THIRD DIVISION
June 29, 2018

No. 1-17-1936

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

In re ESTATE OF SHIRLEY BOWLER, Deceased	)	Appeal from the
	)	Circuit Court of
(CHERYL B. SCHRAGER and JOY E. SHELDON,	)	Cook County.
	)	
Petitioners-Appellants,	)	
	)	
v.	)	No. 15 P 4918
	)	
ERIN P. BOWLER and DANIEL M. BOWLER,	)	
Supervised Co-executors,	)	Honorable
	)	Daniel B. Malone,
Respondents-Appellees).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County denying petitioners' motion to disqualify counsel and affirming respondents' motion to dismiss is affirmed; petitioners have not shown any current member of respondents' counsel was likely to be a necessary witness or that respondents' counsel otherwise had a conflict of interest; petitioners forfeited their arguments contesting the motion to dismiss by not first raising their objection with the trial court; petitioners' will contest is moot because the estate is insolvent and petitioners cannot obtain any relief by setting aside decedent's will.

¶ 2 Petitioners Cheryl Schrager and Joy Sheldon filed a petition to probate the will of their deceased mother, Shirley Bowler. They subsequently filed a petition to contest the will.

Decedent's will named respondents, Erin Bowler and Daniel Bowler, as executors of her estate. Respondents filed their answer to petitioners' will contest. Over a year after decedent passed away, petitioners filed their petition to contest decedent's trust. Respondents filed a motion to dismiss petitioners' will and trust contests, arguing the trust contest was filed outside the applicable statute of limitations and the will contest was moot because the estate is insolvent. Petitioners filed a motion to disqualify respondents' counsel, arguing counsel was conflicted because petitioners were also beneficiaries of the estate. The trial court heard arguments on the matters and issued an order deny petitioners' motion to disqualify counsel, and granting respondents' motion to dismiss petitioners' will and trust contests. Petitioners filed a motion for the trial court to reconsider its judgment. The trial court held a hearing on the motion to reconsider and denied the motion. Petitioners timely filed their appeal. For the reasons that follow we affirm the judgment of the trial court.

¶ 3 BACKGROUND

¶ 4 Shirley Bowler died, testate, on July 11, 2015. Decedent's will, dated September 25, 2009, nominated respondents as co-executors. On August 5, 2015, Cheryl Schrager, one of the petitioners, filed a petition for probate of decedent's will. On August 26, 2015, petitioners filed a petition to contest the will, and filed an amended petition to contest the will on December 14, 2015. Decedent's will was admitted to probate on October 5, 2015. On October 13, 2015, respondents filed their answer to petitioners' contest of the will.

¶ 5 Respondents filed an inventory of the estate on November 17, 2015. No objection to the inventory was filed. According to the inventory, the estate's assets consisted of a checking account and savings account collectively worth $9,792, and other tangible personal property. Decedent devised her "household effects, furniture and furnishings, automobile(s), jewelry,

china, crystal, antiques, artwork, collections, to" respondents and five of her other children, "to be divided in shares of substantially equal value as they agree." Because the will prioritized the payment of funeral expenses from liquid assets, and the funeral expenses totaled $21,966.81, the estate had no remaining assets after disbursing its balance in payment of funeral expenses.

¶ 6 On September 28, 2016, petitioners filed a petition to contest decedent's trust. On October 31, 2016, respondents filed a motion to dismiss the will contest and trust contest. Respondents argued the will contest was moot because the estate contained no assets after paying funeral expenses, and that the estate had to pay the funeral expenses first under the Probate Act. 755 ILCS 5/18-10 (West 2016). Respondents argued that because there were no assets to distribute to anyone after payment of the funeral expenses, the court could not provide any effective relief to anyone and the issue of whether the will was valid was therefore moot.

