not a preliminary injunction.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the trial court's order establishing the escrow account was not a preliminary injunction. As a result, the order is not appealable under Illinois Supreme Court Rule 307(a), and this appeal is dismissed for lack of subject matter jurisdiction.

¶ 27 Appeal dismissed.