

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,	)	
	)	There on Appeal from the Third
v.	)	Judicial Circuit, Madison County,
	)	Illinois, No. 15-L-679
The Vanguard Group, Inc.;	)	
Scott Smith; and, Jeffrey Smith,	)	The Honorable Barbara Crowder
	)	Judge Presiding
Defendants-Appellees.	)	

APPELLEES' BRIEF

## ORAL ARGUMENT REQUESTED

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E-FILED  
8/8/2018 3:27 PM  
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SUPREME COURT CLERK

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**STATEMENT OF FACTS****Background**

On August 6, 2013, Donald L. Smith filed a Petition for Issuance of Temporary Restraining Order and for Preliminary Injunction against his wife, JoAnn F. Smith, who is the Plaintiff-Appellant in this case. R. C59-65; S.A. 1-7. In his Petition, Mr. Smith alleged that he was admitted to Alton Memorial Hospital by JoAnn Smith on July 21, 2013, and that he was discharged from the hospital on August 2, 2013. R. C60; S.A. 2. Mr. Smith claimed during the time period in which he was in the hospital that JoAnn Smith made various withdrawals from his accounts without his authorization. R. C59-65; S.A. 1-7. Mr. Smith alleged, for example, that on July 22, 2013, JoAnn Smith forged his signature to withdraw funds from his accounts at Regions Bank, and that she withdrew in excess of \$134,000 from his US Bank and Regions Bank accounts between July 22, 2013 and August 2, 2013, and that those funds were deposited into JoAnn Smith's single named individual account on or about August 2, 2013. R. C60-61; S.A. 2-3.

While not mentioned in the Petition for Temporary Restraining Order, The Vanguard Group processed an account change on Donald Smith's IRA during this same time period, on July 31, 2013, which designated JoAnn F. Smith as the primary beneficiary of the IRA. R. C26-27. The confirmation of the account change was addressed to Donald Smith at his residence at 2617 Jamison Drive, Alton, Illinois. R. C26. Prior to that time, no beneficiary had been designated on the IRA. R. C26.

Mr. Smith alleged that when he attempted to return home on August 2, 2013 after his discharge from the hospital, JoAnn Smith denied him access to the residence at 2617 Jamison Drive, Alton, Illinois, which contained items such as his bank statements, credit

cards, check books, and financial records. R. C61; S.A. 3. Mr. Smith further alleged that on August 5, 2013, JoAnn Smith “attempted to liquidate (his) Scottrade brokerage accounts by provid(ing) an invalid Power of Attorney to Scottrade ordering Scottrade to liquidate the accounts and remit all funds from (his) accounts to (her).” R. C61; S.A. 3.

In his petition of August 6, 2013, Mr. Smith requested that a temporary restraining order be entered against JoAnn Smith “to maintain the status quo, directing the banks, credit unions, and Scottrade to return the funds ... and prevent (JoAnn Smith) from further converting (Donald Smith’s) assets.” R. C62; S.A. 4. As a result, on August 8, 2013, the court entered a Preliminary Injunction, which provided that “any and all funds withdrawn from the bank accounts held in the individual names of (Donald Smith and JoAnn Smith), or joint names of (Donald Smith and JoAnn Smith), shall be restored to the bank accounts from which they were withdrawn.” R. C29; S.A. 9. Paragraph 9 of the Preliminary Injunction further provided:

Pursuant to the parties’ stipulation, all other bank accounts, credit union accounts, investment accounts (including the Scottrade account), and any other accounts holding funds or investments of the parties shall be closed to any transactions and no trades, transfers, transactions, buy orders or sell orders, withdrawals or deposits shall be made from any accounts without the written agreement of both (Donald Smith) and (JoAnn Smith) or further court order. R. C30; S.A. 10.

On September 6, 2013, Donald Smith filed for divorce against JoAnn Smith, and on November 14, 2013, the divorce case was consolidated with the injunction case. R. C5.

On March 13, 2014, The Vanguard Group processed a beneficiary change where Donald Smith named his sons, Scott Smith and Jeffrey Smith, as the primary beneficiaries of his Vanguard IRA. R. C34-35.

On October 29, 2014, Donald Smith and JoAnn Smith stipulated to the dismissal of the divorce and injunction cases. R. C19; S.A. 16. As part of the Stipulated Order of Dismissal of the divorce and injunction, the parties expressly agreed, and the court ordered, as follows:

All hold orders as to the financial accounts of the parties including but not limited to US Bank, Regions Bank, Shell Community Credit Union, Scottrade and MidAmerica Credit Union ordered in the above causes are dismissed and withdrawn by this order. (Emphasis added.) *Id.*

Donald Smith died on March 30, 2015. R. C6.

#### Procedural History

JoAnn Smith filed the underlying action on May 27, 2015, asking the court to find that she was the beneficiary of the Vanguard IRA, and that Scott Smith and Jeffrey Smith were not the beneficiaries of the Vanguard IRA, arguing that the designation of Scott Smith and Jeffrey Smith was invalid due to the prior injunctive order. R. C3-10.