¶ 7 Respondents also argued petitioners' trust contest should be dismissed because it was filed after expiration of the applicable six-month statute of limitations to contest a trust. Under section 13-223 of the Code of Civil Procedure:

> "An action to set aside or contest the validity of a revocable *inter vivos* trust agreement or declaration of trust to which a legacy is provided by the settlor's will which is admitted to probate, shall be commenced within and not after the time to contest the validity of a will as provided in the Probate Act of 1975 as amended." 735 ILCS 5/13-223 (West 2016).

The Probate Act provides that:

> "Within 6 months after the admission to probate of a domestic will *** any interested person may file a petition in the proceeding for the administration of the testator's estate or, if no proceeding is pending, in the court in which the will

> was admitted to probate, to contest the validity of the will." 755 ILCS 5/8-1 (a) (West 2016).

¶ 8 Petitioners, in their response to respondents' motion to dismiss, made two arguments: 1) that respondents' motion was "procedurally defective and cannot be heard" because the motion to dismiss did not indicate whether it was brought under section 2-615 or 2-619, and 2) that the will contest is not moot, alleging the only reason the estate was insolvent was because assets were improperly dissipated during decedent's lifetime.

¶ 9 On November 17, 2016, petitioners filed a motion to disqualify counsel, arguing respondents' counsel (Quarles & Brady, LLP) were present for the will signing and, as witnesses to the will who could be called to testify in this case, should be disqualified under the advocate-witness rule. See Ill. R. Prof'l. Conduct (2010) R. 3.7 (eff. Jan. 1, 2010). A retired attorney, Ruth Pivar, who was employed by Quarles & Brady from 2013-2014, drafted decedent's 2009 will and notarized the signatures of the witnesses while she was employed at a different law firm.

¶ 10 Petitioners also argued respondents' counsel had a conflict of interest under Rule 1.7 (a) (2), because the accounting submitted by respondents indicated the firm had an unpaid legal bill in the amount of $1,419. Petitioners argued the attorney fees led to the depletion of the estate, and therefore the conduct of the attorneys was at issue and they had a personal interest and conflict under Rule 1.7 (a) (2). Ill. R. Prof'l. Conduct (2010) R. 1.7 (a) (eff. Jan. 1, 2010).

¶ 11 The trial court held a hearing on April 10, 2017, where it heard arguments on respondents' motion to dismiss the will and trust contests and petitioners' motion to disqualify respondents' counsel. The trial court construed respondents' motion to dismiss as a section 2-619 motion because it raised an affirmative matter that defeated the claim. The court dismissed the will contest as moot because the estate is insolvent, dismissed the trust contest because it was

filed after the expiration of the applicable statute of limitations, and denied the motion to disqualify counsel finding no conflict of interest existed because petitioners are not respondents' counsel's clients.

¶ 12 The trial court denied petitioners' motion to disqualify respondents' counsel, stating petitioners' allegations were too vague and unspecified to justify disqualification, relying on *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 178 (1997). The trial court found "petitioners offered vague allegations that [respondents' counsel] obtained confidential information relevant to the current litigation." Petitioners also alleged respondents' counsel's fees depleted the assets in the estate. The court found petitioners only raised "generalized allegations [that] are insufficient to meet petitioners' burden of demonstrating a substantial relationship between the current and former representation *** to justify the drastic step of disqualifying the co-executors' chosen counsel."

¶ 13 The trial court granted respondents' motion to dismiss petitioners' will contest as moot because the estate was insolvent after paying prioritized expenses. The trial court found the estate was insolvent because the Probate Act required the payment of funeral expenses, and the estate had no remaining assets after the payment of funeral expenses. The court found payment of the funeral expenses from the estate was reasonable and prioritized under the Probate Act. See 755 ILCS 5/18-10 (West 2016); 755 ILCS 5/18-13 (West 2016). Therefore, the court concluded the will challenge was moot because there were no remaining assets to reach. "That's based on an inventory that was attached showing the checking account at the time that Ms. Bowler passed away." Respondents submitted with their motion to dismiss a "Verified First and Final Account" of decedent's estate, and supported this with a certification that under penalty of perjury their statements are true. The account stated at the time of her death, decedent had a

