

No. 1-16-0197

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

FIRST MIDWEST BANK, as Successor in Interest to)	
McHenry State Bank, not Personally, but Solely as)	
Trustee of the Minors Trust Agreement of Mary Esther)	
Carey Dated August 21, 1982,)	Appeal from the
)	Circuit Court of
Plaintiff/Counter-Defendant-Appellee,)	Cook County,
)	
v.)	No. 09 CH 28355
)	
JANE ZIEMAN-SALMON, CHRISTOPHER MOREY,)	Honorable
KENNETH L. MOREY, and JUSTIN CHRISTIAN,)	David B. Atkins,
)	Judge Presiding.
Defendants/Counter-Plaintiffs-Appellants,)	
)	
and)	
)	
LISA ANN ZIEMAN and MICHAEL JOHN ZIEMAN,)	
)	
Defendants-Appellees.)	

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Affirming the circuit court’s summary judgment order finding that, under the terms of the trust, a deceased beneficiary’s unclaimed trust proceeds should be distributed to the other beneficiaries since the deceased beneficiary died intestate and without any living descendants; affirming the circuit court’s dismissal of two of the counter-plaintiffs’ claims pursuant to section 2-619(a)(9) of the Code of Civil Procedure for lack of standing, and the other two counterclaims pursuant to section 2-615 of the Code of Civil Procedure where no set of facts could be proved that would entitle the counter-plaintiffs to recover.

¶ 2 This appeal concerns a trust distribution after the death of Kyle Morey, one of four named beneficiaries of his great-grandmother’s trust. The parties to this case include Kyle’s immediate family, Jane Zieman-Salmon, Kenneth L. Morey, Christopher Morey, and Justin Christian; two other beneficiaries of the trust, Lisa Ann Zieman and Michael John Zieman; and the trustee, First Midwest Bank. This is an appeal of the circuit court’s orders granting partial summary judgment in favor of Lisa Ann Zieman and Michael John Zieman, and dismissing the second amended counterclaim of Jane Zieman-Salmon, Kenneth Morey, Christopher Morey, and Justin Christian.

¶ 3 **BACKGROUND**

¶ 4 On August 21, 1982, Mary Esther Carey (the Settlor) established an irrevocable trust titled the Minors Trust Agreement (the Minors Trust) and named four of her great-grandchildren as beneficiaries: Lisa Ann Zieman (Lisa), Michael John Zieman (Michael), Christopher Morey (Chris), and Kyle Morey (Kyle). Chris and Kyle are brothers, and are cousins to Lisa and Michael, who are siblings. Plaintiff First Midwest Bank (First Midwest) became the trustee for the Minors Trust following a financial merger with the named trustee McHenry State Bank. The Settlor initially transferred the sum of \$40,000 into the Minors Trust.

¶ 5 Article I of the Minors Trust states: “The trustee shall forthwith divide the trust estate into equal shares to create one share for each LISA ANN ZIEMAN, MICHAEL JOHN ZIEMAN, CHRISTOPHER MOREY, and KYLE MOREY, each of whom is herein referred to

as a 'beneficiary' ” and “[e]ach share shall be held as a separate trust.” The Minors Trust then provides for the distribution of trust assets:

“Section 1: The trustee shall pay to or for the benefit of a beneficiary so much or all of the income and principal of his or her share as the trustee deems necessary or advisable from time to time for his or her health, maintenance in reasonable comfort, education (including postgraduate) and best interests, adding to principal any income not so paid, except that after the beneficiary has reached the age of 21 years, the trustee shall pay to or for the benefit of the beneficiary all the income from his or her share in convenient installments, at least quarterly.

Section 2: For a period of three months after a beneficiary has reached the age of 21 years, the beneficiary may withdraw any part or all of his or her share by written request delivered to the trustee.

Section 3: After a beneficiary has reached the age of 25 years, the beneficiary may withdraw any part or all of his or her share at any time or times by written request delivered to the trustee.”

¶ 6 Sections 4 and 5 of the Minors Trust address what is to happen to a beneficiary’s share in the event that the beneficiary dies before receiving it:

“Section 4: If a beneficiary dies before receiving his or her share in full, then upon the death of the beneficiary his or her share shall be held in trust hereunder or distributed to or in trust for such appointee or appointees (including the estate of the beneficiary), with such powers and in such manner and proportions as the beneficiary may appoint by his or her will making specific reference to this power of appointment. The trustee may rely upon an instrument admitted to probate in any jurisdiction as the will of the beneficiary or may

assume that the beneficiary died intestate if the trustee has no notice of a will within three months after the death of the beneficiary.