On July 17, 2015, prior to filing any answer, affirmative defenses, or counterclaims which may be related to Plaintiff's Complaint, Scott Smith and Jeffrey Smith initially responded to Plaintiff's Complaint by filing a Motion to Dismiss pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(4) and (a)(9). R. C15-19; S.A. 12-16. In that motion, Scott Smith and Jeffrey Smith argued that Plaintiff's Complaint should be dismissed under 735 ILCS 5/2-619(a)(4) and (a)(9) because the October 29, 2014 stipulated order of dismissal expressly dismissed and withdrew the prior injunctive order, meaning that Plaintiff's cause of action was barred by the prior judgment under Section 2-619(a)(4) and/or barred under Section 2-619(a)(9) due to the affirmative matter in the

stipulated order of dismissal which expressly stated that the prior hold orders were dismissed and withdrawn. *Id.*

The Motion to Dismiss was argued on September 3, 2015, at which time the court dismissed Count II with leave to refile, dismissed JoAnn Smith in her capacity as Administrator of Donald Smith's Estate as a party, and took the motion as to Count I under advisement. R. C46; S.A. 17. On October 29, 2015, the court granted the motion to dismiss Count I pursuant to 735 ILS 5/2-619, reasoning, in part, as follows:

[T]he parties terminated their dissolution by voluntary dismissal which terminated the temporary orders by operation of law. Whether the action taken by Donald Smith to change beneficiaries was governed by the language of the preliminary injunction and therefore the change constituted a violation of the temporary order is not dispositive of this proceeding. Once the dissolution was dismissed, the beneficiary change became effective even if it arguably violated the terms of the injunction when it was signed. The change could at best be termed voidable, not void. The dismissal occurred. The beneficiary change at a minimum is recognized as valid upon the dismissal of the dissolution. Donald Smith was free to have named the beneficiaries of his choice (unless otherwise prohibited or other theories invalidate the elections). The law does not require him to have executed another beneficiary form after the dissolution was dismissed.

R. C47-49; A. 11-13.

Plaintiff filed a Motion to Supplement the Record and to Reconsider on November 16, 2015 (R. C50-92), which was argued and taken under advisement on December 18, 2015. R. C95. Plaintiff did not refile Count II of the Complaint. *Id.* On January 4, 2016, the court granted the motion to supplement the record, denied the motion to reconsider, and noted that the dismissal of Count I was pursuant to 735 ILCS 5/2-619(a)(4) and (a)(9). R. C99. Plaintiff appealed the dismissal of Count I to this Court on January 13, 2016. R. C100-102. On January 31, 2018, the Appellate Court

affirmed dismissal of Count I, holding that “the mere change of beneficiary while the injunction was in effect did not violate the injunction.” A. 1, ¶ 1. The Supreme Court granted leave to appeal on May 30, 2018. A. 17.

### ARGUMENT

THE APPELLATE COURT PROPERLY AFFIRMED THE TRIAL COURT’S DISMISSAL COUNT I OF PLAINTIFF’S COMPLAINT PURSUANT TO 735 ILCS 5/2-619(a)(4) and (a)(9).

Donald Smith’s March 13, 2014, designation of his sons, Scott Smith and Jeffrey Smith, as the beneficiaries on his Vanguard IRA was proper. The injunctive order of August 8, 2013, entered as a result of Donald Smith’s August 6, 2013, petition alleging that his wife, JoAnn Smith, had been converting his assets without his knowledge (during the exact time period that her name was initially added as the beneficiary of the Vanguard IRA), was expressly dismissed and withdrawn under the October 29, 2014 Stipulated Order of Dismissal. R. C15-19; S.A. 12-16. The Order of October 29, 2014, which contains the signatures of Donald Smith, JoAnn Smith, and their counsel, states:

All hold orders as to the financial accounts of the parties including but not limited to US Bank, Regions Bank, Shell Community Credit Union, Scottrade and MidAmerica Credit Union ordered in the above causes are dismissed and withdrawn by this order. R. C19; S.A. 16.

The stipulated order of dismissal makes clear, by use of the words “dismissed and withdrawn”, that the prior hold orders had been vacated and were no longer in effect once the divorce was dismissed. Both the trial court and the Appellate Court reasoned that “the law did not require Donald to execute another beneficiary form after the dissolution was dismissed.” A. 4-5, ¶ 9.

The Appellate Court further noted that the change of beneficiary did not violate the injunctive order, as the terms of the injunctive order did not prohibit a change in beneficiary designation. A. 7, ¶ 17. The Appellate Court also noted in its decision that the cases of *New York Life Ins. Co. v. Sogol*, 311 Ill. App. 3d 156 (5<sup>th</sup> Dist. 1999) and *In re Marriage of Ignatius*, 338 Ill. App. 3d 652 (2<sup>nd</sup> Dist. 2003), cited by Plaintiff, are distinguishable from the facts of this case. A. 7, ¶ 15.

