DIVISION ONE
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BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN THE MATTER OF THE ESTATE OF: JOHN MARSHALL FIFE, Deceased.	1 CA-CV 09-0592 DEPARTMENT D
MARK FIFE, as successor Personal Representative of the ESTATE OF JOHN MARSHALL FIFE, Appellant, v. LARRY FIFE; GARY A. FIFE; and EMILY LEITZELL, Appellees.	**MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. PB2006-090497

The Honorable Kirby Kongable, Commissioner

AFFIRMED

Keeling Law Offices, LLC — Phoenix
By Lynn A. Keeling
Attorneys for Appellant

Jackson White, PC — Mesa
By James L. Tanner
Attorneys for Appellee Emily Leitzell

Larry Fife — Phoenix
Appellee

I R V I N E, Judge

¶1 Appellant Mark Fife ("Mark"), successor personal representative of John Marshall Fife, appeals from the probate court's denial of his motion for new trial. Mark asserts that newly discovered evidence demonstrated the asset distribution ordered by the court was improper and denied some of the beneficiaries their rightful inheritance. We conclude Mark failed to present newly discovered evidence and the probate court therefore did not abuse its discretion in denying the motion.

FACTS AND PROCEDURAL HISTORY

¶2 John Marshall Fife died on May 9, 2006, leaving a will that designated his daughter Dawn L. Chapman-Downs ("Dawn") as executor. The will further directed that, upon his death all his property and possessions were "to be liquidated, balances paid off in full, and the remainder . . . split (4) four ways between [his] children."[1] On July 26, 2006, Dawn filed the will and the necessary documents for informal probate of the will and appointment of herself as personal representative. On August 4, 2006, Gary filed an objection, asserting that Dawn had taken vehicles, closed accounts, and refused to accept his calls.

[1] The will identified his children as Larry M. Fife ("Larry"), Gary Alan Fife ("Gary"), Dawn, and Mark.

¶3 Dawn filed a preliminary inventory of assets on October 25, 2006. The inventory identified as assets a residence valued at $235,000, a pickup truck valued at $7500, a Jaguar valued at $3500, four rifles valued at $5000, and a painting valued at $500. The document also asserted that Larry and Gary had removed all the household furniture and fixtures and a camper such that Dawn could not value the items. It also indicated that unspecified funds had been taken from certain accounts prior to and after John Fife's death.

¶4 On April 5, 2007, Gary filed a request for a status conference, asserting that Dawn had not provided the siblings with an accounting and had not communicated with them. Gary advised that Dawn had been diagnosed with cancer and he believed she needed assistance in performing her duties. At the status conference, the court ordered Dawn to complete a written status report for the parties. Dawn subsequently died, and on June 11, 2008, Mark was appointed successor personal representative.

¶5 In May 2009, Emily Leitzell ("Emily"), Dawn's daughter filed a motion for a status conference. She asserted that she received a proposed distribution dated December 18, 2008 signed by Mark; that she also received a letter from Mark's former attorney, stating that the she was entitled to a larger portion; and that Mark failed to respond to her request that the appropriate distribution be made. In his response, Mark

contended that he was forced by his attorney to use the calculations generated by Dawn and that the attorney had since withdrawn, allowing him to complete an accurate accounting. Mark requested that the court order the attorney to produce the file and allow sixty days for Mark to complete the accounting and final distribution. Attached to Mark's response as an exhibit was a document captioned "Final Accounting Proposal for Distribution" dated November 30, 2008, and signed by Mark as personal representative. The proposed distribution noted that each of the four beneficiaries was to have received $9,488.32, and listed the various distributions each had already received as well as the balance still owed to each beneficiary. The document stated that the right to object to the proposed distribution would terminate in thirty days.

¶6 At a status conference on May 21, 2009, Mark argued that the proposed distribution did not "add up" and that he wanted to verify the information before closing the case. He asserted that he wanted to get the Jaguar, the guns, and the paintings returned to be appraised, and that he had been unable to get the file from his former attorney. He also asserted that he had no information on the proceeds of the sale of the camper, a garage sale, or certain furniture sold by Larry.

