NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARACAJU, INC., an Arizona corporation; and NATHAN W. GWILLIAM and CRYSTAL GWILLIAM, husband and wife, Plaintiffs-Counterdefendants-Appellees, and PETER S. DAVIS, Receiver-Appellee, v. TRUE NORTH, INC., an Arizona corporation; and DALE R. GWILLIAM and KRISTIE GWILLIAM, husband and wife, Defendants-Counterclaimants-Appellants,	1 CA-CV 09-0133 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-022770

The Honorable Richard J. Trujillo, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

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W E I S B E R G, Judge

¶1 True North, Inc. and Dale and Kristie Gwilliam appeal the superior court's order amending and continuing the receivership of Peter S. Davis over certain Arizona limited liability companies and an Arizona general partnership in which appellants have an ownership interest. For the following reasons, we accept special action jurisdiction of the appeal and grant relief.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Dale Gwilliam is the father of Nathan W. Gwilliam. Nathan and Dale jointly owned and operated adoption-related websites through several business entities. As relevant, those entities were Adoption Media, L.L.C., Adoption Profiles, L.L.C., DEVNET, LLC, FamilyStore.com, LLC, Family Ads, LLC, ShareSpace.com, LLC, and Adoption.com, an Arizona general partnership, which we refer to collectively as "the Companies."[1]

¶3 On December 12, 2007, Nathan filed a Petition for Involuntary Dissolution and Motion for Order to Show Cause

[1]Nathan and Dale formed Aracaju, Inc. and True North, Inc., respectively, to hold and manage certain assets related to the Companies. For purposes of our decision, we refer to Nathan, Crystal Gwilliam and Aracaju collectively as "Nathan" and to Dale, Kristie Gwilliam and True North collectively as "Dale."

seeking dissolution of the Companies. Nathan claimed the dissolution was necessary because he and Dale were irreconcilably deadlocked and could not continue to jointly operate the Companies.

¶4 The court initially scheduled the hearing on Nathan's motion for order to show cause for February 2008, but by stipulation of the parties rescheduled it to May 19, 2008. In the meantime, on February 4, 2008, Nathan and Dale voluntarily entered a Limited Receivership Agreement, under which Peter S. Davis was appointed to make decisions for the Companies in the event of a disagreement between Nathan and Dale, "except for decisions involving the bulk sale of assets, the sale of the [Companies], the dissolution of the [Companies] or other similar major decisions." The agreement stated that Davis' appointment would terminate on May 31, 2008.

¶5 Ten days before the rescheduled show cause hearing, Nathan filed a First Amended Complaint, Petition for Involuntary Dissolution, and Amended Motion for Order to Show Cause. Nathan asked the court to declare that under the terms of the operating agreements governing Adoption Media, L.L.C. and Adoption Profiles, L.L.C., Nathan had made a valid offer to buy Dale's interest in the Companies or to sell his interest in the Companies to Dale. He also pled a claim for breach of the operating agreements and through anticipatory repudiation asked

the court to appoint a receiver to protect and preserve the Companies' assets, asked for an involuntary judicial dissolution of the limited liability companies under Arizona Revised Statutes ("A.R.S.") section 29-785(A)(2) (Supp. 2008), and for dissolution of the partnership under A.R.S. §§ 29-1035 and -1071 (1998). The court issued a revised order to show cause why Nathan's request should not be granted.

¶6 Dale then moved the court to quash the revised order to show cause and vacate the May 19, 2008 hearing. Although he agreed with Nathan that the court should appoint a receiver to preserve and protect the Companies' assets, he argued the show cause hearing should be vacated because no emergency existed and he did not have adequate notice and opportunity to prepare for the changed relief requested in Nathan's amended complaint and petition. He also demanded a jury trial and argued that due process required the court to vacate the hearing.

¶7 On May 19, 2008, the court rescheduled the show cause hearing for August 4, 2008. Thereafter, the parties stipulated to the court's appointment of Davis as the Companies' receiver through September 30, 2008. On June 6, 2008, the court entered an order appointing Davis as the Companies' receiver for the "protection and preservation of the [Companies' assets]," pending the sale of ownership interests in the Companies

pursuant to the operating agreements or by agreement of the parties and approval by the court.

¶8 Dale then filed an amended answer and a counterclaim, in which he asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, self-dealing and misappropriation of company opportunities, abandonment of business purpose and efforts to damage the Companies, conspiracy to damage Dale's financial and legal interests, breach of the temporary receivership agreement and the implied covenant relating thereto, breach of the permanent receivership agreement and the implied covenant relating thereto, and defamation. He also sought punitive damages. The trial court granted Dale's motion to quash the revised order to show cause and vacated the August 4, 2008 hearing, noting that there was no longer any urgency related to appointing a receiver and that disputed factual issues would require a jury's consideration.