checking account and savings account collectively worth $9,792. The funeral expenses cost the estate $21,966.81, tax preparation cost $375, a final salary to decedent's caretaker cost $6,200, and the outstanding legal fees to respondents' counsel incurred prior to decedent's death costing $1,419. The court relied on the Probate Act, *Estate of Grigg*, 189 Ill. App. 3d 5 (1989), and *Gillette v. Norton*, 149 Ill. App. 3d 404 (1986) to reach its determination that funeral expenses are prioritized claims that must be paid from the estate, and that the estate will be insolvent after paying the funeral expenses. The court dismissed petitioners' trust contest because it was not timely filed. The court found the trust contest was time-barred by the Probate Act. 755 ILCS 5/8-1(f) (West 2016).

¶ 14 Petitioners filed a motion to reconsider the dismissal of their will contest and the denial of their motion to disqualify counsel. The trial court denied the motion to reconsider after a hearing on July 20, 2017. Petitioners timely filed this appeal.

¶ 15 We note the notice of appeal states petitioners appeal from the order granting respondents' motion to dismiss petitioners' trust contest for failure to file within the applicable statute of limitations. However, petitioners did not raise any argument in their briefs alleging the dismissal of the trust contest was error. Therefore, they have forfeited appellate review of the issue. See *Dunn v. Baltimore & Ohio R. Co.*, 127 Ill. 2d 350, 372 (1989).

¶ 16 ANALYSIS

¶ 17 In this appeal appellants argue the trial court abused its discretion denying petitioners' motion to disqualify counsel and erroneously granted respondents' motion to dismiss petitioners' will contest. Petitioners argue respondents' counsel should have been disqualified because of a conflict of interest due to their owing a duty to petitioners. They claim the motion to dismiss the will contest should not have been granted because the motion was not properly supported by an

affidavit conforming to Rule 191.

¶ 18 Because this is an appeal from a dismissal of a will contest, the only issue is whether the will admitted in probate is decedent's will or if the will should be set aside.

> "The single issue in a will contest is whether the document produced is the will of the testator. The object of a will contest proceeding is not to secure a personal judgment against an individual defendant. Rather, a will contest is a *quasi in rem* proceeding against the will itself and seeks to set the will aside." *In re Estate of Ellis*, 236 Ill. 2d 45, 51 (2009).

Accordingly, the issues we will consider in this appeal are whether the court erred when it denied the motion to disqualify counsel and whether the court erred when it dismissed the will contest.

¶ 19 Shortly after respondents filed their motion to dismiss petitioners' will contest, petitioners filed a motion to disqualify respondents' counsel. Accordingly, prior to our resolution of the dismissal of the will contest, we first consider whether the court erred when it denied the motion to disqualify counsel.

¶ 20 Motion for Disqualification of Counsel

¶ 21 Whether counsel should be disqualified is within the sound discretion of the trial court, and we review for an abuse of discretion. *Schwartz*, 177 Ill. 2d at 176. We will only find a trial court abused its discretion when its "ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt the court's view." *People ex rel. Madigan v. Petco Petroleum Corp.*, 363 Ill. App. 3d 613, 634 (2006).

¶ 22 Petitioners argue the trial court erred denying their motion to disqualify respondents' counsel. "Attorney disqualification is a drastic measure because it destroys the attorney-client relationship by prohibiting a party from representation by counsel of his or her choosing.

[Citation.] Thus, caution must be exercised to guard against motions to disqualify being used as tools for harassment." *Schwartz*, 177 Ill. 2d at 178.