In the *New York Life* case, the husband died while the divorce proceedings were pending. *New York Life* at 158. Though the case is similar to the instant case in that the husband changed beneficiaries on a life insurance policy while a preliminary injunction was in effect, there was no stipulated dismissal or express dismissal and withdrawal of the injunction, which was the core basis for the motion to dismiss in the instant case.

The case of *In re Marriage of Ignatius*, 338 Ill. App. 3d 652 (2<sup>nd</sup> Dist. 2003) also does not deal with a stipulated dismissal of the divorce proceedings or express withdrawal of an injunction. In that case, the wife died while the dissolution proceeding was pending, and although the preliminary injunction was modified prior to her death to allow certain estate planning, the injunctive order otherwise remained in effect until the death of the wife. *Ignatius* at 654.

The cases of *Southern Illinois Medical Business Assocs. v. Camillo*, 208 Ill. App. 3d 354 (5<sup>th</sup> Dist. 1991) and *Cummins – Landau Laundry Mach. Co. v. Koplín*, 386 Ill. 368 (1944) relate to injunctions which were later reversed, not those which were dismissed by stipulation or expressly withdrawn.

The trial court further noted:

Once the dissolution was dismissed, the beneficiary change became effective even if it arguably violated the terms of the



injunction when it was signed. The change could at best be termed voidable, not void. The dismissal occurred. The beneficiary change at a minimum is recognized as valid upon the dismissal of the dissolution. Donald Smith was free to have named the beneficiaries of his choice (unless otherwise prohibited or other theories invalidate the elections). The law does not require him to have executed another beneficiary form after the dissolution was dismissed.

A. 13.

The trial court also properly found that 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. Pursuant to 750 ILCS 5/501(d)(3), a temporary order entered under the Illinois Marriage and Dissolution of Marriage Act terminates “when the final judgment is entered or when the petition for dissolution of marriage or legal separation or declaration of invalidity of marriage is dismissed.” The trial court’s pronouncement that “[t]he 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” is supported by the caselaw. R. C49; A. 3.

The court cited three decisions in its Order of October 29, 2015. The case of *Chestnut v. Chestnut*, 77 Ill. 347 (1875) found that a voluntary dismissal of divorce proceedings operated to revoke a prior temporary order to pay alimony. *Chestnut* at 349. *Johnson v. DuPage Airport Authority*, 268 Ill. App. 3d 409 (2<sup>nd</sup> Dist. 1994), stands for the proposition that:

Where there is no adjudication on the merits, a dismissal should be granted *without* prejudice, as opposed to granting dismissal *with* prejudice. The effect of a dismissal *without* prejudice is to render the proceedings a nullity and leave the parties in the same position as if the case had never been filed.

(Emphasis in original. Internal citations omitted.) *Johnson*, at 418. Likewise, the court in *Tierney v. Burlington Northern Railroad Company*, 240 Ill. App. 3d 526 (1<sup>st</sup> Dist. 1992), noted, “it is well settled that the effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties in the same position as if the case had never been filed.” *Tierney* at 529.

In the instant case, the parties agreed to the voluntary dismissal of their divorce. The trial court determined that “[o]nce the dissolution was dismissed, the beneficiary change became effective even if it arguably violated the terms of the injunction when it was signed.” R. C49, A. 13. Additionally, Scott Smith and Jeffrey Smith agree with the appellate court’s definitive determination that “there was no violation of the injunction while it was in effect.” A. 6, ¶ 13. Indeed, the injunctive order did not prohibit a change in beneficiary designation. The injunctive order provided as follows:

Pursuant to the parties’ stipulation, all other bank accounts, credit union accounts, investment accounts (including the Scottrade account), and any other accounts holding funds or investments of the parties shall be closed to any transactions and no trades, transfers, transactions, buy orders or sell orders, withdrawals or deposits shall be made from any accounts without the written agreement of both (Donald Smith) and (JoAnn Smith) or further court order.

R. C30; S.A. 10.

Upon consideration of the terms of the injunction, the appellate court noted that:

As Donald still owned the Vanguard account when the injunction was terminated, there was no violation of the injunction.

Had the parties wished to draft their stipulation so that it prohibited a beneficiary change that did not result in the transfer of ownership while the injunction was in effect, they could have done so. They did not, and, thus, a mere beneficiary change did not violate the terms of the injunction.

A. 7, ¶ 16-17.

If the word “transactions” were interpreted as broadly as urged by Plaintiff in this context to include a change in beneficiary designation, the term “transactions” would apply to every item specifically enumerated in the injunctive order, including trades, transfers, buy orders and sell orders, withdrawals and deposits, and render all of those terms superfluous. While it is unclear what exactly the parties intended the term “transactions” to mean in the injunctive order, the express language of the order did not prohibit a change in beneficiary designation, nor did any transfer of ownership occur while the injunction was in effect. No transfer of ownership occurred until Donald Smith’s death on March 30, 2015. The beneficiary change complied with the account agreement, which provides that “[t]he Investor may designate from time to time any person or persons, entities, such as a trust, or other recipient acceptable to the Custodian as his or her primary and/or contingent Beneficiaries.” R. C87, Sec. 4.4(a). Vanguard properly processed the beneficiary change naming Scott Smith and Jeffrey Smith as the beneficiaries of the Vanguard IRA. R. C34-35.