¶9 On September 17, 2008, Dale moved the court to continue the receivership past the September 30, 2008 expiration date through the "sale of ownership interest pursuant to governing [o]perating [a]greements and/or [c]ourt [o]rder." The court granted the motion and continued the receivership until the court ordered it terminated or modified.

¶10 Nathan cross-moved to continue and amend the receivership. He asked the court to grant the receiver liquidating powers, including the power to sell the Companies' assets outside the normal course of business. Nathan supported his motion with his own affidavit attesting to alleged harm to the Companies resulting from the parties' deadlock, and Davis' April 10, 2008 avowal that the deadlock between the parties threatened the future sustainability of the Companies and that a sale of the Companies was in their best interests.

¶11 Dale opposed the motion, pointing out that the court had already determined that a sale of the Companies would be inappropriate without a jury trial. He disputed that the Companies were deadlocked or that their existence was threatened and noted that the April 10, 2008 affidavit from Davis that Nathan relied on in support of his motion pre-dated Davis' June 2008 appointment by the court as receiver. Dale offered a more recent affidavit from Davis to support his contention that the Companies had stabilized and were no longer in crisis.

¶12 Before the court ruled on the cross-motion, Nathan filed a Second Amended Complaint in which he pled additional claims for breach of the implied covenant of good faith and fair dealing, breach of the operating agreements, breach of fiduciary duty, legal malpractice, defamation, and intentional infliction of emotional distress. He also sought punitive damages.

¶13 On December 22, 2008, the court entered an order amending and continuing the receivership in which it authorized Davis to "wind up the business of the Companies," giving him the authority to sell or otherwise dispose of the Companies' assets, prepare documents related to the winding up process, pay or otherwise discharge the Companies' debts, and distribute the Companies' assets. The court substituted this authority for the authority previously granted to Davis to manage the business of the Companies. Dale timely appealed the order.

ISSUES

¶14 Dale argues the superior court erred by granting Davis authority to wind-up, liquidate, and dissolve the limited liability companies before hearing any evidence or entering a decree ordering the dissolution of the companies.[2]

DISCUSSION

A. Jurisdiction

¶15 We first consider Nathan's argument that we lack jurisdiction over this appeal. *Sorensen v. Farmers Ins. Co.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997) (stating court has a duty to determine whether it has jurisdiction over appeal). The right to appeal is statutory. If no statute makes

[2]Dale does not challenge the order insofar as it relates to Adoption.com, an Arizona general partnership; Dale only challenges the order as it relates to the limited liability companies. Accordingly, we do not consider this issue on appeal and, for purposes of our discussion, "Companies" does not include Adoption.com.

a judgment or order appealable, this court "[does] not have jurisdiction to consider the merits of the question raised on appeal." *Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981); *see* A.R.S. § 12-2101 (listing judgments and orders that may be appealed). Dale argues four separate statutory bases to support the court's exercise of jurisdiction.

1. A.R.S. § 12-2101(B) and (E)

¶16 First, Dale asserts jurisdiction is proper pursuant to A.R.S. §§ 12-2101(B) and (E), which provide that an appeal may be taken to this court:

> (B) From a final judgment entered in an action or special proceeding commenced in a superior court, or brought into a superior court from any other court, except in actions of forcible entry and detainer when the annual rental value of the property is less than three hundred dollars.
>
> . . . .
>
> (E) From a final order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment.

A.R.S. §§ 12-2101(B) & (E) (2003).

¶17 Both provisions require that the appeal be taken from a final judgment or order. The December 22, 2008 order amending and continuing the receivership does not fully and finally dispose of the action because it did not resolve all pending claims between the parties. Accordingly, it did not terminate the action and is not a final order. Ariz. R. Civ. P. 54(b). The Arizona Rules of Civil Procedure allow a trial court to

direct the entry of final judgment as to fewer than all of the claims or parties upon an express determination that there is no just reason for delay and for the entry of judgment. Ariz. R. Civ. P. 54(b). However, the trial court did not make this determination of finality in the December 22, 2008 order. As the order does not fully and finally dispose of the action and does not contain Rule 54(b) language, it is not a final, appealable order. *Pulaski v. Perkins*, 127 Ariz. 216, 217, 619 P.2d 488, 489 (App. 1980).