¶ 23 On appeal, petitioners claim respondents' counsel should be disqualified due to a conflict of interest without specifying which rule of professional conduct required disqualification, with the exception of citing Rule 1.7. We will consider the allegations and the Rules which apply to those allegations. Plaintiffs argue Respondents attorneys should be disqualified: 1) under Rule 3.7 of the Illinois Rules of Professional Conduct, the advocate-witness rule, because of the attorney who drafted decedent's 2009 will and trust and notarized the signatures of the witnesses to the will, and an attorney supported respondents' motion to dismiss the will contest with testimony concerning privileged knowledge of the estate (Ill. R. Prof'l. Conduct (2010) R. 3.7 (eff. Jan. 1, 2010)); 2) under Rule 1.7, the rule prohibiting concurrent conflicts of interest, because respondents' attorneys received fees from the estate, which depleted the estate and put respondents' counsel's conduct at issue (Ill. R. Prof'l. Conduct (2010) R. 1.7 (a) (eff. Jan. 1, 2010)); and 3) under Rule 1.9 prohibiting representation of persons with interests materially adverse to former clients rule because one of respondents' attorneys acquired privileged information representing decedent (Ill. R. Prof'l. Conduct (2010) R. 1.9 (eff. Jan. 1, 2010)).

¶ 24 I. Disqualification Under the Advocate-Witness Rule

¶ 25 Petitioners claim decedent was represented by Quarles & Brady during her lifetime and that her will was "witnessed by at least one present member of Quarles." Petitioners contend respondents' counsel's representation of decedent created a conflict of interest. We note an attorney who worked for Quarles & Brady from 2013-2014, Ruth Pivar, drafted decedent's 2009 will, although this attorney was then employed by a different law firm. That attorney no longer worked for Quarles & Brady when decedent passed away.

¶ 26 Rule 3.7 provides an attorney should be disqualified if they serve as a witness while they are acting as an advocate in the same proceedings.

> "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> > (1) the testimony relates to an uncontested issue;
> >
> > (2) the testimony relates to the nature and value of legal services rendered in the case; or
> >
> > (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Ill. R. Prof'l. Conduct (2010) R. 3.7 (eff. Jan. 1, 2010).

In this case, Pivar allegedly drafted the will and was present at the time it was signed. Therefore, Pivar may be called as a witness in the will contest. Petitioners contend attorney Pivar's alleged conflict of interest should be imputed to the firm.

¶ 27 Petitioners argue attorney Pivar's former representation of decedent means she would likely be a necessary witness and this should disqualify Quarles & Brady as respondents' counsel regardless of whether Pivar is retired. Petitioners also contend an attorney working as counsel for the estate, Michele Malis, witnessed decedent signing her will. We find the record refutes this assertion. Neither of the two witnesses to the will was attorney Malis, and the signatures of the witnesses were notarized by Pivar.

¶ 28 We find the trial court properly denied the motion to disqualify counsel under the advocate-witness rule at this point of the litigation because an attorney who is a witness may

represent a party in pretrial proceedings. Rule 3.7 serves to protect the trier of fact from being confused or misled by an attorney acting both as an advocate and as a witness. "Permitting an advocate in a matter to testify as a witness in that matter may unfairly prejudice the case of his or her client." *Weil, Freiburg & Thomas, P.C. v. Sara Lee Corp.*, 218 Ill. App. 3d 383, 395 (1991).

> "The most important consideration is that the attorney-witness may not be a fully objective witness, or may be perceived by the trier of distorting the truth for the sake of his client. *** The danger also exists that the trier may confuse the roles of the attorney as witness and attorney as advocate. If the trier, especially a jury, grants undue weight to the attorney's testimony, the opponent of the attorney witness may be unfairly disadvantaged. An attorney-witness will also be in a position to vouch for his own credibility in summing up to the jury." *Jones v. City of Chicago*, 610 F. Supp. 350, 357 (N.D. Ill. 1984) (Internal citations omitted.).

Petitioners have not shown Pivar acted as an advocate or participated in the present proceedings.

¶ 29 However, petitioners allege any disqualification of Pivar be imputed to the entire firm and the entire firm be disqualified. We disagree. Rule 3.7 specifically allows a firm to continue to represent a client if another lawyer in that firm testifies unless there is another disqualification under Rules 1.7 or 1.9. "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Ill. R. Prof'l. Conduct (2010) R. 3.7 (eff. Jan. 1, 2010). Petitioners have not shown Pivar's former representation of decedent should disqualify Quarles & Brady as respondents' counsel.

