

No. 123264

IN THE

SUPREME COURT OF ILLINOIS

JoAnn Smith, Individually; and,	)	On Petition For Leave To Appeal
JoAnn Smith as Administrator of the	)	from the Appellate Court of
Estate of Donald L. Smith, Deceased,	)	Illinois, Fifth Judicial District
	)	No. 5-16-0024
Plaintiffs-Appellants,)	
-vs-	)	There on Appeal from the Third
	)	Judicial Circuit, Madison County,
The Vanguard Group, Inc.;	)	Illinois, No. 15-L-679
Scott Smith; and, Jeffrey Smith,)	
	)	The Honorable Barbara Crowder
Defendants-Appellees.	)	Judge Presiding

REPLY BRIEF

Oral Argument Requested

Phillip H. Hamilton, #6201288
 Farrell, Hamilton & Julian, P.C.
 1305 D'Adrian Professional Park
 Godfrey, IL 62035
 Phone: 618-466-9080
 Fax: 618-466-9105

Email: phil.hamilton@farrellhamiltonjulian.com

E-FILED
 8/23/2018 1:20 PM
 Carolyn Taft Grosboll
 SUPREME COURT CLERK

Argument

The appellate court erred in affirming dismissal of Count I of Plaintiffs' Complaint under 735 ILCS 5/2-619(a)(4), and (9).

Defendants' argument on appeal hinges on the proposition that changing the beneficiary designation on the IRA while the injunctive order was in effect, did not violate the terms of the injunction. The appellate court is in error in finding that the injunctive order only related to an ownership change, and not any transactions as stated in the order (A-7, para. 17; C-30, para. 9). The Supreme Court holds that an injunction must be obeyed even if the injunctive order was erroneously entered. Dissent, citing *Cummins-Landau Laundry Mach. Co. v. Koplín*, 386 Ill. 368, 54 N.E. 462 (Ill. 1944) (A-8, para. 21). The appellate court's effort to distinguish the cases is erroneous. The court improperly limited the injunctive effect of the order to a change in ownership, even though it barred all transactions.

In Defendants' brief they relate certain allegations made by the decedent in his Petition for Issuance of Temporary Order and for Preliminary Injunction (Appellees' Brief, pp. 1-3). The trial court did not consider those allegations in ruling on the Motion to Dismiss. Similarly, the appellate court did not affirm the trial court based on the allegations. After the Petition was filed, the court entered the preliminary injunction which barred any and all transactions to preserve the status quo between the parties. Defendants appear to cite to the allegations to suggest that if this court remands the case, that the trial court should consider Plaintiffs' Complaint on the merits.

Defendants note that the Vanguard Group processed an account change on Donald Smith's IRA on July 31, 2013, which designated JoAnn Smith as the primary beneficiary of the IRA. R. C26-27. Prior to that time, no beneficiary had been designated on the IRA. R. C26. There are no facts or allegations made to support that Plaintiff had any role in the designation of July 31, 2013.

It is apparent that the change of beneficiary violated the injunctive order of the court. The trial court and the appellate court reasoned, without any authority, that the law did not require Donald Smith to execute another beneficiary form after the dissolution was dismissed. A. 4-5, para. 9; and, A-13. The decedent's action taken in violation of the injunctive order was without legal effect. The decedent would have had to do something to confirm or ratify his prior improper act. There are no facts to support that he did so.

The Vanguard Traditional and Roth IRA Custodial Agreement, Section 4.4(a) states,

Any Beneficiary designation by the Investor shall be made in a form and manner prescribed by or acceptable to the Custodian and shall be effective only when received by the Custodian during the Investor's lifetime....(C-88).

Other than to make the ineffective change of beneficiary on March 13, 2014 (C-34), during the period the injunction was in effect, August 8, 2013 (C-28) to October 29, 2014 (C-19), the decedent took no action. Under the terms of the Agreement, the decedent did need to effect a change of beneficiary, if he intended to do so.

As noted by the dissent, the majority is in error in excusing the prohibited beneficiary change that Donald made on the basis that Donald's death, which triggered the ownership transfer, did not occur until after the injunction terminated (A-8, para. 21). Obviously the change of beneficiary took place while the injunctive order was in effect.

The dissent further noted that the interpretation by the majority of case law was at odds with the holdings in *Sogol and Ignatius* (A-8, para. 21). The *Sogol* court held that while death terminated a dissolution action and an injunction, it did not retroactively dissolve a preliminary injunction, as if it had never existed. *New York Life Ins. Co. v. Sogol*, 311 Ill. App. 3d 156, 159-160, 724 N.E.2d 105 (Ill. App. Ct. – 1st Dist. 1999). Likewise, in *Ignatius*, the court found that “[t]he validity of the court orders, and therefore any arguments respecting their validity or violation, does not end with closure of the dissolution case in which the orders were entered.” *In re Marriage of Ignatius*, 338 Ill. App. 3d 652, 661, 788 N.E.2d 794 (Ill. App. Ct. – 2nd Dist. 2003). The legal basis for these holdings is that a court having jurisdiction must be obeyed to preserve the status quo of litigation during its pendency. *Cummings-Landau Laundry Mach. Co. v. Koplín*, 386 Ill. 368, 385-386 (Ill. 1944).