¶18 Nevertheless, Dale contends jurisdiction is supported by the Arizona Supreme Court's holding in *In re Prescott State Bank*, 36 Ariz. 419, 286 P. 189 (1930), that an order directing a receiver to pay a third party was a final order within the meaning of the appellate jurisdiction statute.[3] However, an examination of the court's reasoning in *Prescott State Bank* convinces us that it is distinct from, and does not control, this case. In that case, attorneys who had performed legal services for the insolvent company petitioned the court to fix and award them a reasonable fee for those services. *Id*. at 420, 286 P. at 189-90. After a hearing, the court determined a

[3]As relevant, the statute at issue in *Prescott State Bank*, section 3659, subd. 1, R. C. A. 1928, was identical to the statute applicable to this appeal. *See In re Sullivan's Estate*, 38 Ariz. 387, 390, 300 P. 193, 194 (1931) (quoting section 3659, subd. 1, R. C. A. 1928 as granting the right to appeal: "From a final judgment entered in an action or special proceedings commenced in a superior court . . .").

reasonable fee and ordered the company's receiver to pay the attorneys that amount. *Id*. at 421, 286 P. at 190. In considering whether the court had appellate jurisdiction over a creditor's appeal from that order, the Arizona Supreme Court held that because the order directed the receiver to pay a specific amount to the attorneys, it was a "final and immediately enforceable judgment for the payment of money in an independent and collateral matter," and therefore reviewable as a final order. *Id*. at 423, 286 P. at 190-91. The court based its holding on its determination that because the order directed the receiver to pay the attorneys, if the receiver refused to obey the order he could be liable in contempt; if he did obey the order and the appellate court did not approve the payment, the amount could be recovered from him and his bond. *Id*. at 423, 286 P.2d at 190. The court reasoned that such an unjust situation could and should be avoided if possible. *Id*.

¶19 In this case, however, the December 22, 2008 order controls the scope of Davis' authority as the Companies' receiver, but does not compel him to take any particular action. Thus, the concerns implicated in *Prescott State Bank* are not present in this case.

¶20 As the December 22, 2008 order is not a final, appealable order, sections 12-2101(B) and (E) do not confer jurisdiction over Dale's appeal.

2. A.R.S. § 12-2101(D)

¶21 Dale next argues that jurisdiction is proper under A.R.S. § 12-2101(D), which provides for an appeal to this court "[f]rom any order affecting a substantial right in any action when the order in effect determines the action and prevents judgment from which an appeal might be taken." A.R.S. § 12-2101(D). For example, the Arizona Supreme Court has held that this provision allows an appeal from an order denying a motion to intervene, *Hill v. Alfalfa Seed & Lumber Co.*, 38 Ariz. 70, 76, 297 P. 868, 870 (1931), because in that case the trial court's interlocutory order brought the appellant's case to an end and had the practical effect of preventing a judgment from which the appellant could appeal.

¶22 In this case, however, the December 22, 2008 order does not conclude Dale's case and does not prevent a judgment from which he might appeal. Yet, Dale contends the Arizona Supreme Court's decision in *Hill v. Alfalfa Seed and Lumber Company*, supports our exercise of jurisdiction pursuant to A.R.S. § 12-2101(D) because the court in *Hill* held that jurisdiction was proper when the trial court's order denying leave to intervene determined the action so far as the appellant was concerned. Dale argues the result should not be different in this case, where, he contends, the December 22, 2008 order awards final relief on Nathan's dissolution claim. We reject

this argument, as the Arizona Supreme Court held in *Musa* that A.R.S. § 12-2101(D) does not provide appellate jurisdiction unless the trial court's order brings the appellant's case to a conclusion or prevents a judgment from which the appellant may ultimately appeal. *Musa*, 130 Ariz. at 314, 636 P.2d at 92. Even assuming the December 22, 2008 order resolved the dissolution claim as Dale asserts, it did not bring Dale's case to a conclusion or prevent entry of a judgment from which he could appeal.

¶23 We do not have jurisdiction pursuant to A.R.S. § 12-2101(D).

3. A.R.S. § 12-2101(F)(2)

¶24 Finally, Dale contends appellate jurisdiction is appropriate pursuant to A.R.S. § 12-2101(F)(2), which allows an appeal to this court from an order "[g]ranting or dissolving an injunction, or refusing to grant or dissolve and injunction or appointing a receiver." A.R.S. § 12-2101(F)(2).