¶ 30 Petitioners claim members of Quarles & Brady would be likely to be called as necessary

witnesses in the proceedings because they have knowledge of the firm's billing. Petitioners argue the firm dissipated assets that should have gone into the estate, and therefore members of the firm would be necessary witnesses to testify as to how much the firm billed decedent prior to her death. However, as noted above, a will contest is not a tort action to secure judgment against an individual defendant, "a will contest is a *quasi in rem* proceeding against the will itself and seeks to set the will aside." *Estate of Ellis*, 236 Ill. 2d at 51. Petitioners have not shown the amount billed by the firm and paid by decedent is relevant to whether decedent's will should be set aside. Therefore, petitioners have not shown any of respondents' attorneys were necessary witnesses likely to be called as witnesses in the will contest.

¶ 31 Petitioners argue: "[n]ot only was one of the counsel for the Estate, Ms. Malis, a witness to the will, but this attorney was instrumental in supplying her personal knowledge of the Estate assets and related matters at the last hearing before the Court at the critical hearing of July 20, 2017." Under Rule 3.7 an attorney may be a witness if the testimony relates to uncontested issues. In this case, at the motion for rehearing, Malis repeated one of her co-counsel's assertions that a letter had been sent to petitioners from the firm of Ungaretti and Harris to notify them that a transfer of property was being made into decedent's trust. This was not a contested issue as acknowledged by counsel during this exchange:

> "Ms. Malis: We have a letter from 2012 –
>
> * * *
>
> Mr. Novoselsky: Yes, I agree with them. Quarles & Brady says we have this letter from Ungaretti & Harris which they merged into, some of the people went over there, saying here's what's there and that's all we have to prove. Don't take this the wrong way, Counsel, but I'm not challenging your credibility, but I

> don't think that's evidence of definitive proof. There is – my clients have a reasonable basis to believe and have identified to me items they believe should still be in the estate and are not there."

Although petitioners' attorney contested the veracity and legal sufficiency of the letter, he did not contest the fact that the letter was sent, which was all Malis stated.

> "[O]ur courts disapprove of the use of disqualification motions as a tactical weapon in litigation insofar as such motions can be misused for purposes of harassment. *** Thus, disqualification is regarded as a drastic measure [citation] which courts should grant only when the movant can show that the lawyer's testimony is likely to prejudice the testifying lawyer's own clients." *Weil, Freiburg, Thomas, P.C.*, 218 Ill. App. 3d at 396.

Petitioners have not met that burden here. At the July 20, 2017 hearing Malis did not testify as a witness, and she did not provide the court with privileged information about the estate. Malis simply replied to a hypothetical raised by the court of how potential beneficiaries were given notice which would allow them to protect themselves from assets wrongly converted during decedent's lifetime. Malis stated a letter had been sent to petitioners concerning transfers of assets, although another member of respondents' counsel had already informed the court of this earlier in the hearing. Malis did not testify to any contested issue that would disqualify her advocacy of respondents under Rule 3.7. See Ill. R. Prof'l. Conduct (2010) R. 3.7 (eff. Jan. 1, 2010). Petitioners failed to prove Malis provided the court with testimony on contested issues. Petitioners have not shown the trial court abused its discretion finding no reason for disqualification of respondents' counsel under the advocate-witness rule. We next determine whether the court erred when it denied disqualification under Rules 1.7 and 1.9.

¶ 32 II. Disqualification for Concurrent Representation Under Rule 1.7

¶ 33 Petitioners claim that respondents' counsel's representation of decedent creates a conflict of interest because they have knowledge of the underlying proceedings concerning the health of decedent and because the firm charged decedent's estate legal fees for estate administration. Contrary to petitioners' contention, we find rule 1.7 of the Illinois Rules of Professional Conduct does not support petitioners' claim.

> "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Ill. R. Prof'l. Conduct (2010) R. 1.7 (a) (eff. Jan. 1, 2010).

