

NOTICE
Decision filed 02/25/19. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2019 IL App (5th) 180553-U

NO. 5-18-0553

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<i>In re</i> ESTATE OF MARIA L. STILES, Deceased)	Appeal from the
)	Circuit Court of
(Roy Parker, Tom Stewart, Amy Liefer, and Jennifer Fish,)	Madison County.
)	
Petitioners-Appellants,)	
)	
v.)	No. 18-P-435
)	
Larry Parker and CNB Bank & Trust, N.A.,)	Honorable
)	Clarence W. Harrison II,
Respondents-Appellees).)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court erred in appointing third party administrator to collect as to decedent’s estate where executor designated under will was disqualified and persons entitled to nominate an administrator pursuant to section 9-3 of the Probate Act (755 ILCS 5/9-3 (West 2016)) had filed such petitions and there was no basis to disqualify those who were so nominated.

¶ 2 The petitioners, Roy Parker, Tom Stewart, Amy Liefer, and Jennifer Fish, appeal the following orders of the circuit court of Madison County with respect to the estate of Maria L. Stiles, deceased (the estate): (1) the October 15, 2018, order appointing the respondent, CNB Bank, as executor of the estate; (2) the October 22, 2018, order

amending the appointment so that CNB Bank's status with respect to the estate is "Administrator to Collect," rather than executor; (3) the October 22, 2018, order denying the petition for revocation of letters and issuance of new letters to the petitioners, Amy Liefer and Jennifer Fish, which was submitted by the petitioner, Tom Stewart, the sole trustee of the Maria L. Stiles Irrevocable Living Trust; and (4) the November 13, 2018, order denying Jennifer's petition for revocation of letters and issuance of letters testamentary to Jennifer Fish, executrix, and maintaining CNB Bank as "Administrator to Collect." For the following reasons, we reverse and remand with directions that the circuit court issue letters of office to Jennifer Fish as executor, if she is so named in the will, or Jennifer Fish and Amy Liefer, as co-administratrix with will annexed, if Jennifer Fish is not named in the will. In addition, we order immediate issuance of the mandate.

¶ 3

FACTS

¶ 4 On July 16, 2018, petitioner Roy Parker (Roy) filed a petition for letters of administration to issue to Amy Liefer (Amy) as to the decedent's estate. The petition alleged that the decedent died on March 6, 2017, and Roy's brother, Larry Parker (Larry), had been charged with the commission of two criminal offenses relating to causing the decedent's death and/or harm: (1) "Criminal Abuse or Neglect of an Elderly Person Resulting in Death" (720 ILCS 5/12-4.4a(b)(1) (West 2016)) and (2) "Criminal Abuse or Neglect of an Elderly Person" (*id.*). According to the petition, in addition to her sons, Roy and Larry, the decedent was survived by several grandchildren, including Jennifer Fish (Jennifer). The petition alleged that Roy was legally qualified to nominate an

administrator, and sought the appointment of his daughter, Amy, who the petition alleged was qualified and willing to act.

¶ 5 According to Roy's petition, although a purported last will and testament dated September 6, 2012, was filed in the circuit court on May 1, 2017, after due and reasonable inquiry, Roy had concluded that this instrument was invalid as the product of undue influence exerted upon the decedent. The petition further alleged that Roy, after due and reasonable inquiry, has cause to believe that the decedent had executed a last will and testament prior to the aforementioned instrument, but the earlier instrument had not yet been discovered. Petitioner Tom Stewart (Tom), being the trustee of the Maria L. Stiles Irrevocable Living Trust dated October 5, 2007, who the petition contended was the sole beneficiary of a purported last will and testament of the decedent dated September 6, 2012, filed, contemporaneous with Roy's petition, a waiver of the right to administer the estate and a nomination of Amy Liefer to serve as personal representative.