¶25 Dale acknowledges that the statute does not expressly provide appellate jurisdiction over an order modifying a receivership order, but argues that because we previously held in *Nu-Tred Tire Co., Inc. v. Dunlop Tire & Rubber Corp.*, 118 Ariz. 417, 420, 577 P.2d 268, 271 (App. 1978), that this provision grants jurisdiction over an order modifying an injunction, a similar conclusion is warranted in this case. We

do not read *Nu-Tred* so broadly, however, as in that case we considered only whether the appellant could properly appeal from an order denying its motion to dissolve a preliminary injunction, and did not specifically address whether A.R.S. § 12-2101(F)(2) permits an appeal from a motion solely to modify an injunction.

¶26 The plain language of the statute authorizes appellate jurisdiction only over an appeal from an order appointing a receiver, and not an order modifying the receiver's authority. We decline to read the statute more broadly so as to confer jurisdiction in this case. *See Pulaski,* 127 Ariz. at 217, 619 P.2d at 489 ("The right to appeal exists only by force of statute and is limited to the terms of the authorizing statute.").

4. Special Action Jurisdiction

¶27 Although we lack appellate jurisdiction, we may nevertheless consider whether to exercise our discretion to take special action jurisdiction. A.R.S. § 12-120.21(A)(4) (2003) (providing court of appeals has "[j]urisdiction to hear and determine petitions for special actions brought pursuant to the rules of procedure for special actions, without regard to its appellate jurisdiction."); *Danielson v. Evans*, 201 Ariz. 401, 411, ¶ 35, 36 P.3d 749, 759 (App. 2001) (after determining it lacked appellate jurisdiction, appeals court sua sponte accepted

special action jurisdiction); *Arvizu v. Fernandez,* 183 Ariz. 224, 227, 902 P.2d 830, 833 (App. 1995) (although trial court's paternity testing order not appealable, this court may exercise special action jurisdiction and treat appeal as petition for special action).[4] Further, this court may exercise its special action jurisdiction even if the appellant has not requested such relief. *Id.* "'Special action jurisdiction is appropriate when there is no plain, speedy and adequate remedy by way of appeal' or 'in cases involving a matter of first impression, statewide significance, or pure questions of law.'" *Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 270, ¶ 9, 159 P.3d 578, 580 (App. 2007) (quoting *Roman Catholic Diocese v. Superior Court*, 204 Ariz. 225, 227, ¶ 2, 62 P.3d 970, 972 (App. 2003)).

¶28 The issues Dale raises on appeal are predominantly questions of law and the record on appeal is adequate to allow us to resolve those legal questions. *Grand v. Nacchio*, 214 Ariz. 9, 17-18, ¶ 22, 147 P.3d 763, 771-72 (App. 2006) (finding special action jurisdiction appropriate under such circumstances). Moreover, if we were to decline special action jurisdiction, Dale might be irreparably harmed by the receiver's disposition of the Companies' assets prior to the court's entry of final judgment and would undoubtedly raise the same issues in

[4]We note that another panel of this court previously rejected Dale's petition for special action from the December 22, 2008 order. *See* 1 CA-SA 09-0097. We deem it appropriate to reconsider that earlier ruling.

an appeal from a final judgment. *Id*. at 18, ¶ 24, 147 P.3d at 772 (stating interests of judicial efficiency may support the exercise of special action jurisdiction).[5] Accordingly, we exercise our discretion and consider the appeal as one for special action.

B. Court Improperly Authorized Receiver to Wind Up Companies' Business

¶29 Dale challenges the trial court's order granting Davis the authority to wind up the business of the Companies, and argues that by ordering the Companies dissolved and liquidated without a trial or evidentiary hearing, the court exceeded its authority and improperly resolved the merits of Nathan's dissolution claim by summary disposition. In particular, he asserts Arizona's statutes governing dissolution of a limited liability company do not allow a court to order liquidation of the company prior to the entry of a judgment of dissolution, and that the court may not appoint a liquidating receiver without holding an evidentiary hearing. We defer to the court's factual findings if they are supported by substantial evidence, but review any issues of law de novo. *Southwest Soil Remediation v. City of Tucson*, 201 Ariz. 438, 442, ¶ 12, 36 P.3d 1208, 1212 (App. 2001).

[5]The trial court granted Dale's request to stay the order pending appeal through April 7, 2009, but provided that the stay will only remain in effect after that date if Dale posts a $100,000 supersedeas bond.