In this case respondents' attorneys do not represent petitioners. Petitioners here have not shown respondents' counsel owed them a duty because as the attorneys for the executors of the will they do not represent the respondents, although they do assist the executors in performing their duties. See *Estate of Vail v. First of America Trust Co.*, 309 Ill. App. 3d 435, 441 (1999). Therefore there is no reason for disqualification under Rule 1.7.

¶ 34 Petitioners argue the trial court erred in not finding a conflict of interest because opposing counsel had a duty to them because they are beneficiaries of the will, relying on *Jewish Hospital of St. Louis v. Boatmen's Bank*, 261 Ill. App 3d. 750 (1994). However, we find *Jewish Hospital*

supports the respondents' position that the attorney who drafted the will may serve as the attorney representing the estate.

> "Although the executor owes a fiduciary duty to the estate and the beneficiaries, the executor must also defend terms of the will and the best interests of the estate. [Citation.] Defending the terms of the will often results in an adversarial relationship between the estate and some other party. Often, the estate's adversary is a beneficiary of the estate who is contesting the will or making a claim against the estate or petitioning to have the executor removed or held liable for mismanagement of the estate. [Citation.] An attorney representing an estate must give his first and only allegiance to the estate, in the event that such an adversarial situation arises. Even though beneficiaries of a decedent's estate are intended to benefit from the estate, an attorney for an estate cannot be held to a duty to a beneficiary of an estate, due to the potentially adversarial relationship between the estate's interest in administering the estate and the interests of the beneficiaries of the estate. [Citation.] Furthermore, plaintiffs have not explicitly included or alleged facts that Jennings' primary duty was to plaintiffs rather than to the executors." *Id.* at 763.

Petitioners cannot support their contention that respondents' counsel owed them a duty because they are potential beneficiaries of the estate. Respondents' counsel only have a duty to the estate, not to petitioners.

> "[A]n estate has a duty to defend a will contest and to employ counsel for that purpose. [Citation.] The attorney for the executor does not have an attorney-client relationship with the beneficiaries and may represent the estate against a

> challenge by a beneficiary. When an adversarial situation arises, the attorney for the executor owes allegiance only to the estate." *Estate of Vail*, 309 Ill. App. 3d at 441.

Therefore, respondents' counsel did not represent petitioners and did not owe a duty to petitioners.

¶ 35 Petitioners claim respondents' counsel created a conflict of interest by depleting the estate by charging attorney fees. The accounting showed unpaid legal bills in the amount of $1,419. Petitioners contend respondents' counsel therefore put their conduct at issue by having a personal interest in the proceedings under Rule 1.7. We find petitioners' argument is without merit. Decedent's funeral expenses totaled $21,966.81 and the estate had assets totaling $9,792. Because the Probate Act prioritizes funeral expenses above all other claims against the estate, the estate was insolvent after paying out funeral expenses. 755 ILCS 5/18-10 (West 2016); 755 ILCS 5/18-13 (West 2016). Therefore, respondents' counsel did not recover any fees from the estate, and petitioners' claim respondents' counsel depleted estate assets by charging attorney fees is plainly false.

¶ 36 III. Disqualification for Former Representation Under Rule 1.9

¶ 37 Petitioners claim attorneys Pivar and Malis obtained confidential information when they represented decedent during her lifetime.

> "It is axiomatic that only a party who has been a client of the attorney whose conduct is in question may complain of the attorney's subsequent representation of another. [Citations.] The party seeking disqualification carries the burden of proving the existence of a former attorney-client relationship." *Schwartz*, 177 Ill. 2d at 173-74.

Petitioners are not former clients of respondents' attorneys. They have not shown respondents' counsel owed them a duty. See *supra* ¶ 34. Therefore, petitioners failed to show respondents' counsel's representation in this matter created a conflict of interest under Rule 1.9. Ill. R. Prof'l. Conduct (2010) R. 1.9 (eff. Jan. 1, 2010).