### **CONCLUSION**

Scott Smith and Jeffrey Smith respectfully request the Court to affirm the appellate court order of January 31, 2018, which affirmed the trial court orders of October 29, 2015 and January 4, 2016 dismissing Count I of Plaintiff’s Complaint pursuant to 735 ILCS 5/2-619(a)(4) and (a)(9), and to award such other and further relief as the Court deems proper.

Respectfully submitted:

SCOTT SMITH and JEFFREY SMITH

/s/ Michael J. Hertz

By: Michael J. Hertz, #6289731

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10 pages.

*/s/ Michael J. Hertz* \_\_\_\_\_  
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No. 123264

IN THE

## SUPREME COURT OF ILLINOIS

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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,	)	
	)	There on Appeal from the Third
v.	)	Judicial Circuit, Madison County,
	)	Illinois, No. 15-L-679
The Vanguard Group, Inc.;	)	
Scott Smith; and, Jeffrey Smith,	)	The Honorable Barbara Crowder
	)	Judge Presiding
Defendants-Appellees.	)	

**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 Appellees' Brief with the Court on August 8, 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 Phillip H. Hamilton, Esq. at phil.hamilton@farrellhamiltonjulian.com and Eric D. Brandfonbrener, Esq. at ebrand@perkinscoie.com.

Respectfully submitted:

Scott Smith and Jeffrey Smith

By: /s/ Michael J. Hertz  
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**SUPPLEMENTARY APPENDIX**

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15-L-679

FILED 11162015 CLERK OF COURT

IN THE CIRCUIT COURT OF MADISON COUNTY  
THIRD JUDICIAL CIRCUIT  
STATE OF ILLINOIS

DONALD L. SMITH,

Petitioner,

vs.

JOANN F. SMITH,  
US BANK,  
REGIONS BANK,  
SHELL COMMUNITY CREDIT UNION,  
SCOTTRADE, AND  
MIDAMERICA CREDIT UNION,

Respondents.

Cause Number: 13-CII-  
610  
DA

**FILED**  
AUG 06 2013

PETITION FOR ISSUANCE OF  
TEMPORARY RESTRAINING ORDER  
AND FOR PRELIMINARY INJUNCTION  
CLERK OF CIRCUIT COURT # 82  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

COME NOW Petitioner, DONALD L. SMITH (hereinafter "Petitioner"), pro se, and issue his:

- A. Petition for Issuance of Temporary Restraining Order pursuant to 735 ILCS 5/11-101, et seq.
- B. Petition for Issuance of Preliminary Injunction pursuant to 735 ILCS 5/11-101, et seq.
- C. Petitioner submits Verification by Certification in support of this Petition with verified facts.
- D. A Temporary Restraining Order is requested as it clearly appears from specific fact shown by affidavit by the verified complaint that immediate and irreparable injury, loss, or damage will result to the Petitioner before notice can be served and a hearing had thereon.

FACTS

- 1. Petitioner Donald L. Smith was admitted by his wife, Respondent Joann F. Smith, to Barnes Jewish Hospital on 6/10/2013 at 11:12 a.m. after spending ten (10) days at his lake house at the Lake of the Ozarks, located in the unincorporated village of Rocky Mount, Morgan County, Missouri.
- 2. Petitioner was experiencing difficulty breathing and an elevated temperature.

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S.A. 1

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3. Petitioner was treated with fluids and antibiotic and released to return to his primary residence located at 2617 Jamison in Alton, Madison County, Illinois on oral medication.
4. Petitioner's driving privileges were reinstated seven (7) days after his release from Barnes Jewish Hospital.
5. Petitioner enjoyed normal health at his residence located at 2617 Jamison in Alton, Illinois thereafter.
6. Petitioner was admitted Alton Memorial Hospital by Respondent on 7/21/2013 at 12:45 p.m.
7. Petitioner was discharged from Alton Memorial Hospital on 8/2/2013 15:57 PM.
8. The principle diagnosis of Petitioner was Septic Shock.
9. On August 3, 2013, Petitioner attempted to access his checking account at US Bank located in Alton, Illinois.
10. Petitioner was advised Respondent notified that US Bank that Petitioner was gravely ill and would likely not recover and that Respondent had immediate need for cash from Petitioner's accounts.
11. Respondent had withdrawn from US Bank \$56,524.70 on August 2, 2013.
12. Respondent further withdrew cash from Petitioner's Individual Retirement Accounts at US Bank on August 2, 2013 valued at \$4500.
13. The funds converted from Petitioner's accounts at US Bank were deposited by Respondent via cashier's checks at Shell Community Federal Credit Union located in Wood River, Illinois on August 2, 2013 into an account solely in the name of Respondent.
14. On July 22, 2013, Respondent forged Petitioner's signature to withdraw amounts in accounts held by Petitioner at Regions Bank.
15. Respondent withdrew funds in Petitioner's accounts at Regions Bank on numerous occasions from July 22, 2013 through August 2, 2013 amounting to \$73,168.89.