In contrast, the majority attempted to distinguish *Sogol* and *Ignatius* by stating that both cases dealt with a transfer of ownership of the accounts in question occurring as a result of the beneficiary change while the injunction was in effect, but only because of the death, while the injunction was in effect,

of one of the individuals involved. A-7, para. 15. Case law does not support limiting those holdings to circumstances involving the death of the account holder while the injunction was in effect which then caused the ownership transfer that violated the injunction. A-7, para. 15.

None of the cases support Defendants' argument that the dismissal of the divorce caused the "withdrawal of the injunction". Appellees' Brief, pg. 6. All of the cases are in line with the holding that a party must obey a circuit court's order of injunction, while it is in effect. *Southern Illinois Medical Business Assocs. v. Camillo*, 208 Ill. App. 3d 354, 567 N.E.2d 74, 81-82 (Ill. App. Ct. – 5th Dist. 1991), citing *Cummins-Landau Laundry Mach. Co.* There is no support at all for the trial court's holding that once the dissolution was dismissed, the beneficiary change became effective even if it "arguably" violated the terms of the injunction when it was signed (A-13).

Although the preliminary injunction terminated by operation of law when the parties stipulated to the voluntary dismissal of the divorce on October 29, 2014 (R. C47-49, A. 11-13) the injunction did not become a nullity. The appellate court noted that Defendants' argument that the injunctive order became void as a matter of law is contrary to settled law in Illinois. A-5, para. 11.

Although Defendants cited no authority for dismissal of Plaintiffs' Complaint, the trial court provided authorities in its order (C47; and, A-11). The court cited 750 ILCS 5/501(d)(3) noting that a temporary order terminates

when the petition for dissolution is dismissed (A-13). But the cases cited by the court do not in any way support its holding that, the general rule is that a case that has been dismissed without prejudice results in the proceedings being declared a nullity and leaves the parties in the same position as if the case had not been filed (A-13). The statute provides that a temporary order is terminated when the petition is dismissed, but it does not state that an injunctive order is retroactively vacated as if it had never been entered.

The cases cited by the court in support of its ruling deal with principles of res judicata, and do not preclude an action for the decedent's violation of the injunction. In *Tierney v. Burlington N.R.R.*, 240 Ill. App. 3d 526, 608 N.E. 2d 479, 480 (Ill. App. Ct. – 1st Dist. 1993), the case had originally been filed in Federal court where a summary judgment motion was denied. The case was then voluntarily dismissed pursuant to the agreement of the parties. *Id.* The case was later refiled in state court which granted summary judgment. *Id.* The court rejected the argument that the denial of summary judgment in the federal case became the law of the case in the later state court proceeding. *Id.* at 481. The denial of summary judgment in the federal case was not binding upon the state court in the refiled action. *Id.* The enforcement of a court's injunctive order was not involved, nor were any issues presented that related to dismissal of a divorce.

In *Johnson v. Du Page Airport Auth.*, 268 Ill. App. 3d 409, 644 N.E.2d 802 (Ill. App. Ct. – 2nd Dist. 1994), the plaintiffs had filed a suit for injunction

which was dismissed as moot. *Id.* at 804. The plaintiffs filed a new complaint requesting an accounting and other relief. *Id.* at 804-805. The court dismissed the second action based in part on res judicata. *Id.* at 806. The Appellate Court reversed because the dismissal of the first suit was supposed to be without prejudice. *Id.* at 808-809. The effect of a dismissal without prejudice was to render the proceedings a nullity and leave the parties in the same position as if the case had never been filed, so the subsequent dismissal of the second suit based on res judicata was found to be error. *Id.* Again there was no issue of a party being required to adhere to a court's order for an injunction, nor were there any issues pertaining to dismissal of a divorce.

The ancient case of *Chestnut v. Chestnut*, 77 Ill. 346 (Ill. 1875), has absolutely no application to the subject action. During the pendency of a divorce filed by the husband, the court entered an order for temporary alimony in favor of the wife. *Id.* at 348. The husband later dismissed the divorce with leave of court. *Id.* at 348-349. The dismissal of the divorce operated to revoke the order allowing temporary alimony because when it was dismissed, the husband's common law liability to support his wife was revived, and the necessity for alimony did not exist. *Id.* at 349. Procedurally, the matter came before the court on a writ of *scire facias* which has since been abolished by 735 ILCS 5/2-1601. In addition, under the law as it existed in 1875, a married woman could not even sue her husband in an action at law. *Id.* at 350. The court made a giant leap in citing this obscure case for the proposition that

under modern jurisprudence, the dismissal of a divorce renders a prior injunctive order a nullity.

