

FIFTH DIVISION
February 1, 2013

No. 1-12-0197

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

JOSEPHINE MANDZIAK, Special Administrator of the)	Appeal from the
Estate of DANIEL W. MANDZIAK, Deceased,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 08 L 9138
)	
ALZA CORPORATION; JANSSEN)	
PHARMACEUTICAL PRODUCTS, L.P.; JANSSEN)	
L.P.; JANSSEN PHARMACEUTICAL, INC.,)	
ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS,)	
INC.,)	
Defendants - Appellees.)	
)	
)	
(Catherine Moore, Mother and Guardian of the minor,)	Honorable
Candace Mandziak,)	Eileen M. Brewer,
Appellant.))	Judge Presiding.

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

ORDER

¶ 1 *HELD:* Appellant had no standing to bring appeal because she was not a party to the underlying wrongful death case; appointment of special administrator was not void; appellant waived rights by failing to intervene in underlying case and not contesting settlement; attorney fees properly awarded.

¶ 2 This appeal arises as a result of a December 20, 2011, order by the circuit court which denied a motion by the guardian of minor Candace Mandziak, Catherine Moore, to have Josephine Mandziak removed as special administrator in a wrongful death action filed on behalf of the minor and her deceased father. The guardian also contested the award of attorneys' fees to the administrator's attorneys. For the reasons that follow, we affirm in part and dismiss the appeal in part.

¶ 3 BACKGROUND

¶ 4 Decedent, Daniel Mandziak, died intestate on August 20, 2006, allegedly from the toxic effects of fentanyl and cocaine intoxication. He had been using a fentanyl pain patch designed, manufactured and distributed by defendants, Alza Corporation, Janssen Pharmaceutical Products, L.P., Janssen, L.P. and Ortho-McNeal-Janssen Pharmaceuticals, Inc. Decedent had one child, Candace Mandziak, born on April 20, 2000, to he and his former wife, Catherine Moore. Decedent and Catherine were divorced prior to his death.¹ Additionally, decedent's mother, Josephine Mandziak (plaintiff) and his sister, Sophie Wisch, survived him.

¹The record does not indicate the date of the divorce or the number of years that they were divorced.

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¶ 5 On September 20, 2006, pursuant to a petition for special administrator, Catherine was named as special administrator for decedent's estate to substitute as plaintiff in a lawsuit connected with a claim for personal injuries decedent suffered on August 25, 2004, while performing renovation work (case number 04 L 13082). Upon settlement of the lawsuit, an estate was opened on behalf of the minor in LaSalle County (case number 07 P 281), where both Catherine and the minor reside. Catherine was thereafter appointed guardian of the minor's estate and the settlement funds were distributed to the minor's estate.

¶ 6 On August 19, 2008, Josephine filed a wrongful death suit against the pain patch manufacturers as mother and next friend of decedent and next friend of the minor. Sophie also filed in her own behalf. Josephine also filed a motion to have herself appointed as the special administrator which the trial court granted. Prior to the filing of the case, Sophie contacted Catherine to determine whether she intended to pursue a lawsuit against the pain patch manufacturers. Sophie testified that Catherine indicated to her during their conversation that her attorney advised her that there was no case and that she did not intend to file suit. During the pendency of the case, Catherine was subpoenaed to give a deposition, which she discussed with her attorney² prior to doing so. Catherine subsequently indicated that she did not wish to be part of the case with Josephine and Sophie because they did not get along.

¶ 7 A settlement agreement was subsequently negotiated on behalf of decedent's heirs by the parties to the lawsuit, and a confidential settlement agreement, indemnity agreement and release

²The attorney is the same attorney who initially advised Catherine and who has represented Catherine in all subsequent proceedings related to this matter, including this appeal.

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were sent to Catherine. Josephine's attorneys requested that Catherine execute the documents on behalf of the minor as the "natural and appointed Guardian for Candace Mandziak, Daniel W. Mandziak's minor daughter." Catherine did not execute the documents. On November 29, 2011, Josephine and Sophie, through counsel, filed a motion to approve the settlement of the wrongful death suit and to determine attorneys' fees, costs, expenses and net distributable amount. Barry Weiss, Catherine's attorney, appeared at the hearing and challenged the attorneys' fees and costs.

¶ 8 On December 9, 2011, Catherine, through her attorney, Weiss, filed a motion to remove Josephine as special administrator and for other relief. Proceedings were held on December 20, 2011, in Cook County, where Catherine alleged that Josephine was improperly appointed as special administrator and that the appointment was void. Catherine further argued that all of the proceeds should go to the minor and that Josephine's attorneys were not entitled to fees and costs.