Section 5: Upon the death of a beneficiary any part of his or her share not effectively appointed shall be distributed per stirpes to his or her then living descendants, or if none, then in equal shares to such of the other beneficiaries of the trust as shall then be living, except that the then living descendants of a deceased beneficiary shall take per stirpes the share which the beneficiary would have received if living, subject in each case to postponement of possession as provided below, and except further that each portion otherwise distributable to a beneficiary for whom a share of the trust estate is then held hereunder shall be added to that share. Any part of the shares not effectively disposed of by the foregoing shall be distributed in accordance with the provisions of settlor's last will and testament or in the event the settlor shall die leaving no last will and testament then to the heirs-at-law and the proportions which they shall respectively take to be determined in each case according to the present laws of descent of the State of Illinois as if the settlor had died at that time."

The Minors Trust also provides that Illinois law "shall govern the validity and interpretation of the provisions of this agreement."

¶ 7 Kyle died on March 6, 2009, at the age of 28 years. At the time of his death, Kyle's share of the Minors Trust was worth approximately \$500,000. Prior to Kyle's death, co-defendants Lisa and Michael (collectively, the Ziemans) had each withdrawn their shares of the Minors Trust in full.

¶ 8 As trustee, First Midwest sought legal advice about how to dispose of Kyle's share of the Minors Trust. In a letter to First Midwest in June 2009, the lawyer retained for this purpose

advised that Kyle's share should "be distributed in equal one-quarter shares to his mother, father and two brothers": Jane Ziemman-Salmon (Jane), Kenneth L. Morey (Kenneth), Justin Christian (Justin), and Chris (collectively, the Moreys), the other co-defendants in this case. First Midwest then took steps to distribute the funds in accordance with the lawyer's advice: First Midwest deposited one-quarter shares in the individual accounts of Jane, Chris, and Justin, who all held accounts with First Midwest, and was awaiting distribution instructions from Kenneth that would allow it to make a distribution to him.

¶ 9 In July 2009, First Midwest received a letter from Lisa, in which she stated the legal opinion First Midwest received in June was "blatantly erroneous" and requested First Midwest halt its distribution of Kyle's share of the Minors Trust. First Midwest then contacted a second lawyer to review the dispositive provisions of the Minors Trust and the advice provided by the first lawyer. In an email, the second lawyer stated that he "disagree[d]" with the first lawyer's advice and advised instead that Kyle's share "be allocated among the three surviving named beneficiaries, either to the share any still has in the trust or outright if their share has already been distributed." On July 15, 2009, First Midwest removed the one-quarter shares from the accounts of Jane, Chris, and Justin, and placed them back into the Kyle Morey Trust.

¶ 10 First Midwest filed an interpleader complaint on August 14, 2009, in which it stated that it was "unable to determine to which of the Defendants the Kyle Morey Trust should be distributed." First Midwest asserted that it was "ready and willing to distribute it to those persons as the Court shall direct" and requested that "Defendants interplead with each other to determine their respective rights to the Kyle Morey Trust." On September 17, 2009, the Ziemans filed a counterclaim for declaratory judgment, asserting that, because Kyle died intestate and without descendants, they were entitled to portions of Kyle's share which, pursuant to the terms of the Minors Trust, was to be split evenly between the other beneficiaries. The Ziemans later filed an

amended counterclaim on January 18, 2011, to add a second count seeking a declaration that First Midwest was not entitled to reimbursement of attorney fees and costs relating to this cause.

¶ 11 On February 9, 2010, the Moreys filed affirmative defenses to the Ziemans' counterclaim, as well as their own counterclaim for declaratory judgment, seeking a declaration that they were entitled to some or all of the money held in Kyle's trust. On May 6, 2011, the Ziemans filed a motion for partial summary judgment on all claims pertaining to the distribution of Kyle's trust: the interpleader action, the Moreys' counterclaim, and count I of their own counterclaim. After withdrawing that motion to conduct additional discovery, the Ziemans renewed their motion for partial summary judgment on April 29, 2013. Meanwhile, on March 1, 2012, the Moreys filed a motion for summary judgment on their counterclaim and filed a memorandum of law in support of that motion on July 24, 2012.