¶ 38 In summary, respondents' attorneys did not represent petitioners. Therefore, there is no conflict of interest under Rules 1.7 and 1.9. No attorney presently employed at Quarles & Brady was likely to be called as a necessary witness in the proceedings. Even assuming one attorney was called as a witness, disqualification of the entire firm would not be required under Rule 3.7 because there is no disqualification under rules 1.7 and 1.9. Ill. R. Prof'l. Conduct (2010) R. 3.7 (eff. Jan. 1, 2010); Ill. R. Prof'l. Conduct (2010) R. 1.7 (eff. Jan. 1, 2010); Ill. R. Prof'l. Conduct (2010) R. 1.9 (eff. Jan. 1, 2010). We cannot say no reasonable court would make the same ruling as the trial court, or that the trial court's decision to deny the motion was arbitrary or capricious. Therefore, we cannot say the trial court abused its discretion by denying petitioners' motion to disqualify respondents' counsel.

¶ 39 Dismissal of Petitioners' Will Contest

¶ 40 The trial court granted respondents' motion to dismiss the will contest because the contest was moot due to the insolvency of the estate. The inventory and final accounting filed in this case showed decedent's funeral expenses exceeded the value of the assets of the estate. Respondents raised the affirmative matter that petitioners' will contest was moot because petitioners could not obtain relief even if successful due to the estate's insolvency. No one would receive anything from the estate regardless of the outcome of the will contest. A section 2-619 motion to dismiss raises an affirmative matter that avoids the legal effect of or defeats a plaintiff's complaint. 735 ILCS 5/2-619 (West 2016). In response, petitioners argued 1) the

motion did not indicate whether it was brought under section 2-615 or 2-619, and 2) there is no authority that a case is moot where those with authority over the estate dissipate its assets. The trial court found respondents' motion was brought under section 2-619. As stated above, no objection was filed to the inventory and accounting filed in this case.

¶ 41 A case is moot when it is "impossible for the reviewing court to render effectual relief." *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 10. "If a cause of action is dismissed during hearing on a section 2–619 motion on the pleadings and affidavits, the question on appeal is whether there is a genuine issue of material fact and whether defendant is entitled to judgment as a matter of law." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 494 (1994). We review a trial court's grant of a 2-619 motion to dismiss *de novo*. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). In ruling on a section 2-619 motion to dismiss, we "interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Id.*

¶ 42 For the first time on appeal, petitioners argue dismissal of their will contest was error because respondents failed to comply with Illinois Supreme Court Rule 191. Petitioners contend that because the attached affidavits did not specify the affiants would testify as to the contents of the affidavit they were not sufficient to support a motion to dismiss. We find this argument was forfeited by petitioners due to their failure to raise any objection during the trial. See *Hays v. Louisiana Dock Co.*, 117 Ill. App. 3d 512, 515 (1983) ("the plaintiff did not object at the trial level to the motion to dismiss for failure to present an affidavit. This argument has thus not been preserved for purposes of this appeal."). See also *Wanandi v. Black*, 2014 IL App (2d) 130948, ¶ 23.

¶ 43 Petitioners argue they can obtain relief here because if an administrator to collect were

appointed, the administrator may discover assets that should have been in the estate and were not included in the inventory or accounting. Petitioners raised the issue of an administrator to collect for the first time at the hearing on their motion for the trial court to reconsider its rulings.

> "The purpose of a motion to reconsider is to bring to the trial court's attention newly discovered evidence not available at the time of the first hearing, changes in the law, or errors in the previous application of existing law to the facts at hand." *River Village I, LLC v. Central Insurance Companies*, 396 Ill. App. 3d 480, 492 (2009).

Petitioners forfeited their ability to request an administrator to collect by raising the issue for the first time at a hearing on a posttrial motion.

> "Trial courts should not permit litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling. Civil proceedings already suffer from far too many delays, and the interests of finality and efficiency *require* that the trial courts not consider such late-tendered evidentiary material, no matter what the contents thereof may be." (Emphasis in original) *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248-49 (1991).