¶ 9 Conversely, Josephine argued, through her attorneys, that she was properly named and Catherine had knowledge of the case, evidenced by her appearance at a deposition in May 2011. Josephine also contended that Catherine waived objection to her appointment as special administrator.

¶ 10 On December 20, 2011, the trial court denied Catherine's motion, finding that Catherine had notice of the case and Josephine's status as the special administrator, and that she waived any objection. The trial court then approved the settlement and attorneys' fees. Catherine filed this timely appeal of the trial court's denial of her motion to remove Josephine as special administrator and for the grant of attorneys' fees to Josephine's attorneys. Catherine does not

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appeal approval of the settlement agreement.

¶ 11 ANALYSIS

¶ 12 On appeal, Catherine contends that: 1) she has standing to object to Josephine's appointment as special administrator for the wrongful death suit and to the "settlement, attorney fees and costs;" 2) Josephine's appointment as special administrator violated the wrongful death act and was void; and 3) the attorneys employed by Josephine and Sophie were not entitled to attorney fees or costs from the settlement proceeds.

¶ 13 Standing

¶ 14 As a threshold matter, we examine the issue of standing. Catherine filed the appeal in the instant case in her capacity as mother and guardian of the Estate of Candace Mandziak, a minor. Catherine contends that she has standing to object to both Josephine's appointment as special administrator and to the attorneys' fees coming from the proceeds of the settlement. Specifically, she contends that "it was incumbent upon [her] to protect [the minor]'s best interest and absent a guardian *ad litem* appointed by the court, to bring to the court's attention the lack of capacity of Josephine to serve as special administrator." She notes that although her lack of standing was included as a basis for the trial court's decision in the certified bystander's report, it was not part of the order entered on December 20, 2011. As previously stated, Catherine is not objecting to the settlement agreement itself.

¶ 15 Generally, the question of standing is reviewed *de novo*. *In re Guardianship of K.R.J.*, 405 Ill. App. 3d 527, 535 (2010). There was no probate estate opened for decedent, and the only

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asset of the decedent's estate was the wrongful death action, thus a special administrator could be appointed to bring the action. 740 ILCS 180/2.1 (West 2010). A wrongful death cause of action must be brought by, and in the name of, the representative or administrator of the decedent's estate, and " 'it is this administrator who possesses the sole right of action or control over the suit.' " *Cushing v. Greyhound Lines, Inc.*, 2012 IL App (1st) 100768, ¶ 92, (quoting *Will v. Northwestern University*, 378 Ill. App. 3d 280, 289 (2007)). There is no requirement that a guardian of a minor child intervene in such action. *Harnetiaux' Estate v. Hartzell*, 91 Ill. App. 2d 222, 227 (1968). The right to institute a wrongful death action and to settle the same is with the personal representative of the deceased and not with an heir. *Hartzell*, 91 Ill. App. 2d at 227. Wrongful death and survival actions do " 'not create an individual right in a beneficiary to bring suit.' " *Will*, 378 Ill. App. 3d at 289-90, (quoting *Rodgers v. Consolidated R.R. Corp.*, 136 Ill. App. 3d 191, 193 (1985)). Thus, if a beneficiary is not a party to the underlying suit, then he or she cannot be a party to the appeal. *Will*, 378 Ill. App. 3d at 290.

¶ 16 However, under section 2-408(a)(2) of the Code of Civil Procedure (735 ILCS 5/2-408(a)(2) (West 2010)), a person can intervene in an action upon timely application "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action." In order to intervene, an applicant must "present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he or she proposes to file." 735 ILCS 5/2-408(e) (West 2010).

¶ 17 Here, the record does not indicate, and Catherine does not argue, that she sought leave to

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intervene in the wrongful death action on behalf of the minor at any time prior to settlement, although the right to intervene was available. See *Szymakowski v. Szymakowski*, 185 Ill. App. 3d 746, 747 (1989) (decedent's ex-wives, acting in their capacity as guardians of the estate of their minor children, were granted leave to intervene in wrongful death suit filed by decedent's parents). The record only shows that after the settlement agreement was reached, Catherine, through her attorney, filed various motions contesting the appointment of Josephine as special administrator and the attorneys' fees to Josephine's attorneys. Catherine has cited no case, nor have we found one, which grants standing for appeal purposes to a party who was not a party to the underlying case, even when the party is the guardian of the minor beneficiary in the underlying case. Had Catherine sought leave to intervene as guardian of the minor, she would have been a party to the underlying action and consequently had standing on appeal. We agree with Josephine that Catherine has no standing to bring this appeal and that her appeal should be dismissed.