¶ 12 The circuit court ruled on both summary judgment motions on August 14, 2014. It determined that the terms of the Minors Trust required that Kyle's share be distributed in equal parts to the three other beneficiaries named in the trust: Lisa, Michael, and Chris. In its ruling, the circuit court first addressed the "threshold matter" of whether Lisa and Michael, who previously withdrew their shares, should nevertheless be considered "beneficiaries" for purposes of section 5 of the Minors Trust. After examining the document as a whole, the court found that the Settlor's use of the word "beneficiary" in the Minors Trust was "not strictly tied to a legal definition of the term," but was instead intended to be "a synonym for any one of those four individuals" named as beneficiaries in article I. Thus, although their individual trusts terminated at the time each of them withdrew their full share prior to Kyle's death, Lisa and Michael remained "beneficiaries" for purposes of section 5 of the Minors Trust.

¶ 13 The circuit court next considered whether Kyle died without a will and without any living descendants. The court relied primarily on the depositions of Kyle's immediate family members

to find that Kyle died without any descendants: Jane, Kenneth, Chris, and Justin each stated that they had no “personal knowledge of whether Kyle had any heirs.” The court further noted that “neither side [] produced a shred of evidence indicating that Kyle had heirs and the court fail[ed] to see how a trial would alter this conclusion.” Although both the witnesses and the court used the word “heirs,” it appears from the context that they were all saying that there was no evidence that Kyle had any descendants, since there is no question that his parents and siblings are his heirs under Illinois law. See 755 ILCS 5/2-1(d) (West 2014).

¶ 14 The circuit court also found that the Ziemans had sufficiently demonstrated that Kyle died without a will. The Moreys contended that Kyle “recorded a rap song prior to his death that was intended to serve as his last will and testament,” which contained lyrics stating how Kyle wished the funds would be used. However, the court ruled that whether it applied the law of Illinois or of Colorado, the state where Kyle died, this song did not meet the requirements for a will. The court also stated that “no written will has been produced to date,” and when asked during their depositions whether they had personal knowledge of whether Kyle had a will, all four members of Kyle’s immediate family replied either “no” or “I do not recall.” Additionally, the court noted that “[a]ll parties agree that no will was furnished to First Midwest” and that section 4 of the Minors Trust states that “[t]he trustee *** may assume that the beneficiary died intestate if the trustee has no notice of a will within three months after the death of the beneficiary.”

¶ 15 The Moreys filed a motion to reconsider the circuit court’s ruling, which was denied on April 10, 2015. In its order, the court noted that it “disposed of essentially all of [the Moreys’] arguments in its previous order” and their “new arguments did not establish any error in the court’s application of law.”

¶ 16 On September 25, 2015, the Moreys filed their second amended counterclaim, bringing

four claims against First Midwest. In count I, breach of fiduciary duty, the Moreys alleged that First Midwest failed as trustee to effectively advise the beneficiaries of their rights under the Minors Trust, and specifically failed to inform Kyle of his right of withdrawal and the need for him to transfer his share of the Minors Trust in order to protect his interests. Jane, Chris, and Justin also brought a breach of fiduciary duty claim in count II, in which they asserted that First Midwest's removal of funds from their accounts, after Kyle's share of the Minors Trust was initially distributed to those accounts in 2009, was in violation of their account agreements with First Midwest and of their express instructions to leave the funds untouched. In count III for conversion, Jane, Chris, and Justin additionally alleged that First Midwest "exercised unauthorized dominion and wrongful control" over the funds when it removed the funds from their accounts without their knowledge or consent. In count IV, the Moreys sought to recoup attorney fees and compensation for pursuing the action for Kyle's share of the Minors Trust against the Ziemans, legal action they alleged was necessitated by First Midwest's breaches of fiduciary duty described in count I.

¶ 17 First Midwest moved to dismiss the Moreys' counterclaim pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)). The circuit court granted First Midwest's motion on December 17, 2015. The court ruled that "because the court ha[d] already determined that Chris [was] entitled to a one-third share of Kyle's share of the Minors Trust and this [was] the maximum that Chris could hope to receive in this litigation," Chris could not demonstrate how he had been injured by First Midwest's actions and lacked standing to bring any of the claims. As it had already determined that the remaining members of Kyle's immediate family—Jane, Kenneth, and Justin—did not have an interest in Kyle's share of the Minors Trust, the court concluded that they also lacked standing to bring counts I or IV of the counterclaim. The court further noted that no probate estate was ever opened and no administrator over Kyle's

estate was ever appointed so no one stood in a position to bring a claim on Kyle's behalf.