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S.A. 2

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15-L-679

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16. To the best of Petitioners knowledge, these funds were deposited in Respondents single named individual account at Shell Community Credit Union on or about August 2, 2013.

17. On August 5, 2013, Respondent attempted to liquidate Petitioner's Scottrade brokerage accounts by provided an invalid Power of Attorney to Scottrade ordering Scottrade to liquidate the accounts and remit all funds from Petitioner's accounts to Respondent.

18. The principal residence of Petitioner Donald L. Smith is located at 2617 Jamison Drive, Alton, Illinois. Petitioner attempted to return to his residence on August 2, 2013 and was denied access to his residence by Respondent. Petitioner's personal property including, but not limited to his driver's license, bank statements, computer, tax returns, Rolex watch, credit cards, check books, financial records, tax returns, and Petitioner's vehicle are located within Petitioner's residence.

19. On August 2, 2013, Petitioner attempted access to his residence, Respondent advised Petitioner that his wallet and other personal belongings had been placed in a safe deposit box.

20. Petitioner is not aware of a safe deposit box owned by Respondent.

21. Petitioner Donald L. Smith has been a practicing attorney in the State of Illinois for 50 years. Petitioner maintains a law office in his residence at 2617 Jamison Drive, Alton, Illinois.

22. Respondent Joann F. Smith refuses to allow Petitioner access to his law practice law office and refuses to return his keys to his office and his bar cards.

23. Petitioner owns 9 rental properties including his personal resident, eight of which are located in Madison County and one of which is located in St. Clair County. The properties are known as:

Parcel 1	137 Charlene, East Alton, IL	2013 19-2-08-20-08-201-004
Parcel 2	2617 Jamison Dr., Alton, IL	2013 20-2-02-31-02-201-005

4452574.1

S.A. 3

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Parcel 3	140 Hodge, East Alton, IL	2013 19-2-08-20-08-202-004
Parcel 4	108 Hodge, East Alton, IL	2013 19-2-08-20-08-202-009
Parcel 5	106 Hodge, East Alton, IL	2013 19-2-08-20-08-202-010
Parcel 6	110 Irwin St., East Alton, IL	2013 19-2-08-20-08-202-038
Parcel 7	776 Rice, Wood River, IL	2013 19-2-08-21-12-201-017
Parcel 8	723 Lincoln, Wood River, IL	2013 19-2-08-22-14-301-012
Parcel 9	158 Central, Wood River, IL	2013 19-2-08-27-12-202-039
Parcel 10	315 Central, Wood River, IL	2013 19-2-08-27-20-404-003
Parcel 11	1318-1320 North Church St., Belleville, IL	

24. Petitioner has been denied access to all receipt books, records, keys for the rental property, computers and associated equipment and files.

25. Petitioner requests this Court order Respondent to maintain the status quo, directing the banks, credit unions and Scottrade to return the funds for deposit by Petitioner for further deposit and prevent Respondent from further converting Petitioner's assets.

26. Petitioner requests this Court order Respondent to allow Petitioner access to his personal residence and to his law office and taking sole possession of residence and automobiles to maintain status quo.

27. All Orders should apply to and include:

- a) All US BANK, REGIONS BANK, SHELL COMMUNITY CREDIT UNION, SCOTTRADE, AND MIDAMERICA CREDIT UNION in the name of Petitioner and/or Respondent
- b) Scottrade accounts in the names of Petitioner and Respondent and for removal of hold on account 739801333.
- c) All individual accounts of Respondent JoAnn F. Smith or Joann F. Smith

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S.A. 4

15-L-679

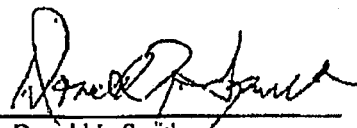
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28. All orders should direct said Institutions to allow withdraw of all funds by Petitioner Donald L. Smith so he may deposit said funds to maintain the status quo of the parties prior to the withdrawal and deposits and issuances of hold order for Scottrade as to include as stated above and but not limited to the same, and further the exclusive use and possession of the home at the Lake of the Ozarks and the keys thereto, automobiles at the residence of Petitioner.

29. In addition, the order should allow Respondent Joann F. Smith limited personal items and clothes as selected and to be picked up by her daughter Tracy Sharpmack.

WHEREFORE, Respondent prays that the Petition for Temporary Restraining Order be granted along with the Relief requested in the Petition and that a date set for Hearing on the Preliminary Injunction be set and notices of Hearing on Petitioner's Petition Preliminary Injunction be sent to Respondent with Summons to be issued to Respondent and thereby served.

RESPECTFULLY SUBMITTED,

  
Donald L. Smith

15-L-679

FILED 11-16-2013 ELERKOP COURT

IN THE CIRCUIT COURT OF MADISON COUNTY  
THIRD JUDICIAL CIRCUIT  
STATE OF ILLINOIS

DONALD L. SMITH,

Petitioner,

vs.

JOANN F. SMITH,  
US BANK,  
REGIONS BANK,  
SHELL COMMUNITY CREDIT UNION,  
SCOTTRADE, AND  
MIDAMERICA CREDIT UNION,

Respondents.

Cause Number: 13-CH- *610*

**FILED**  
AUG 06 2013

CLERK OF CIRCUIT COURT # 82  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

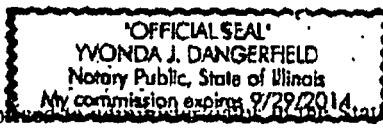
VERIFICATION BY CERTIFICATION

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 Complaint are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true. DONALD L. SMITH, individually, on oath states that the allegations in the Complaint are true and correct.

August 6, 2013

*Donald L. Smith*

STATE OF ILLINOIS )  
 ) SS.  
COUNTY OF MADISON )



I, the undersigned, a Notary Public authorized to practice in the State of Illinois, hereby certifies that DONALD L. SMITH, having appeared before me and having been first duly sworn, declared to me that he signed and executed this Affidavit, and that he had willingly signed and executed such instrument as his free and voluntary act for the purposes therein stated. IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal on this 6th day of August, 2013.

*Yvonda J. Dangerfield*  
Notary Public

*S.A. 6*

FILED 115201 CLERK OF COURT

1. US BANK, 1100 14th St, Washington Ave,  
Altoona, Pa. 62002
  2. Midamerica Credit Union, Hwy 143,  
Wood River, Illinois 62095
  3. Regions Bank, New Adams Ave, Altoona, Pa. 62002
  4. ~~Shelton~~ COMMUNITY CREDIT UNION, ~~Shelton~~  
Wood River, Pa. 62095
  5. STOTRAF, Edinboro, Pa. 62024
  6. JOANNE F. STOTRAF, 2617 <sup>1752E</sup> JAMESON, ALTOONA,  
Pa. 62002
- ↓ JAMESON DRIVE
- 6620  
6655 Edinboro Crossing Drive

15-L-679

**FILED**

**AUG 08 2013**

**CLERK OF CIRCUIT COURT #19  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS**

FILED 08172015 CLERK OF COURT

IN THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

DONALD L. SMITH,

Petitioner,

vs.

JOANN F. SMITH,

Respondent.

Cause No. 13-CH-610

PRELIMINARY INJUNCTION

THIS MATTER comes before the court on the 8<sup>th</sup> day of August, 2013, for further hearing on Petitioner's Petition for Issuance of a Temporary Restraining Order and for Preliminary Injunction.

Petitioner, Donald L. Smith, appears in person and with his attorney, Frederick M. Steiger. Respondent, Joann F. Smith, appears in person and with her attorney, Holly A. Reese.

The parties by and through counsel advise the Court that they have reached a stipulated basis for entry of Preliminary Injunction and upon the stipulation of the parties, the Court enters Preliminary Injunction on the following terms:

1. Respondent, Joann F. Smith, shall continue to reside at the parties' primary residence at 2617 Jamison, Alton, Illinois.
2. On a temporary basis, Petitioner, Donald L. Smith, will reside with his son and

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FILED 08 17 2015 CLERK OF COURT

daughter-in-law, Scott and Kathy Smith, at their residence.

3. Any and all funds withdrawn from the bank accounts held in the individual names of Petitioner and Respondent, or joint names of Petitioner and Respondent, shall be restored to the bank accounts from which they were withdrawn, including, but not limited to, the US Bank account, Alton, Illinois, the Regions Bank accounts and Midamerica Credit Union.

4. The parties stipulate that the approximately \$56,524.00 withdrawn from the joint US Bank account, the family account, shall be redeposited into that account. They further state that that shall be the account to which rental income, Social Security income and any other regular recurring income shall be deposited and the account from which the regular monthly bills and expenses shall be paid.

5. It is stipulated that Respondent, Joann F. Smith, shall pay all bills and expenses that arise in the normal course of the household activities from that account.

6. It is further stipulated that Petitioner, Donald L. Smith, shall receive a monthly draw from that account in the amount of \$2,500.00 to be paid to him by check once per month by Respondent for his personal expenses.

7. That Respondent, Joann F. Smith, agrees that she will keep full and complete records of the transactions, deposits, bills and payments made from the account and shall provide to Petitioner once per month a summary of the income and expenses and a copy of the monthly US Bank statement.

8. Petitioner, Donald L. Smith, agrees that he will keep records of the expenditures made from his monthly personal draw.

9. Pursuant to the parties' stipulation, all other bank accounts, credit union accounts, investment accounts (including the Scottrade account), and any other accounts holding funds or investments of the parties shall be closed to any transactions and no trades, transfers, transactions, buy orders or sell orders, withdrawals or deposits shall be made from any accounts without the written agreement of both Petitioner and Respondent or further Court order.

10. The parties' rental properties as enumerated in Petitioner's Petition for Issuance of Temporary Restraining Order, shall remain, to the extent possible, gainfully rented and Respondent, Joann F. Smith, shall continue to maintain the records of all rents received from the accounts which rents shall be deposited in the US Bank account set forth above.

11. All repairs and maintenance costs for the rental properties shall be made upon the agreement of Petitioner and Respondent for all amounts in excess of \$2,500.00. The parties shall discuss and make every effort to agree upon the appointment or selection of an individual acceptable to both parties who can be called upon to regularly perform minor maintenance and repair duties for the rental properties.

12. The parties have previously stipulated that Petitioner, Donald L. Smith, shall have access to 2617 Jamison, Alton, Illinois, at approximately 1:00 p.m. on August 7, 2013, for purpose of retrieving from the house his clothing and personal effects, including his

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FILED 08 17 2015 CLERK OF COURT

watch, wallet, drivers license, suitable clothing and personal effects as chosen by Petitioner, as well as Petitioner's black tower computer, monitor, printer and associated equipment.

13. The parties have stipulated that Respondent, Joann F. Smith, is authorized to purchase a suitable replacement computer for her to use in the home to maintain the customary books and records of the family's finances as set forth above.

14. The parties stipulate, and the Court orders, that the Preliminary Injunction issued herein is intended to preserve the status quo of the parties assets and accounts while providing to both Petitioner and Respondent appropriate sums to allow them to continue to maintain their customary standard of living.

15. This matter is ordered reset for further review and Case Management on the 30 day of Oct, 2013.

SO ORDERED:

B. Corder  
Judge

Dated: 08-08-13

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IN THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

JOANN SMITH, Individually and as )  
Administrator of the Estate of )  
DONALD L. SMITH, Deceased, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THE VANGUARD GROUP, INC., )  
SCOTT SMITH, AND JEFFREY SMITH, )  
 )  
Defendants. )

**FILED**  
JUL 17 2015

CLERK OF CIRCUIT COURT # 82  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

Case No. 15-L-679

**MOTION TO DISMISS PURSUANT TO 735 ILCS 5/2-615 AND 735 ILCS 5/2-619**

COME NOW Defendants, SCOTT SMITH and JEFFREY SMITH, by their attorneys, Lucco, Brown, Threlkeld & Dawson, L.L.P., and for their Motion to Dismiss Pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619, state:

**Part I – Motion to Dismiss Pursuant to 735 ILCS 5/2-615**

1. Plaintiff, JOANN SMITH, has filed this action both individually and in her capacity as Administrator of the Estate of Donald L. Smith, Deceased. The action relates to an IRA with The Vanguard Group, Inc., upon which Donald L. Smith named his natural sons, Scott Smith and Jeffrey Smith, as payable on death beneficiaries. Plaintiff has asked the court to determine that she, individually, is the beneficiary of the IRA. Plaintiff has named THE VANGUARD GROUP, INC., SCOTT SMITH, and JEFFREY SMITH as the Defendants in this suit. For the reasons that follow, Plaintiff's Complaint is substantially insufficient in law, and should be dismissed pursuant to 735 ILCS 5/2-615.

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2. Plaintiff asserts in her Complaint that Donald L. Smith's designation of his sons on the Vanguard IRA was "in violation of a court order entered in *Smith v. Smith*, Case No. 13-D-811, consolidated with Case No. 13-CH-610." Complaint, par. 4. According to Plaintiff, the "pertinent part" of that order of August 8, 2013, reads as follows:

Pursuant to the parties' stipulation, all other bank accounts, credit union accounts, investment accounts (including the Scottrade accounts), and any other accounts holding funds or investments of the parties shall be closed to any transactions and no trades, transfers, transactions, buy orders or sell orders, withdrawals or deposits shall be made from any accounts without the written agreement of both Petitioner and Respondent or further Court order.

Complaint, par. 17.

3. The terms of the order of August 8, 2013, did not prohibit Donald L. Smith from changing the beneficiary designation on the Vanguard IRA.

4. Further, the named Defendants in the instant case were not parties to Case No. 13-CH-610, in which the order of August 8, 2013, was entered.

5. Also, the Estate of Donald L. Smith is not a proper Plaintiff in this action. JoAnn Smith has asked the Court to determine that she, individually, is the beneficiary of the Vanguard IRA. She has not claimed that the Vanguard IRA is an asset of the Donald L. Smith Estate. Therefore, in the event that the Court is not inclined to dismiss this case in its entirety, Scott Smith and Jeffrey Smith move the Court to order that JoAnn Smith, in her capacity as the Administrator of the Estate of Donald L. Smith, be dismissed from this cause of action.

6. In Count II of the Complaint, Plaintiff appears to be attempting to state a cause of action for fraud against Donald L. Smith, yet neither Donald L. Smith nor his estate are named as Defendants in this cause of action. The allegations in this count are likewise substantially insufficient in law in that Plaintiff has failed to adequately plead the elements or facts of a cause

of action for fraud with any specificity. Plaintiff's allegations in Paragraph 29 of the Complaint related to general statements of Donald L. Smith are also barred by the Dead Man's Act, 735 ILCS 5/8-201, as JoAnn Smith is a person directly interested in this cause of action. In the event the Court does not dismiss this cause of action in its entirety, Scott Smith and Jeffrey Smith move the Court to strike Paragraph 29 from the Complaint.