¶7 Emily argued that the issues Mark was raising had been raised previously. Emily noted that Mark had signed the proposed

distribution, that any objection had to be filed within thirty days, and that no one had objected. Mark claimed that he did not agree with the proposed distribution but had been forced to sign it. Emily noted that the proposed distribution reflected that the estate owed her for funeral costs.

¶8 The court ordered that the funds be distributed in accordance with the Final Accounting Proposal for Distribution signed by Mark on November 30, 2008. The court reasoned:

> Number one, there's been a lot of time elapsed; a lot, a lot of time elapsed. And it's kind of late now to say, "Wait a minute, I want to keep going back in and churn this thing back up again."
>
> Secondly, there were no objections to anyone by anyone to the proposal. And, you know, that kind of makes those kind of late.
>
> We had the fact that Mark himself signed the proposal. Maybe he says he was forced to, but, you know, he himself signed the proposal, so he shouldn't be objecting to that now.
>
> And then, finally, just the size of the estate's going to get totally eaten up if we're going to fight over this.
>
> So for those four reasons let's just go ahead and distribute it according to the proposal and let's get it done.

At the close of the conference, Emily agreed to provide the appraisal for the guns, the painting, and the bill of sale for the Jaguar. An unsigned minute entry was filed on May 27, 2009 reflecting the court's ruling. Emily subsequently sent a letter

to Mark, including the appraisal for the guns and an offer to "sell" Mark the painting "for the $500.00 that was deducted from Mom's portion." She also included a copy of a credit card statement she said showed that Gary had made charges after the decedent's death. Mark asserted she was required to turn over the guns and painting in exchange for payment of her distribution.

¶9 Mark filed a motion for reconsideration of the court's order of distribution on June 11, 2009. He asserted that Emily refused to turn over the guns and painting, that she now admitted the Jaguar sold for only $1000, and that she was still challenging Gary's distribution and thereby admitting that the accounting was not complete. Mark also alleged that Dawn's husband made unauthorized payments from the estate, and Larry admitted he received personal property and the camper and kept some of the funds. The court denied the motion without elaboration.

¶10 On July 21, 2009, Mark filed a motion for new trial pursuant to Arizona Rule of Civil Procedure 59(a) on the grounds of newly discovered evidence. Mark contended that new evidence showed that certain property had been transferred to specific heirs rather than the estate, that Larry sold the camper, and that the truck, camper, guns, painting, and Jaguar were all sold for less than their value. He also asserted that he had evidence

that at least one buyer wanted to purchase the residence for significantly more than the selling price. He argued that Emily was refusing to give him access to the guns and painting for valuation. Mark asserted that the new evidence would permit a correct distribution and that the estate should not be closed using inaccurate information, leaving him liable for an improper distribution. Mark sought an order directing Emily to provide the guns and painting to Mark for appraisal, directing Emily and Dawn's husband to refund the fair market value of the Jaguar, the truck, the guns, the dissipation of the home, and the painting "from the actual cash received for these items, based upon who received the payments," directing Larry to return a ledger to Mark, and directing that Larry's distribution be offset by the value of the furniture, camper and other property improperly removed from the estate.

¶11 The court denied the motion without explanation.[2] Mark timely appealed.

DISCUSSION

¶12 Mark argues that the court improperly denied his motion for new trial. Emily contends that Mark's motion was

[2] Because the court's minute entry order denying Mark's motion for new trial was not signed, this Court suspended the appeal pursuant to *Eaton Fruit Co. v. Cal. Spray-Chemical Corp.*, 102 Ariz. 129, 426 P.2d 397 (1967), to allow Mark an opportunity to obtain a signed order. The trial court signed the order and filed it on December 1, 2009.

untimely because it was filed more than fifteen days after the probate court entered its May 27, 2009, minute entry ruling.

¶13 Arizona Rule of Civil Procedure 59(d) provides that "[a] motion for new trial shall be filed not later than 15 days after entry of the judgment." In *Dunahay v. Struzik,* the Arizona Supreme Court found that a motion for new trial filed after a verdict but before entry of judgment was a proper motion from which an appeal could be taken. 96 Ariz. 246, 249, 393 P.2d 930, 932-33 (1964).