¶ 18 The circuit court also dismissed counts II and III for breach of fiduciary duty and conversion. The court noted that a conversion claim must include an allegation of the plaintiff's right in the property that was wrongfully seized. Jane and Justin could not state a claim for conversion because of the court's earlier finding that they had no right to the money First Midwest originally deposited into their accounts. Where no conversion could be alleged, their claim that First Midwest breached its fiduciary duties by allowing the conversion also failed.

¶ 19 In its order of December 17, 2015, the circuit court made a "special finding," pursuant to Illinois Supreme Court Rule 304(a), that the dismissal order, the summary judgment order of August 14, 2014, and the order denying the Moreys' motion to reconsider on April 10, 2015, were final and appealable. On January 15, 2015, the Moreys filed a timely notice of appeal. Accordingly this court has jurisdiction over this appeal under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 20

ANALYSIS

¶ 21

I. Distribution of Kyle's Trust Proceeds

¶ 22 The Moreys and the Ziemans, as co-defendants to First Midwest's interpleader action, and as appellants and appellees respectively, address the question of who should receive the distribution of Kyle's share of the Minors Trust. The Moreys argue that Kyle's share of the Minors Trust should be distributed to them as his legal heirs and not distributed pursuant to any provisions in the Minors Trust, because Kyle received and maintained control over his share of the Minors Trust beginning when he turned 25 years old. At the very least, the Moreys argue, the terms of the Minors Trust required that all income generated from Kyle's share was to be disbursed to him as of his 21st birthday, and therefore that accumulation of income is not part of the Minors Trust and should transfer to Kyle's heirs. The Moreys alternatively contend that,

should Kyle's share of the Minors Trust be distributed to the remaining beneficiaries in accordance with the terms of the Minors Trust, when the Ziemans withdrew their respective shares of the Minors Trust, their individual trusts terminated and they stopped being beneficiaries entitled to any portion of another beneficiary's share. Therefore, according to the Moreys, all undistributed principal should transfer to Chris, the only other beneficiary who had not taken all of his trust proceeds at the time of Kyle's death.

¶ 23 In response, the Ziemans assert that Kyle's share of the Minors Trust is subject to and must be distributed in accordance with the terms of the Minors Trust. They argue that because Kyle died without a will and without any living descendants, the terms of the Minors Trust require that his share be split equally among the remaining beneficiaries: Lisa, Michael, and Chris. They contend that Lisa and Michael remain "beneficiaries" under the terms of the Minors Trust, entitled to their portion of Kyle's trust distribution, even after withdrawing their own shares of the trust in full.

¶ 24 An order granting summary judgment is reviewed *de novo*. *Seymour v. Collins*, 2015 IL 118432, ¶ 42. "Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.* Generally, "[w]hen parties file cross-motions for summary judgment, they agree that only a question of law is involved" and the information contained in the record is sufficient for the court to decide the issues. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. However, the mere filing of cross-motions for summary judgment does not, in itself, "establish that there is no issue of material fact, nor does it obligate a court to render summary judgment." *Id.*

¶ 25 We begin with the language of the Minors Trust. In construing a trust, the primary objective is to give effect to the settlor's intent, so long as that intent is not contrary to public policy. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991). The plain

language and structure of the Minors Trust indicate that it was the Settlor's intent for Kyle's share to be distributed to the other beneficiaries upon his death, in the event he died without a will and without any living descendants. The Minors Trust provides that:

“Upon the death of a beneficiary any part of his or her share not effectively appointed shall be distributed per stirpes to his or her then living descendants, or if none, then in equal shares to such of the other beneficiaries of the trust as shall then be living, except that the then living descendants of a deceased beneficiary shall take per stirpes the share which the beneficiary would have received if living, subject in each case to postponement of possession as provided below, and except further that each portion otherwise distributable to a beneficiary for whom a share of the trust estate is then held hereunder shall be added to that share.”

The reference to “not effectively appointed” refers to the previous paragraph of the Minors Trust that allows the beneficiary to appoint “by his or her will” other persons to receive his or her share of the trust in the event of their death. If there is no will and the deceased beneficiary has no descendants, the Settlor's intent is clear that their share is to go “in equal shares” to “the other beneficiaries of the trust.”

¶ 26 There is no other way to read this trust language and the Moreys do not suggest one. The Moreys also do not contest on appeal the circuit court's findings that, based on the evidence presented on the cross-motions for summary judgment, Kyle died without a will and without any living descendants. Instead, the Moreys make a series of arguments about why they should receive Kyle's trust funds, notwithstanding the language of the trust.

¶ 27 The Moreys' primary contention is that some or all of Kyle's share of the Minors Trust should be viewed as having been taken by him prior to his death. The Moreys rely on two provisions in the trust to support this argument. Section 1 provides that “after the beneficiary has

reached the age of 21 years, the trustee shall pay to or for the benefit of the beneficiary all the income from his or her share in convenient installments, at least quarterly.” Section 3 provides that “[a]fter a beneficiary has reached the age of 25 years, the beneficiary may withdraw any part or all of his or her share at any time or times by written request delivered to the trustee.” By virtue of these two sections, the Moreys argue, “[a]ll funds, including principal and income, were the sole and separate property of Kyle at his death, free and clear of any right, title, claim or interest of First Midwest.” At the very least, the Moreys argue, “all income vested with Kyle as of his 21st birthday” and should be distributed to his immediate family as his legal heirs.

¶ 28 The Moreys mistakenly equate the right to assume control of the funds with actual control over the funds. Although we recognize that Kyle *could* have obtained “exclusive and complete control” over his share of the Minors Trust at any point after his 25th birthday, the record reflects that he did not exercise that right and never actually assumed control over the funds. Indeed, the record reflects that in May 2001, prior to his 21st birthday, Kyle wrote a letter to First Midwest stating that he would “not be expecting any more distributions from [his] trust” and recognizing that his share would be “kept intact by [First Midwest] until such time that [he is] sincerely committed to continue with [his] educational pursuits, and or drug rehabilitation.”

¶ 29 The only evidence the Moreys provided indicating that Kyle actually assumed control over his share was the deposition testimony of Justin, in which Justin recalled a conversation he had with Kyle in 2008. Justin stated that he informed Kyle of Kyle’s ability to “take control” of his account, and that Kyle later “instructed the bank to give him all of his income from the account and he was using it to buy *** a vehicle and to get money for whatever he needed or deemed necessary.” The Moreys only first raised this in their reply brief and they offer absolutely no evidence supporting Justin’s stated belief that Kyle exercised control over the funds constituting his share of the Minors Trust.

¶ 30 This point does not matter, however. To the extent, if any, that Kyle actually took money from his share of the Minors Trust, that money is clearly not the subject of this case and does not impact those funds that remained in the trust. The Minors Trust describes how a beneficiary's share should be distributed "[i]f a beneficiary dies before receiving his or her share *in full*" (emphasis added), indicating that the Settlor intended for any remaining portion of a deceased beneficiary's share to be distributed pursuant to sections 4 and 5 of the Minors Trust.

¶ 31 The Moreys cite *Wayman v. Follansbee*, 253 Ill. 602 (1912), for the proposition that:

“ ‘Where property is given to certain persons for their benefit, and in such manner that no other person has or can have any interest in it, they are, in effect, the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary.’ ” *Id.* at 615-16 (quoting *Sears v. Choate*, 15 N.E. 786, 790 (Mass. 1888)).

In the paragraph from which this quote was taken, our supreme court was discussing the “power and duty of the court to decree the termination of [a] trust,” and how “a trust will terminate as soon as the object for which it was established has been accomplished.” (Internal quotation marks omitted.) *Id.* at 615. This has nothing to do with this case. Neither *Wayman* nor any of the other cases cited by the Moreys suggest that because Kyle had the right to withdraw his trust funds at age 21 or age 25, the court should view those funds as having already been withdrawn from the trust and distribute them to his heirs, as if they were Kyle's personal property.

¶ 32 The Moreys argue that, at the very least, all income from Kyle's portion of the Minors Trust, which the trust stated was to be paid to him beginning when he turned 21 years old, had vested with Kyle as of his 21st birthday and should transfer to Kyle's immediate family as his heirs. As noted above, pursuant to Kyle's written instructions to First Midwest shortly before his 21st birthday, Kyle declined to receive his required income distributions. First Midwest may

have improperly failed to discharge this obligation despite following Kyle's explicit instructions, since the Minors Trust makes the income distribution mandatory. Regardless, all income that First Midwest did not disburse to Kyle remained with First Midwest in Kyle's individual trust, and the Minors Trust directs how any funds a deceased beneficiary had not yet received are to be distributed. The Moreys have provided us with no authority, nor are we aware of any, that suggests that a court should pretend that the trustee has made a distribution where no such distribution was made so that an heir or a creditor of that beneficiary would receive money that the beneficiary never got. There is simply no legal support for this argument.

¶ 33 The Moreys' other argument is that, if Kyle's share of the Minors Trust is distributed pursuant to section 4 of the trust, the entirety of those funds should be distributed to Chris because the Ziemans, who had already withdrawn their full shares of the Minors Trust, were no longer beneficiaries of the Minors Trust.

¶ 34 We agree with the Moreys that the Minors Trust created four separate trusts for each of the beneficiaries and that, by withdrawing their full shares of the Minors Trust, the Ziemans effectively terminated their separate trusts. See *Chicago Title & Trust Co. v. Steinitz*, 288 Ill. App. 3d 926, 932-33 (1997) ("A trust can terminate under several circumstances, including *** conveyance by the trustee to or at the direction of the beneficiary or by other terms of the instrument."). However, this does not mean, as the Moreys contend, that the Ziemans lost their rights as contingent beneficiaries under Kyle's separate trust.

¶ 35 The Minors Trust provides that in addition to what right each of the beneficiaries had in their own trusts, they also had contingent beneficiary rights in each other's trusts. There is no language in the Minors Trust that states that *only* beneficiaries whose shares are still held by the trustee are entitled to receive these contingent distributions from a deceased beneficiary's trust. To the contrary, the only condition for the distribution of a deceased beneficiary's share to

another beneficiary is that the other beneficiary is still alive. And even if a receiving beneficiary is not alive, section 5 provides that “the then living descendants of a deceased beneficiary shall take per stirpes the [deceased beneficiary’s share] which the beneficiary would have received if living.”

¶ 36 The Minors Trust specifically contemplates that a named beneficiary may or may not have withdrawn his or her own trust funds by providing that “each portion otherwise distributable to a beneficiary for whom a share of the trust estate is then held hereunder shall be added to that share.” This language further supports the Ziemans’ reading of the trust language in that it recognizes that there could be “beneficiaries” who no longer have a share of the trust estate because they have previously taken their trust proceeds.

¶ 37 The Moreys argue that any rights that the Ziemans had as contingent beneficiaries to Kyle’s trust ended when they terminated their trusts by withdrawing their shares in full. The Moreys cite a series of cases in which courts have recognized that, upon termination of a trust, the beneficiary’s rights are also terminated. See, *e.g.*, *Steinitz*, 288 Ill. App. 3d at 929-33; *Croslow v. Croslow*, 38 Ill. App. 3d 373, 377 (1976); *In re Estate of Coleman*, 28 Cal. Rptr. 3d 282, 287 (Cal. Ct. App. 2005). That does not matter, however, because in addition to their own rights as beneficiaries of their own trusts, the Ziemans are named as contingent beneficiaries of Kyle’s trust. The Minors Trust directs that, if Kyle died with no will and no living descendants, his share of the trust is to be distributed “in equal shares to such of the other beneficiaries of the trust as shall then be living.” As discussed above, the Minors Trust language makes clear that there was no requirement that these persons designated as beneficiaries had not withdrawn all proceeds from their own trusts.

¶ 38 The Moreys also contend that the only way to ascribe a “fair and just meaning” to the terms of the Minors Trust is to find that the Ziemans and Kyle no longer had reciprocal interests

in each other's shares once the Ziemans withdrew their shares. However, when determining the terms of a trust, if the intent is clear through the instrument's language, it will be honored so long as the intention is not against public policy. See *Bank of America v. Carpenter*, 401 Ill. App. 3d 788, 797-99 (2010) ("We find no support for the remainder beneficiaries' claim that [the settlor] actually intended something different from what his will plainly provided.").