¶ 18 Appointment of Special Administrator

¶ 19 Even if we were to find that Catherine had standing to bring this appeal, we find no merit to her contention that the appointment of Josephine as special administrator is void and violates the Wrongful Death Act.

¶ 20 A judgment is void (as opposed to voidable) only if the court that entered it lacked jurisdiction. *Cushing*, 2012 IL App (1st) 100768, ¶ 103. A void order is a complete nullity from its inception and has no legal effect. *Cushing*, 2012 IL App (1st) 100768, ¶ 103.

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¶ 21 This issue involves the interpretation of the Wrongful Death Act (Act) (740 ILCS 180/1 *et al.* (West 2010)). The interpretation of a statute is a legal issue and our review is *de novo*. *Cushing*, 2012 IL App (1st) 100768, ¶ 96. Section 2.1 of the Act, in regards to the appointment of a special administrator, states, in pertinent part:

"In the event that the only asset of the deceased estate is a cause of action arising under this Act, and no petition for letters of office for his or her estate has been filed, the court, upon motion of any person who would be entitled to a recovery under this Act, and after such notice to the party's heirs or legatees as the court directs, * * * may appoint a special administrator for the deceased party for the purposes of prosecuting or defending the action." 740 ILCS 180/2.1 (West 2010).

¶ 22 The Act is the sole source for determining who may sue and under what conditions. *Mio v. Alberto-Culver Co.*, 306 Ill. App. 3d 822, 826 (1999). The special administrator, as personal representative, possesses the sole right to prosecute the action. *Mio*, 306 Ill. App. 3d at 826. Determining who is the proper personal representative requires a determination of who is entitled to recover under the Act. *Mio*, 306 Ill. App. 3d at 826. Recovery is limited to those persons delineated in the statute (*Mio*, 306 Ill. App. 3d at 826); "the surviving spouse and next of kin of such deceased person" (740 ILCS 180/2 (West 2010)).

¶ 23 In this case, the only asset of the decedent's estate was the wrongful death action, and the

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record does not indicate that letters of office had been issued. A special administrator of the estate was eligible to be appointed.

¶ 24 Catherine first argues that she, as the natural guardian of the minor, did not receive notice of Josephine's appointment as required by section 2.1 of the Act, and that renders Josephine's appointment as special administrator void. However, the Act does not set a time limit on when notice should occur, but instead indicates that notice should be sent as the court directs. 740 ILCS 180/2.1 (West 2010); *Pruitt v. Jockisch*, 228 Ill. App. 3d 295, 297 (1992). Although the record does not indicate that Catherine ever received formal notice from the court regarding Josephine's appointment, the record is clear that Catherine had actual notice of the appointment and that there was a wrongful death action pending, yet she filed no petition to intervene nor any petition for appointment of someone other than Josephine to act as next friend of the minor. The record further indicates that Catherine had the benefit of counsel at all relevant times. Instead, she waited until the settlement agreement was fully negotiated and subject to approval by the trial court before first attempting to object to Josephine's appointment. Catherine does not cite, nor have we found, any authority for the premise that failure to give such notice renders the appointment of a special administrator void *ab initio*. See *Sepeda v. LaBarre*, 303 Ill. App. 3d 595, 599 (1999); *Clay v. Huntley*, 338 Ill. App. 3d 68, 75 (2003).

¶ 25 Catherine further contends that as mother and natural guardian of the minor, she was the only person who could have moved for the appointment of a special administrator because the minor was the only next of kin entitled to recovery under the Act.

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¶ 26 Section 2-1 of the Probate Act (755 ILCS 5/2-1(West 2010)) sets forth the rules of descent and distribution for intestacy, and indicates that if there is no surviving spouse but a descendant of the decedent, the entire estate goes to the decedent's descendants *per stirpes*. 755 ILCS 5/2-1(b) (West 2010). As such, Catherine is correct that the minor is the next of kin to the exclusion of all others. Accordingly, the right to maintain a wrongful death action belonged to the minor as decedent's descendant.