¶ 6 On August 10, 2018, Larry filed an objection to the petition for letters of administration and a counterpetition for probate of will and for letters testamentary. Thereafter, on August 27, 2018, Roy filed a petition to admit will and for letters of administration with will annexed, stating that he believed the September 6, 2012, last will and testament of the decedent is valid, effectively withdrawing his previous petition and the allegations made therein. Roy's new petition alleged that the decedent had nominated Larry to serve as her personal representative and Jennifer to serve in the event that Larry failed or refused to qualify and act. Roy's new petition alleged that Larry was unqualified because he was charged with crimes involving the abuse and death of the decedent and he

failed to act for more than a year following the decedent's death and more than 30 days after the filing of the decedent's last will and testament. Roy's new petition sought the appointment of Jennifer and Amy to serve as co-administratrix with the will annexed in the matter of the estate of the decedent.

¶ 7 On September 17, 2018, Larry filed an objection to Roy's petition, admitting that Jennifer is the named alternate executor in the will but that Amy is not named and has no authority to act.¹ Larry requested an independent third party executor and trustee be named. On September 18, 2018, the circuit court held a hearing on Roy's petition and Larry's objection. The circuit court took judicial notice of the criminal charges pending against Larry in relation to abuse, neglect, and the death of the decedent. After hearing argument by counsel, the circuit court ordered Larry's counsel to come forward with a bank willing to act as executor within seven days and stated that if that was not done, he would sign Roy's proposed order appointing Jennifer and Amy.

¶ 8 On September 20, 2018, CNB Bank filed an oath of office, and on September 24, 2018, the circuit court entered an order admitting the September 6, 2012, will to probate and appointing CNB Bank as administrator with will annexed. On October 3, 2018, Tom filed a petition for revocation of letters and issuance of new letters to Amy and Jennifer. Tom, on oath, stated that he is the sole trustee of an irrevocable living trust settled by the decedent in 2007 and amended on September 6, 2012, and as such, also the sole legatee

¹We note that only one copy of the last will and testament at issue can be found in the record on appeal, and that copy is missing page 2. Accordingly, this court is unable to definitively determine the decedent's designations as to executor of the will. Nevertheless, as will be set forth below, the Probate Act allows us to make a determination of error in this case despite the missing page.

of the estate of the decedent pursuant to the will. According to Tom, he was not served with any petition requesting CNB Bank to be appointed as an administrator of the estate. As such, he requested, pursuant to section 9-7 of the Probate Act of 1975 (Probate Act or Act) (755 ILCS 5/9-7 (West 2016)), that the letters issued to CNB Bank be revoked and that Amy and Jennifer be appointed to act as co-administratixes with will annexed for the estate of the decedent.

¶ 9 On October 15, 2018, Tom, Roy, Amy, and Jennifer filed a motion for reconsideration of the circuit court's September 24, 2018, order. This motion basically echoed the concerns set forth in Tom's October 3, 2018, petition regarding the fact that no petition to issue letters of office to CNB Bank had ever been filed, and that Tom, as sole legatee, should be permitted to nominate an administrator pursuant to section 6-9 of the Probate Act. *Id.* § 6-9. A hearing was held on Tom's petition to revoke letters of office and the motion for reconsideration on October 22, 2018. At that hearing, the circuit court was informed, as it had been in the pleadings, that CNB Bank was unwilling to pursue any cause of action against Larry on behalf of the estate for the decedent's death.

¶ 10 Following the hearing, the circuit court entered an order on October 25, 2018, denying the motion for reconsideration and the petition for revocation of letters to CNB Bank. The circuit court granted Larry's motion to amend his petition to admit the will to probate and for letters testamentary to nominate CNB Bank as administrator to collect with will annexed. The circuit court ordered CNB Bank to continue, not as executor, but as administrator to collect with will annexed, *nunc pro tunc*, to September 24, 2018.

Finally, the circuit court granted leave to the petitioners to file a motion to name a special representative to file any wrongful death or survival action against Larry.

¶ 11 On November 2, 2018, Jennifer filed a petition for revocation of letters and issuance of letters testamentary to herself. In that petition, Jennifer, upon oath, outlined the history and circumstances surrounding the death of the decedent and Larry's involvement therein. Jennifer argued that Larry was unqualified to nominate CNB Bank as administrator to collect pursuant to section 9-3 of the Probate Act. 755 ILCS 5/9-3 (West 2016). Jennifer additionally argued that the appointment of an administrator to collect was inappropriate in this case pursuant to section 10-1(a) of the Probate Act. *Id.* § 10-1(a). Jennifer argued that she was appointed by the decedent to serve as executrix of the estate should Larry be unqualified as such. After a hearing on November 13, 2018, the circuit court denied Jennifer's motion. On November 21, 2018, Roy, Jennifer, Tom, and Amy filed a notice of appeal from the circuit court's orders.

¶ 12 On December 7, 2018, the petitioners filed a motion, pursuant to Illinois Supreme Court Rule 311(b) (eff. July 1, 2018), to accelerate this appeal. The petitioners stated in their motion that they are concerned that the viability of certain causes of action otherwise available for the benefit of the estate or the decedent's heirs may be jeopardized by applicable statutes of limitations, as decedent died on March 6, 2017. This court granted the motion to accelerate on January 22, 2019.

¶ 13

ANALYSIS

¶ 14 We begin by noting that no appellee's brief has been filed in this case. On February 7, 2019, this court received correspondence from CNB Bank, stating that

although CNB Bank has accepted the circuit court's appointment as administrator of the estate and continues to act at the request and direction of the circuit court, it does not take a position with regard to the issue raised in this appeal, and therefore will not be submitting an appellee's brief in this matter. Our supreme court has set forth the following guidelines for cases where no appellee's brief has been filed:

“We do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed.” *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 15 We find this case to be of the latter type described by the supreme court in *Capitol Mortgage Corp.* The petitioners begin by directing this court's attention to our supreme court's decision in *In re Estate of Poole*, 207 Ill. 2d 393 (2003). As in *Estate of Poole*, the question brought forward on appeal is who has legal precedence to act as the administrator in this estate. *Id.* at 401. “Because this question involves the construction of statutes, we review the circuit court's determination *de novo*.” *Id.* Section 6-8 of the Probate Act (755 ILCS 5/6-8 (West 2016)) provides that “[w]hen a will is admitted to

probate, letters testamentary shall be issued to the executor named in the will if he qualifies and accepts the office, unless the issuance of letters is excused.” Here, the record does not contain a complete copy of the last will and testament of the decedent that enables this court to definitively determine who the decedent named as executor and/or successor executor. However, the parties have admitted in the various pleadings set forth above that the decedent had named Larry as executor and Jennifer as successor executor. It is clear from the record that there is a potential cause of action against Larry for the wrongful death of the decedent and/or for abuse or neglect. This, in effect, creates a conflict of interest that essentially disqualifies Larry from being the executor of the estate. *In re Estate of Storer*, 131 Ill. App. 2d 1049, 1053 (1971). By operation of the will as set forth by the admission of the parties, Jennifer should be appointed executor, and a *prima facie* error on the part of the circuit court is apparent. 755 ILCS 5/6-8 (West 2016). Even if Jennifer were not named in the will as successor executor, however, the following analysis would apply.

¶ 16 Section 6-9 of the Probate Act provides that where the named executor fails to qualify for the office, letters of administration with the will annexed shall be issued in accordance with the preferences in section 9-3 upon petition under section 6-2 and notice as provided in section 9-5. *Id.* § 6-9. In either event, section 9-3 of the Probate Act provides that, *inter alia*, the following persons are entitled to preference in the following order in obtaining the letters of administration with the will annexed: (1) surviving spouse or any person nominated by the surviving spouse; (2) the legatees or any person nominated by them, with preference to legatees who are children; (3) the children or any

person nominated by them; and (4) the grandchildren or any person nominated by them. *Id.* § 9-3. Section 9-3 further provides that only a person qualified to act as an administrator may nominate. *Id.*