¶ 39 The Moreys' final argument is that the circuit court's order should be reversed because "the remaining and unresolved questions concerning prior distribution of Kyle's trust fund proceeds by First Midwest Bank to Jane, Chris and Justin preclude[] summary judgment in favor of [the Ziemans]." The Moreys present this argument without any further explanation, but we presume this is a reference to counts II and III of their counterclaim against First Midwest, which were dismissed and are also a subject of the present appeal. While both lawsuits arise from the same set of general facts, we do not see how resolution of the tort claims brought by the Moreys against First Midwest would affect a court's determination of how Kyle's share of the Minors Trust should be distributed. In any event, as addressed below, we affirm the circuit court's dismissal of those claims.

¶ 40 II. Dismissal of the Moreys' Second Amended Counterclaim

¶ 41 The Moreys also appeal the circuit court's dismissal of their four-count counterclaim against First Midwest. The Moreys contend that, as contingent beneficiaries, they have standing to bring an action for the trustee's breach of its fiduciary duty to Kyle to protect their contingent interests. The Moreys also argue that they have alleged sufficient facts to state claims against First Midwest: two breach of fiduciary duty claims, one conversion claim, and one claim for a cause of action arising out of the wrong of another doctrine.

¶ 42 First Midwest's motion to dismiss the Moreys' second amended counterclaim was brought under section 2-619.1 of the Code of Civil Procedure, which allows a party to file a

motion combining a section 2-619 motion to dismiss with a section 2-615 motion to dismiss. See 735 ILCS 5/2-619.1 (West 2014). A section 2-615 motion to dismiss is a facial challenge that “tests the legal sufficiency of a complaint.” *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. The question raised by such a motion is “whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted.” *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). A court will grant a section 2-615 motion if “it clearly appears that no set of facts could ever be proved that would entitle the plaintiff to recover.” *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110, 115 (1995).

¶ 43 A section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts an affirmative matter that defeats the claim. *Bjork v. O’Meara*, 2013 IL 114044, ¶ 21. “Lack of standing is an ‘affirmative matter’ that is properly raised under section 2-619(a)(9)” (735 ILCS 5/2-619(a)(9) (West 2014)). *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999) (citing *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 494 (1988) (lack of standing is an “affirmative defense” and it is the defendant’s burden to plead and prove the plaintiff’s lack of standing)). For the purposes of ruling on a section 2-619 motion, the court will accept as true “all well-pleaded facts, as well as all reasonable inferences that may arise therefrom,” and will “interpret all pleadings and supporting documents in favor of the nonmoving party.” *Id.* We review a court’s dismissal under either section 2-615 or 2-619 *de novo*. *Patrick Engineering*, 2012 IL 113148, ¶ 31.

¶ 44 Counts I and IV of the Moreys’ second amended counterclaim rest on allegations that First Midwest breached its fiduciary duty to Kyle because of its failure to communicate with and advise him of his right to withdraw funds under the Minors Trust. Count IV alleges that the Moreys are entitled to attorney fees for pursuing the breach of fiduciary duty claim in Count I.

Counts II and III are claims by three of the Moreys who had accounts at First Midwest; those claims are based on First Midwest's withdrawing funds from those accounts after it received conflicting advice on how to distribute Kyle's share of the Minors Trust. The circuit court dismissed counts I and IV of the second amended counterclaim under section 2-619 for lack of standing and counts II and III under section 2-615 for failure to state a claim. We find that the court properly dismissed these claims and agree with the court's reasoning.

¶ 45 The Moreys argue that they have standing to bring this action against First Midwest as “contingent beneficiar[ies]” of the Minors Trust based on their status as “heirs under the state intestacy rules.” The Moreys cite *Giagnorio v. Emmett C. Torkelson Trust*, 292 Ill. App. 3d 318, 323-24 (1997), for the proposition that even a contingent beneficiary whose interest “may not vest in possession” still has standing to protect her potential interest in the trust. We note that unlike *Giagnorio* and the cases cited therein, where that court was concerned with allowing contingent beneficiaries to take legal action to protect trust assets that might one day be theirs (*id.* at 323), this is not a suit for an accounting or against a trustee for mismanagement. More importantly, however, we have affirmed the circuit court's ruling that the terms of the Minors Trust require that Kyle's share be distributed to the other beneficiaries: Lisa, Michael, and Chris. Thus, Kyle's legal heirs do not have even a potential contingent interest in the trust proceeds—they have no interest at all. The Moreys, through their relation to Kyle as his parents and siblings, lack even a “remote and contingent” interest in his share of the Minors Trust (*Burrows v. Palmer*, 5 Ill. 2d 434, 440 (1955)) and do not constitute contingent beneficiaries with any standing to sue the trustee for any breach of its fiduciary duties to Kyle.