¶ 44 Forfeiture aside, if petitioners had timely filed for appointment of an administrator to collect, petitioners still have not shown it would have been appropriate to appoint one. Under the Probate Act, an administrator to collect may be appointed for two reasons:

> "Upon the filing of a petition of any interested person or upon its own motion, the court may issue letters of administration to collect: (1) when any contingency happens which is productive of delay in the issuance of letters of office and it

> appears to the court that the estate of the decedent is liable to waste, loss or embezzlement or (2) when a person is missing from his usual place of residence and cannot be located or while in military service is reported by the federal government or an agency or department thereof as missing or missing in action. In order to act as administrator to collect one must be qualified to act as an administrator under this Act." 755 ILCS 5/10-1 (West 2016).

Petitioners have not shown either of those two situations is present in this case. The record indicates letters of office were filed on October 5, 2015, the same day the will was admitted to probate. Petitioners did not argue any delay occurred in issuing the letters of office, and have not argued there was any loss to the estate from any delay in issuing letters of office. Additionally, petitioners have not shown any person was missing from their usual place of residence and could not be located. Therefore, petitioners have not shown that, under the Probate Act, an administrator to collect should have been appointed.

¶ 45 For the first time at the hearing on petitioners' motion to reconsider, and in this appeal, petitioners argue their will contest is not moot because if they succeed in their argument decedent was incompetent at the time decedent created her will and trust, they would be able to retrieve all of the assets of the estate, including but not limited to the assets in the trust. Petitioners claim the inventory of the estate in the record is inaccurate because it does not represent the full extent of decedent's assets at the time of her death. Petitioners have not provided any authority supporting their position they can use their will contest to reach decedent's *inter vivos* transfers of property. To the contrary, in *Estate of Ellis* our supreme court found the petitioner could not use a will contest to reach the decedent's *inter vivos* transfers of property:

> "Furthermore, a will contest would not have provided sufficient relief to [the petitioner] because it would not have extended to the alleged *inter vivos* transfers of property. [The petitioner] alleged that [the pastor] depleted [the decedent's] estate by inducing her to transfer assets worth more than $1 million to him prior to her death. In a successful will contest, [the petitioner] could have recovered only assets that were part of the estate upon [the decedent's] death but could not have reached the assets transferred during her lifetime." *Id.* at 56.

Accordingly, petitioners cannot use their will contest to reach *inter vivos* transfers made by decedent. *Id.*

¶ 46 Our review of the record indicates decedent had $9,792 in a checking account and savings account at the time of her death. The funeral expenses exceeded this amount. The inventory of the estate also noted a number of tangible personal goods to be distributed under the will. Respondents claim the tangible goods are of "no monetary value," and petitioners do not contest this. Because funeral expenses are prioritized payments under the Probate Act, the administrator of the estate must pay those expenses before making other distributions. 755 ILCS 5/18-10 (West 2016). The funeral expenses here exceed the assets of the estate, leaving the estate insolvent after payment of that claim. Therefore, there are no more funds to be disbursed from the estate and petitioners cannot receive redress even if their challenge is successful. A case is moot if there is no actual controversy or if it is "impossible for the reviewing court to render effectual relief." *Commonwealth Edison Co.*, 2016 IL 118129, ¶ 10. "As a general rule, courts of review in Illinois do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998). Petitioners' trust contest was properly dismissed due to

a failure to file within the applicable statute of limitations. 755 ILCS 5/8-1(f) (West 2016). Petitioners cannot reach any assets in their will contest. The court cannot provide them with relief here, and the case is moot. Therefore, we affirm the trial court.

¶ 47 In summary, petitioners failed to show their will contest was improperly dismissed or that the trial court abused its discretion denying their motion to disqualify respondents' counsel. Petitioners cannot receive relief and there is no justiciable controversy for the court to adjudicate. Therefore, we affirm the trial court's dismissal of petitioners' case.

¶ 48 CONCLUSION

¶ 49 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

¶ 50 Affirmed.