Defendants' position on appeal appears to be entirely dependent on the notion that although there was an injunction in place, that Donald Smith was free to change the beneficiary on his IRA. The injunctive order closed "any transactions". C-30, para. 9. That was the general prohibition on account activity. The specific prohibition on account activity included "... trades, transfers, transactions, buy orders or sell orders, withdrawals or deposits ..." (C-30) from any accounts. The order was broadly tailored to bar any and all activities with respect to the accounts, without court approval. There is no dispute that Donald Smith did not seek court approval prior to attempting to change the beneficiary of his IRA.

The appellate court erroneously determined that the injunction only barred a transfer of an interest in property. A-7. It sought to distinguish the cases based on the idea that a party had died while the injunction was in effect which caused an ownership transfer. Since the decedent did not die while the injunction was in effect, it reasoned that no ownership change occurred. It held incorrectly that changing the beneficiary did not change the status quo (A-7, para. 16). When the decedent changed the beneficiary on his IRA, he did so willfully, knowing there was an injunction in place. Oddly, the court would excuse the decedent's willful act but find a violation of the injunction did occur if the decedent had died before the divorce was dismissed. Logic dictates that

the change must be set aside and that Plaintiff should be restored as the beneficiary.

Although the decedent complied with Vanguard's requirements to designate a beneficiary, he did so while under a court order prohibiting him from doing so. The designation was therefore invalid. After the injunction came to an end with dismissal of the divorce action, Donald Smith took no action to confirm or ratify the prior improper act.

Conclusion

The appellate court's order affirming the dismissal of Count I of the Complaint should be reversed. Judgment should be entered in favor of Plaintiff awarding her the IRA. Alternatively, the case should be remanded for proceedings consistent with the Supreme Court's Order. Plaintiff requests such other and further relief as the court finds equitable and just.

Respectfully submitted:

JoAnn Smith, Individually; and,
JoAnn Smith, Administrator of the
Estate of Donald L. Smith, Deceased

By: /s/Phillip H. Hamilton
Phillip H. Hamilton, #6201288
Farrell, Hamilton & Julian, P.C.
1305 D'Adrian Professional Park
Godfrey, IL 62035
Phone: 618-466-9080
Fax: 618-466-9105
Email: phil.hamilton@farrellhamiltonjulian.com

Certificate of Compliance

I, Phillip H. Hamilton, attorney for Plaintiffs-Appellants certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the Reply Brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) Certificate of Compliance, and the Certificate of Service is 8 pages.

Respectfully submitted:

By: /s/Phillip H. Hamilton
Phillip H. Hamilton, #6201288
Farrell, Hamilton & Julian, P.C.
1305 D'Adrian Professional Park
Godfrey, IL 62035
Phone: 618-466-9080
Fax: 618-466-9105
Email: phil.hamilton@farrellhamiltonjulian.com

No. 123264

IN THE

SUPREME COURT OF ILLINOIS

JoAnn Smith, Individually; and,	)	On Petition For Leave To Appeal
JoAnn Smith as Administrator of the	)	from the Appellate Court of
Estate of Donald L. Smith, Deceased,	)	Illinois, Fifth Judicial District
	)	No. 5-16-0024
Plaintiffs-Appellants,)	
-vs-	)	There on Appeal from the Third
	)	Judicial Circuit, Madison County,
The Vanguard Group, Inc.;	)	Illinois, No. 15-L-679
Scott Smith; and, Jeffrey Smith,)	
	)	The Honorable Barbara Crowder
Defendants-Appellees.	)	Judge Presiding

Proof of Service

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

The undersigned certifies that he electronically filed Reply Brief with the court on August 23, 2018. In addition, 13 paper copies of the brief were mailed to the Illinois Supreme Court in compliance with the Supreme Court of Illinois Electronic Filing Procedures and User Manual. A copy was further emailed to opposing counsel Michael J. Hertz, Esq. at mhertz@lbtdlaw.com; and, Eric D. Brandfonbrener, Esq. at ebrand@perkinscoie.com.

Respectfully submitted:

JoAnn Smith, Individually; and, JoAnn
Smith, Administrator of the Estate of
Donald L. Smith, Deceased

By: /s/Phillip H. Hamilton
Phillip H. Hamilton, #6201288
Farrell, Hamilton & Julian, P.C.
1305 D'Adrian Professional Park
Godfrey, IL 62035
Phone: 618-466-9080
Fax: 618-466-9105
Email: phil.hamilton@farrellhamiltonjulian.com