¶ 46 The circuit court also found that Chris “has no standing because he lacks any injury in fact,” and the Moreys make no specific argument on appeal about that aspect of the court's ruling. In its order, the court noted that, as a beneficiary under the Minors Trust, Chris was

entitled to a one-third portion of Kyle's share and that this is "the maximum that Chris could hope to receive in this litigation." According to the Moreys' claims, had the breach of fiduciary duty alleged in counts I and IV not occurred, Kyle would have withdrawn his share of the Minors Trust prior to his death and Chris would have received a one-quarter portion of those funds as one of Kyle's heirs. Instead, Chris will receive one-third of the funds as a beneficiary. Therefore, the court was correct that Chris suffered no injury from this alleged breach of fiduciary duty.

¶ 47 Counts II and III are based on allegations that First Midwest, after having deposited one-quarter portions of Kyle's share of the Minors Trust into the accounts of Jane, Chris, and Justin (collectively, the Accountholders), later withdrew those funds when they received conflicting legal advice about how those funds should be distributed. The Accountholders claim that this withdrawal by First Midwest constituted the conversion of those funds (count III) and that First Midwest breached the fiduciary duties it owed to the Accountholders by allowing this conversion to occur (count II). The circuit court dismissed these two counts on the basis that no set of facts existed or could exist that would allow the Accountholders to recover through either cause of action. We agree.

¶ 48 To properly plead a claim of conversion, a plaintiff must set forth facts showing "(1) an unauthorized and wrongful assumption of control, dominion, or ownership by a defendant over a plaintiff's personalty; (2) plaintiff's right in the property; (3) plaintiff's right to the immediate possession of the property; and (4) a demand for possession of the property." *Small v. Sussman*, 306 Ill. App. 3d 639, 647-48 (1999). The Accountholders argue that they met these requirements by pleading that First Midwest lacked authorization to withdraw the funds from their individual accounts, that they had a right to the funds upon being deposited into their accounts, that they had a right to use the funds at the time they were taken, and that they objected to the removal of the funds and demanded their immediate return.

¶ 49 A conversion claim cannot survive where the plaintiff has no immediate or ultimate right in the property. See *Sussman*, 306 Ill. App. 3d at 648. The Accountholders' conversion claim is premised on the argument that once First Midwest initially deposited the funds into their accounts, that conveyed to the Accountholders "a right to the funds in their accounts," including the right to "move[] the funds to a different bank" or "spen[d] the funds as they saw fit." This assertion, however, is undermined by the circuit court's order, which we affirm, that Kyle's share of the Minors Trust should be distributed to the other beneficiaries, not to Kyle's heirs. Accordingly, there is no set of facts that could establish that, at the time the funds were initially deposited or at any other time, the Accountholders had a right in those funds, and their conversion claim was correctly dismissed. See *Mt. Zion*, 169 Ill. 2d at 115.

¶ 50 As the Accountholders' breach of fiduciary duty claim set forth in count II is based on the allegation that First Midwest allowed the conversion of the funds withdrawn from their accounts, the success of the claim similarly requires a finding that the Accountholders had a right to the funds and were injured due to their loss of access to those funds. As we just noted, the circuit court's earlier ruling precludes their ability to present any set of facts that supports such findings. The Accountholders have not alleged, and would not be able to show, that they had any right to keep the funds had First Midwest not withdrawn them when it did. See *Herlehy v. Marie V. Bistersky Trust Dated May 5, 1989*, 407 Ill. App. 3d 878, 897 (2010) (to state a breach of fiduciary duty claim, a plaintiff must show that "the damages would not have occurred absent defendant's conduct"). The circuit court properly dismissed count II.

¶ 51

CONCLUSION

¶ 52 For the foregoing reasons, we affirm the circuit court's order of August 14, 2014, granting partial summary judgment in favor of Lisa Ann Zieman and Michael John Zieman, and against Jane Zieman-Salmon, Kenneth L. Morey, Christopher Morey, and Justin Christian, and

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we affirm the court's order of December 17, 2015, dismissing the second amended counterclaim of Jane Zieman-Salmon, Kenneth L. Morey, Christopher Morey, and Justin Christian against First Midwest Bank.

¶ 53 Affirmed.