¶30 Dale argues that under Arizona law governing dissolution of a limited liability company the trial court did not have authority to authorize the receiver to wind up and liquidate the Companies prior to issuance of a judgment of dissolution. Specifically, he cites A.R.S. § 29-785(B)(2), which provides that the superior court may wind up and liquidate the assets and business of a limited liability company "[i]n an action filed by any member *after* the issuance of a judgment of dissolution in Subsection A."[6] Dale contends the trial court had

[6]The superior court may decree dissolution of a limited liability company upon application by a member and judicial determination that:

> (1) It is not reasonably practicable to carry on the limited liability company business in conformity with an operating agreement.
>
> (2) Unless otherwise provided in an operating agreement, the member or managers are deadlocked in the management of the limited liability company and irreparable injury to the limited liability company is threatened or being suffered or the business of the limited liability company cannot be conducted to the advantage of the members generally because of the deadlock.
>
> (3) Unless otherwise provided in an operating agreement, the members or managers of the limited liability company have acted or are acting in a manner that is illegal or fraudulent with respect to the business or the limited liability company.
>
> (4) Unless otherwise provided in an operating agreement, substantial assets of the limited liability company are being wasted, misapplied or diverted for purposes not related to the business of the limited liability company.

no power to ignore the plain language of the statute and order liquidation of the Companies' assets prior to a judgment of dissolution. Nathan responds that A.R.S. § 12-1241 (2003), which grants the superior court authority to appoint a receiver to protect and preserve property or the parties' rights, even if an action includes no other claim for relief, is applicable in this case and, in accordance with Arizona Rule of Civil Procedure 66 allowed the trial court to vest Davis with the power to wind up the Companies.

¶31 We agree with Dale because the more specific provisions of A.R.S. § 29-785 regarding when the superior court may wind up and liquidate the assets and business of a limited liability company control over the more general provisions of A.R.S. § 12-1241 and Arizona Rule of Civil Procedure 66 regarding the appointment of a receiver. *See Mercy Healthcare Ariz., Inc. v. Arizona Health Care Cost Containment Sys.*, 181 Ariz. 95, 100, 887 P.2d 625, 630 (App. 1994) ("[W]hen a general and a specific statute conflict, we treat the specific statute as an exception to the general, and the specific statute controls."). Accordingly, the trial court did not have the power to authorize the receiver to wind up and liquidate the Companies prior to issuance of a judgment of dissolution.

A.R.S. § 29-785(A).

¶32 Moreover, even assuming the court could have properly appointed a receiver to liquidate the Companies' assets prior to its resolution of Nathan's claim for dissolution, Nathan did not demonstrate that he was entitled to such relief. Nathan asserted dissolution was warranted because he and Dale were irreconcilably deadlocked and could not continue to jointly operate the Companies.[7] Dale argued that the operating agreements governing Adoption Media, L.L.C. and Adoption Profiles, L.L.C., and not the judicial dissolution statute, controlled the dissolution of those companies and that Nathan had not satisfied the terms of the operating agreements' buy/sell provisions. Both parties submitted affidavits supporting their positions. In the face of such conflicting evidence, and without conducting an evidentiary hearing, the trial court erred by granting Nathan's motion to modify the receivership order and, in effect, granting Nathan's claim for dissolution. *Cf*. *Andrews v. Blake*, 205 Ariz. 236, 250-51, ¶¶ 50-53, 69 P.3d 7, 21-22 (2003) (holding, in a claim for equitable relief, that the existence of genuine issues precludes

[7]Nathan did not offer any evidence of an emergency condition or other extraordinary circumstance that would support pre-dissolution winding up. *Cf. King v. Coulter*, 113 Ariz. 245, 246-47, 550 P.2d 623, 624-25 (1976) (recognizing the possibility that extraordinary circumstances may allow dissolution of a corporation without statutory authority); *Kruzel v. Leeds Bldg. Prods., Inc.*, 470 S.E.2d 882, 884 (Ga. 1996) (holding trial court erred by authorizing receiver to sell property prior to trial on the merits because it made no finding of an emergency creating an immediate necessity for a pre-trial sale).

summary resolution and instead requires that the facts be fully developed and the court balance the equities).

¶33 The court's December 22, 2008 order amending and continuing the receivership was in error.

CONCLUSION

¶34 For the foregoing reasons, we accept special action jurisdiction and grant relief.

¶35 Both parties request an award of costs and attorneys' fees incurred in the superior court proceedings and on appeal pursuant to A.R.S. § 12-341.01 (2003). We award Dale, as the prevailing party, its costs on appeal subject to compliance with Arizona Rule of Civil Appellate Procedure 21. In our discretion, we decline to award fees. However, when the trial court determines the prevailing party, the court is authorized to consider the fees and costs incurred by the prevailing party on appeal in determining whether and how much to award as reasonable attorneys' fees.

___/S/_____
SHELDON H. WEISBERG, Presiding Judge

CONCURRING:

_/S/_____
PHILIP HALL, Judge

_/S/_____
JOHN C. GEMMILL, Judge