WHEREFORE, Defendants, SCOTT SMITH and JEFFREY SMITH, respectfully request the Court to dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-615, and to award such other relief as the Court deems proper. In the alternative, Defendants, SCOTT SMITH and JEFFREY SMITH, respectfully request the Court to dismiss JoAnn Smith, in her capacity as the Administrator of the Estate of Donald L. Smith, from this cause of action, and to strike Paragraph 29 from the Complaint.

Part II – Motion to Dismiss Pursuant to 735 ILCS 5/2-619

1 – 6. Defendants, SCOTT SMITH and JEFFREY SMITH, incorporate by reference their arguments in Paragraphs 1 through 6 of Part I as Paragraphs 1 through 6 of Part II of this Motion to Dismiss.


7. Plaintiff's contentions in her Complaint that she should be the beneficiary of the Vanguard IRA center around one principal theory: that Donald L. Smith's designation of Scott and Jeffrey Smith as the beneficiaries on that account violated the August 8, 2013, court order. Even if the Court were inclined to find this argument persuasive, the August 8, 2013, order is of no effect, as that order was withdrawn under the terms of the Stipulated Order of Dismissal which was entered on October 29, 2014, in Case Numbers 13-D-811 and 13-CH-610. Under the terms of the Stipulated Order of Dismissal, a copy of which is attached hereto as Exhibit A, JoAnn Smith and Donald Smith agreed that "[a]ll hold orders as to the financial accounts of the parties including

but not limited to US Bank, Regions Bank, Shell Community Credit Union, Scottrade and MidAmerica Credit Union ordered in the above causes are dismissed and withdrawn by this order.”

8. Dismissal of Plaintiff's Complaint is therefore proper pursuant to 735 ILCS 5/2-619(a)(4) and 735 ILCS 619(a)(9), as the Stipulated Order of Dismissal bars the instant cause of action and/or constitutes affirmative matter avoiding the legal effect of Plaintiff's claim.

WHEREFORE, Defendants, SCOTT SMITH and JEFFREY SMITH, respectfully request the Court to dismiss Plaintiff's Complaint pursuant to 735 ILCS 5/2-619, and to award such other relief as the Court deems proper.

SCOTT R. SMITH  
JEFFREY D. SMITH

  
By: J. William Lucco, #01701835  
Joseph R. Brown, Jr. #00316253  
Michael J. Hertz, #6289731

LUCCO, BROWN, THRELKELD & DAWSON, L.L.P.  
224 ST. LOUIS STREET, P.O. BOX 539  
EDWARDSVILLE, ILLINOIS 62025  
TELEPHONE (618) 656-2321; FAX (618) 656-2363

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business addresses as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail box in Edwardsville, Illinois, on the 17<sup>th</sup> day of July, 2015.

Case No. 15-L-679  
Page 4 of 5

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**FILED**

OCT 29 2014

CLERK OF CIRCUIT COURT #51  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

IN THE CIRCUIT COURT  
THIRD JUDICIAL CIRCUIT  
MADISON COUNTY, ILLINOIS

DONALD L. SMITH,  
Petitioner

Vs.

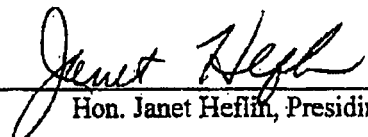
Consolidated Cause Nos.  
13-D-811 and 13-CH-610

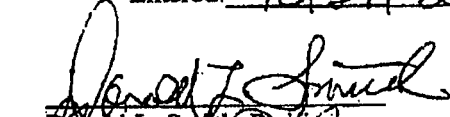
JOANN F. SMITH  
Respondent

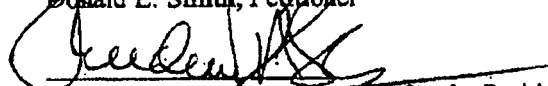
STIPULATED ORDER OF DISMISSAL

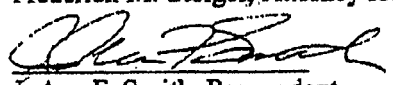
Comes now the Petitioner, Donald L. Smith and the Respondent, JoAnn F. Smith in the above stated matters and state that the parties have reconciled and stipulate and agree that the above stated causes be dismissed and that the court enter this order of dismissal. All hold orders as to the financial accounts of the parties including but not limited to US Bank, Regions Bank, Shell Community Credit Union, Scottrade and MidAmerica Credit Union ordered in the above causes are dismissed and withdrawn by this order.

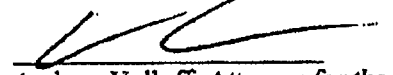
Entered: 10/29/2014

  
Hon. Janet Hefflin, Presiding Judge

  
Donald L. Smith, Petitioner

  
Frederick M. Steiger, Attorney for the Petitioner

  
JoAnn F. Smith, Respondent

  
Andrew Velloff, Attorney for the Respondent

15-L-679  
5065

Ex. A  
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