

FIRST DIVISION
November 14, 2016

No. 1-16-1054

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 McHale:)	Appeal from the
)	Circuit Court of
TRACY M. MCHALE,)	Cook County
)	
Petitioner-Appellee,)	
)	
and)	No. 13 D5 30015
)	
SHAWN T. MCHALE, deceased, by his)	
Administrator and PALOS FIREFIGHTERS)	
PENSION BOARD OF TRUSTEES,)	Honorable
)	David E. Harasz,
Respondents-Appellants.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 **Held:** We vacate the order granting the petition to vacate the judgment for dissolution of marriage and remand for further proceedings to allow the circuit court to address respondent's argument concerning the timing of adding the pension board as a party. On remand, the circuit court should join decedent's children and appoint a guardian to represent the minors' interests.

¶ 2 The parties were divorced on November 13, 2013 after the circuit court of Cook County entered a judgment for dissolution of marriage. Respondent had been a firefighter for the Palos

Heights fire department and part of the divorce granted petitioner 50% of that pension. However, the benefit would terminate upon either of the parties' death, whichever occurred first. On June 10, 2015, Shawn McHale died unexpectedly before becoming eligible to start collecting his pension. On November 3, 2015, petitioner filed a motion to vacate the judgment for dissolution of marriage so she could collect the pension as the surviving spouse. The Palos Fire Protection Fund Board of Trustees was not added as a party until November 24, 2015. On April 1, 2016, the circuit court, over the objection of the Palos Fire Protection Fund Board of Trustees, granted the motion to vacate. With the dissolution of marriage set aside, petitioner attempted to claim the pension as a surviving spouse. The Palos Fire Protection Fund Board of Trustees appeals the circuit court's ruling vacating the judgment for dissolution.

¶ 3 On appeal, respondent, Palos Fire Protection Fund Board of Trustees, raises several arguments in support of reversing the order of the circuit court, however, we do not address the arguments raised, as a review of the record shows the circuit court never considered the issue of whether the petitioner complied with the requirements of 40 ILCS 5/4-114(g) (West 2014) in making the Board a party to the proceedings. Further, we are concerned by the circuit court's failure to safe guard the interests of the minor children in this proceeding. Accordingly, the order of the circuit court is vacated and this case is remanded for further proceedings consistent with this order.

¶ 4

JURISDICTION

¶ 5 On April 1, 2016, the circuit court entered a final and appealable judgment when it granted petitioner's motion to vacate the judgment for dissolution of marriage. Respondents timely filed a notice of appeal on April 13, 2016. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb.1, 1994); R. 303 (eff. May 30, 2008).

¶ 6

BACKGROUND

¶ 7 On January 3, 2013, petitioner, Tracy M. McHale, filed a petition for dissolution of marriage after 19 years of marriage from decedent, Shawn T. McHale. Both parties had the benefit of counsel and on November 13, 2013, a judgment for dissolution of marriage was entered by the trial court. At the time of the divorce, decedent was employed by the Palos Heights Fire Protection District as a firefighter and was vested with the pension fund. The judgment of dissolution included a Qualified Illinois Domestic Relations Order (hereinafter "QDRO"). The QDRO granted petitioner 50% of decedent's retirement pension benefits, which terminated upon either the death of either of them, whichever occurred first.

¶ 8 On June 10, 2015, decedent died unexpectedly of a heart attack. At the time of his death, decedent was two years shy of being able to begin collecting his pension. On November 3, 2015, petitioner filed a motion to vacate the judgment for dissolution of marriage entered November 13, 2013. Petitioner did not attempt to add the Palos Fire Protection Fund Board of Trustees (hereinafter "the Board") as a party at this time. On November 24, 2015, petitioner filed a motion to add the Board as a party to the proceeding. This motion was granted the same day. The Board was served with notice of the motion to vacate on December 15, 2015.

¶ 9 On December 7, 2015, because decedent was not married when he died, his contributions to the Palos Fire Protection Fund, in the amount of \$59,617.14, were refunded to the executor of his estate. In addition, two survivor benefit checks each in the amount of \$12,332.52 were issued to decedent's minor children, Lyndsey and Hanna. These three checks were received by petitioner. On or about December 12, 2015, the three checks refunding decedent's contributions to the pension fund were cashed.

¶ 10 On April 1, 2016, a hearing was held on petitioner's motion to vacate. After the short hearing, the circuit court granted the motion on the grounds that it would be unconscionable and inequitable not to grant it. The Board timely filed this Notice of Appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, respondents argue the circuit court erred in setting aside the dissolution of marriage. However, we do not address any of the issues raised as a review of the record shows the circuit court never considered whether the Board had properly been made a party to the proceedings pursuant to Section 4-114(g). This part of the pension law states in relevant part:

If a judgment of dissolution of marriage between a firefighter and spouse is judicially set aside subsequent to the firefighter's death, the surviving spouse is eligible for the pension provided in paragraph (a) only if the judicial proceedings are filed within 2 years after the date of the dissolution of marriage and within one year after the firefighter's death and the board is made a party to the proceedings.

40 ILCS 5/4-114(g) (West 2014). While respondent did raise this issue in the pleadings below, the circuit never addressed the issue. In vacating the dissolution of marriage and QDRO, the court simply found that granting the petition to vacate was the equitable thing to do without addressing this issue. The trial court should have addressed this preliminary issue before moving on to the merits of the petition.

¶ 13 We are also concerned by the circuit court's failure to join the decedent's children and ensure their interests in this matter were adequately protected. Under Illinois law, a party is considered necessary or indispensable for any of three reasons: (1) to protect an interest which the absentee has in the subject matter of the controversy which would be materially affected by a judgment entered in his absence; (2) to reach a decision which will protect the interests or those who are before the court; or (3) to enable the court to make a complete determination of the controversy. *Safeco Ins. Co. of Illinois v. Treinis*, 238 Ill. App. 3d 541, 546 (1992) citing *Lain v. John Hancock Mutual Life Insurance Co.*, 79 Ill. App. 3d 264, 268-69 (1979). Further, an order

entered without jurisdiction over a necessary party will be void. *Zurich Insurance Co. v. Baxter International, Inc.*, 275 Ill. App. 30, 37 (1995). The failure to join a necessary party may be raised at any time; by the parties or by the trial court or by the appellate court *sua sponte*. *Lah v. Chicago Title Land Trust Co.*, 379 Ill. App. 3d 933, 940 (2008).

¶ 14 After the section 2-1401 petition was filed but before the circuit court ruled on it, the Board refunded the decedent's pension contributions and issued two survivor benefit checks in the amounts of \$12,332.52 to decedent's minor children. If the petition were to be granted (which it ultimately was) these proceeds would have to be returned to the Board. However, without them as parties, the court cannot require them to disgorge the funds. This made the minor children necessary parties to this litigation. Further, a review of the record demonstrates the trial court failed to consider what affect vacating the divorce decree would have on the estate and decedent's children's claims to it. If the divorce decree is vacated, petitioner, as the surviving spouse, would also have a claim on the estate to the determinant of the decedent's children. Accordingly, on remand, the circuit court should join the decedent's children and appoint a guardian to represent the minors to ensure their interests are adequately protected.

¶ 15

CONCLUSION

¶ 16 Based on the above, we vacate the order granting the petition to vacate the judgment for dissolution of marriage. On remand, the circuit court shall join the decedent's children, appoint a guardian to ensure the minors' interest are adequately protected and make an express finding regarding the petitioner's compliance with 40 ILCS 5/4-114(g) (West 2014).

¶ 17 Vacated and remanded with directions.