¶ 17 Section 10-1 of the Act sets forth the required conditions before a court may issue letters of administration to collect. *Id.* § 10-1. That section provides that letters of administration to collect are appropriate where “(1) 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 ***.” *Id.* Further, section 10-1 provides that the selection of an administrator to collect for the estate of a decedent is in the discretion of the court, giving due consideration to the person named as executor in the will, or if there is no will or if no executor is named, to the preferences in section 9-3. *Id.*

¶ 18 Based on the aforementioned sections of the Probate Act, we find the petitioners’ brief demonstrates *prima facie* reversible error which finds support in the record as we have reviewed it. See *First Capitol Mortgage Corp.*, 63 Ill. 2d at 133. Larry, who the parties admit was named in the will as executor, is clearly disqualified to act as executor of the decedent’s estate. See *Storer*, 131 Ill. App. 2d at 1053-54. Similarly, Larry is not qualified to nominate CNB Bank as administrator or administrator to collect. See 755 ILCS 5/9-3 (West 2016). Even if Larry were so qualified, a plain reading of section 10-1 of the Probate Act reveals that the circumstances of this case are not such that an administrator to collect is appropriate. *Id.* § 10-1. Assuming Jennifer was named

successor executor in the will, she would be entitled to letters of office as successor executor. *Id.* § 6-8. Even if this were not the case, however, the petitioners have filed petitions nominating persons to be administrator that are entitled to preference pursuant to section 6-9 of the Act. *Id.* § 6-9. Roy, as the decedent's son, nominated Jennifer and Amy as co-administratrix, and no one has alleged that they should be disqualified. Further, the circuit court did not find that they should be disqualified.

¶ 19 For the foregoing reasons, we find that the circuit court erred in appointing CNB Bank as administrator to collect as to the decedent's estate. This error was compounded by the circuit court's attempt to appoint special representatives to prosecute the wrongful death claim on behalf of the estate. Section 2.1 of the Wrongful Death Act (740 ILCS 180/2.1 (West 2016)) provides for the appointment of a special administrator only in the event that the only asset of the estate is a cause of action under the act, and where no petition for letters of office for the estate has been filed. This is clearly not the case here. Accordingly, we find the circuit court erred in the appointment of CNB Bank as administrator to collect and in its denial of the various petitions to appoint Jennifer and/or Amy as co-administratrix of the estate of the deceased. We therefore vacate the orders of the circuit court appointing CNB Bank as administrator and remand with directions that the circuit court grant letters of office to Jennifer as executor, if she is so named in the will, or Jennifer and Amy, as co-administratrix with will annexed, if Jennifer is not named in the will.

¶ 20 Finally, Illinois Supreme Court Rule 368(a) (eff. July 1, 2006) provides as follows:

“The clerk of the reviewing court shall transmit to the circuit court the mandate of the reviewing court, with notice to the parties, not earlier than 35 days after the entry of judgment unless the court orders otherwise. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court.”

¶ 21 Here, we granted the motion to accelerate the appeal due to potential statute of limitations issues in relation to the wrongful death action. In addition, because no appellees’ briefs were filed in this case, the appellees have no basis on which to file a petition for rehearing, as points not argued in a brief are waived and shall not be raised on petition for rehearing. Ill. S. Ct. R. 341(h)(7), (i) (eff. May 25, 2018). Due to the time sensitive nature of these issues, we find good cause for an immediate issuance of the mandate in this case and hereby order that the mandate immediately issue.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we vacate the orders of the circuit court appointing CNB Bank as administrator and remand with directions that the circuit court grant letters of office to Jennifer as executor, if she is so named in the will, or Jennifer and Amy, as co-administratix with will annexed, if Jennifer is not named in the will.

¶ 24 Orders reversed; remanded with directions; mandate to immediately issue.