¶ 27 As indicated previously, it is the administrator of the decedent's estate who must bring a wrongful death action, and it is the administrator and not the heir who has both the right to institute and the right to settle a wrongful death action. *Cushing*, 2012 IL App (1st) 100768, ¶ 92. Here, the record shows that Josephine initiated this suit partially in her capacity as next friend of the minor, thus the wrongful death suit was brought by the minor, who was decedent's next of kin. See (*Nagel v. Inman*, 402 Ill. App. 3d 766, 770 (2010) (a wrongful-death action must be filed by a representative of the decedent on behalf of the estate). While Catherine argues that she, as the minor's guardian, had a superior right to choose the special administrator of the estate, the record indicates, as discussed previously, that Catherine did not seek to intervene in the proceedings initiated by Josephine, even though she had notice.

¶ 28 Moreover, Catherine has not proven any disqualification of Josephine or any conflict of interest sufficient to disqualify Josephine. *In the Matter of the Estate of Morrissey*, 38 Ill. App. 3d 981, 982 (1976). There is no evidence that any portion of the settlement agreement was for Josephine's benefit. Moreover, we note that although Catherine said she did not want to be a part

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of the case with Josephine or Sophie because they did not get along, Catherine never pursued her own cause of action on the minor's behalf during the almost five-year period that elapsed between the decedent's death and the time the settlement agreement was reached. In fact, Catherine never did anything to enforce the minor's rights in decedent's estate under the wrongful death action at any time.

¶ 29 *Morrissey*, although decided under an earlier version of the Probate Act, was factually similar to the case at bar. In affirming the appointment of decedent's mother as special administrator, this court found that there was no evidence that any hostility existed between the children (beneficiaries of the wrongful death action) and their grandmother (the administrator) that would preclude her from properly acting on the minors' behalf, even though they were the only beneficiaries under the wrongful death action and the grandmother and mother did not get along. *Morrissey*, 38 Ill. App. 3d at 983. The same result is warranted here.

¶ 30 In the case at bar, Josephine was appointed the special administrator of decedent's estate. In her capacity as the administrator of decedent's estate, Josephine filed a wrongful death action on behalf of the decedent's estate and as the next friend of the minor. Josephine, through the attorneys that she hired to prosecute the case, successfully negotiated a settlement on the minor's behalf. We again note that Catherine never objected to Josephine's appointment as the special administrator and makes no objection to the settlement agreement negotiated by Josephine and her attorneys. Catherine, however, seeks to be appointed as special administrator at this stage of the proceedings, yet fails to indicate how Josephine's representation as special administrator

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adversely affected the interests of the minor when she is not objecting to the settlement agreement. See *Szymakowski*, 185 Ill. App. 3d at 750.

¶ 31 We conclude that by accepting the settlement agreement, Catherine implicitly waives any argument that the minor's interests were not properly handled by Josephine, despite their hostility towards one another and despite any rights Catherine had as the minor's mother and guardian. See *Kubian v. Alexian Brothers Medical Center*, 272 Ill. App. 3d 246, 251 (1995) (plaintiff failed to establish that she should have been appointed special administrator where she slept on her rights). At best, any error in appointing Josephine was harmless as the minor's interests were not prejudiced by Josephine's appointment as special administrator.

¶ 32 As such, we agree with the trial court that Catherine waived any right to object to Josephine's appointment as special administrator of the decedent's estate on behalf of the minor. This court may affirm the trial court's judgment, regardless of the trial court's reasoning, on any basis found in the record. *Central Illinois Electrical Services, L.L.C. v. Slepian*, 358 Ill. App. 3d 545, 550 (2005).

¶ 33 Attorney Fees

¶ 34 Catherine contends that Josephine's attorneys are not entitled to fees or costs because Josephine's appointment as special administrator is void, and that the attorneys were in fact, volunteers. However, we have already concluded that Josephine's appointment as special administrator was not void. It follows then that the attorneys hired by Josephine are entitled to their fees for the work in connection with successfully negotiating the settlement on behalf of the

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minor. Quite simply, if the attorneys had done no work, there would be no settlement for the minor, especially given the evidence that Catherine was determined to follow her counsel's advice not to proceed with a wrongful death action because there was no case. A trial court's exercise of discretion in determining reasonable attorney fees is not reversed absent an abuse of discretion. *Pietrzyk v. Oak Lawn Pavilion, Inc.*, 329 Ill. App. 3d 1043, 1046 (2002). We conclude that the trial court did not abuse its discretion in awarding attorney fees to the attorneys hired by Josephine to prosecute the wrongful death action on the minor's behalf.

¶ 35 CONCLUSION

¶ 36 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed and the appeal dismissed.

¶ 37 Affirmed and appeal dismissed.