¶14 Mark filed his motion for new trial after the probate court had filed its minute entry ruling but before the final judgment was entered. Under *Dunahay*, the motion was timely and the ruling on the motion may be reviewed on appeal.

¶15 We review a court's decision denying a motion for new trial for an abuse of discretion. *Boatman v. Samaritan Health Servs., Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990). Mark moved for a new trial on the grounds of newly discovered evidence. A court may grant a new trial based on "[m]aterial evidence, newly discovered, which with reasonable diligence could not have been discovered and produced at the trial." Ariz.R.Civ.P. 59(a)(4). A motion for new trial based on newly discovered evidence is appropriate only if "(1) the newly discovered evidence could not have been discovered before the granting of judgment despite the exercise of due diligence, (2)

the evidence would probably change the result of the litigation, and (3) the newly discovered evidence [existed] at the time of the judgment." *Boatman*, 168 Ariz. at 212, 812 P.2d at 1030.

¶16 Mark argues the newly discovered evidence is that Emily withheld the bill of sale for the sale of the Jaguar and withheld appraisals for the painting and the guns. He also argues that Larry withheld evidence regarding the sale of furniture and the camper.

¶17 The record shows that the preliminary inventory Dawn filed in October 2006 listed the Jaguar, the guns, and the painting as assets of the estate and advised that Larry and Gary had taken the furniture and the camper from the residence. Mark could have, as successor personal representative, made efforts to obtain the appraisals and to determine the disposition of the furniture and camper, but he does not point us to any evidence in the record that any such effort was made. This is not newly discovered evidence that could not have been discovered before judgment was entered. The court did not abuse its discretion in denying Mark's motion for new trial.

¶18 Mark also argues that the distribution is incorrect and some of the beneficiaries are being denied their inheritance. He asserts that the numbers listed in the final distribution "do not make any sense as Ms. Leitzell is given three times the disbursement as compared to Gary Fife."

¶19 We first note that Mark, himself, signed the proposed distribution, which included the declaration that the right to object to the proposal would terminate if a written objection was not received within thirty days after mailing or delivery of the proposal. Although the proposed distribution in the record does not include a certificate of mailing and the document does not appear to have been filed with the court, none of the beneficiaries claimed that they did not receive the proposal or that they made any objection as required. Mark asserts that the proposal for distribution was not filed with the court and that objections were made at status conferences. Section 14-3906(B) (2005),[3] however, requires the personal representative to mail or deliver a copy of the proposal to all persons that have a right to object; the statute does not require that the proposal be filed with the court. The statute further requires that

[3] Section 14-3906(B) provides:

> After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset the person is to receive, if not waived earlier in writing, terminates if the person fails to object in writing received by the personal representative within thirty days after mailing or delivery of the proposal.

objections to the proposal for distribution be in writing and received by the personal representative within thirty days after mailing or delivery of the proposal. *Id.* Failure to make such an objection within that timeframe terminates the right to object. None of the parties claim to have sent any written objection in compliance with the statute. The right to object to the distribution has therefore terminated.[4]

¶20 Mark has requested attorneys' fees on appeal, but has offered no authority to support such fees. We therefore deny the request. *See Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, 172, ¶ 25, 7 P.3d 973, 978 (App. 2000) (request for fees on appeal will be denied where party fails to state any substantive basis for the request). Emily has requested an award of fees pursuant to A.R.S. § 12-341.01(C) (2003), which requires the court to award attorneys' fees upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless, and is not made in good faith. All three elements must be shown. *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587, ¶ 33, 20 P.3d 1158, 1168 (App. 2001). Emily has argued only that the

[4] We note that the order of distribution may contain a mathematical error in Emily's distribution. If the amounts received for prior distributions are correct, Emily is entitled to $619.71 in additional funds, not $2,735.01. Neither party raises this issue on appeal, so we do not address it.

appeal is groundless. We deny Emily's request for attorneys' fees.

CONCLUSION

¶21 We conclude that the probate court did not abuse its discretion in denying Mark's motion for new trial. We affirm.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge