IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 02/16/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

In the Matter of the Guardianship and Conservatorship of:	)	1 CA-CV 11-0116
	)	DEPARTMENT E
LAMAR FRANK LALONDE, An Adult.	)	**MEMORANDUM DECISION**
DAVID LYNCH, Appellant,	)	Not for Publication – (Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	)	
LAMAR FRANK LALONDE, Appellee.	)	

Appeal from the Superior Court in Maricopa County

Cause No. PB2010-070222

The Honorable Jacki Ireland, Judge *Pro Tempore*

AFFIRMED

David M. Lynch — Wickliffe, OH
Appellant, *In Propria Persona*

John R. Coll — Phoenix
And
Arnold N. Hirsch — Apache Junction
Attorneys for Appellee LaLonde

H A L L, Judge

¶1 Appellant David M. Lynch appeals the probate court's order imposing sanctions against him for violating Arizona Rule of Civil Procedure (Rule) 11(a) in connection with the petition filed in this matter. For the following reasons, we affirm the court's order.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 This case arises out of an emergency petition concerning Lamar Frank LaLonde, an elderly man who resides in Arizona. In March 2010, Lamar's sister, Betty Yoger, filed an emergency petition for the court to: (1) appoint her as Lamar's guardian and conservator, (2) appoint her as trustee of Lamar's revocable living trust, and (3) declare null and void certain documents (a power of attorney, trust amendments, and a beneficiary deed) executed by Lamar in 2007 and 2009. In particular, Betty alleged Lamar was an incapacitated adult in need of protection because his mental capacity was rapidly declining and his caregivers, Gerardo and Lorena Alcala, were attempting to take over his assets by having him sign documents that granted them a survivorship interest in his home, granted them power of attorney on his behalf, and made Gerardo the successor trustee of Lamar's trust. Betty alleged Lamar's physician, Dr. Robert Luberto, had notified her that "he suspected that Gerardo and Lorena Alcala were manipulating Lamar's assets and indicate[d] that Lamar has suffered from

dementia for a substantial period of time and is incapable of understanding" the challenged documents. Betty verified the petition and it was signed by Lynch, her Ohio counsel.[1]

¶3 The court appointed attorney Arnold N. Hirsch as counsel for Lamar and set an emergency hearing on the petition. Lamar, through his personal counsel John R. Coll, opposed the petition on the grounds that he was not incapacitated and was capable of making his own financial decisions and living arrangements. Coll averred that he prepared the challenged documents and had observed that Lamar had testamentary capacity when he executed those documents. Lamar asked the court to impose Rule 11 sanctions against Betty because, he alleged, she had falsely declared that Dr. Luberto told her he suspected the Alcalas were not properly caring for Lamar and manipulating his affairs, when in fact Dr. Luberto had told Betty the opposite.

¶4 At the beginning of the emergency hearing, Lynch asked the court to admit him *pro hac vice*. However, after hearing testimony that Lynch had met with Dr. Luberto under false pretenses to discuss Lamar's condition, the court determined

[1] Local counsel Matthew M. Jones filed the petition, but did not sign it.

Lynch was a potential witness in the matter and denied his request.[2]

¶5 Betty testified she believed emergency intervention was necessary because, in December 2009, the Alcalas had prevented her from moving Lamar to Ohio even though they had told her they were unable to care for him, and immediately thereafter Lamar revoked the power of attorney he had given her. She also testified that while she was visiting Lamar in July 2009, Lorena Alcala had left Betty and Lamar waiting in a hot car for thirty minutes and Betty understood from Lamar that Lorena regularly left Lamar in a hot car. Betty admitted, however, that contrary to her assertion in the petition, Dr. Luberto did not tell her that he suspected the Alcalas were manipulating Lamar's assets.

¶6 Dr. Luberto testified he did not have any concerns regarding Lamar's care and never told Betty that he was concerned Lamar was being financially exploited. He stated that Betty had asked him to claim that Lamar was incompetent, but he refused because he was not a neurologist and could not express an opinion regarding Lamar's competency.

[2] The court also determined attorney Coll was a potential witness because he had been Lamar's long-standing estate planning attorney and therefore ruled that attorney Hirsch would represent Lamar going forward in the matter.

¶7 The court determined there was no basis for the appointment of a guardian and conservator for Lamar. It also sanctioned Betty and Lynch pursuant to Rule 11, ordering they would be jointly and severally liable for $6470.00 in attorneys' fees incurred by Lamar for the services of attorney Coll in responding to the emergency petition because it contained material misrepresentations and omissions.

¶8 The court set a hearing date on Betty's remaining motion for appointment as trustee, noting that a neurological report on Lamar's condition was pending.[3] Thereafter, Lamar provided the report of a neurological exam in which the physician concluded he suffered from mild senile dementia but exhibited no signs of Parkinson's disease or neuropathy. In response, Betty asked the court to order that Lamar undergo a complete psychological exam performed by another physician.[4] Hirsch, on Lamar's behalf, opposed Betty's request on the grounds that there was no basis for a second neurological examination. He also asked the court to strike Betty's petition for appointment as trustee because it was not signed by local

[3] The court stated it would determine at the conclusion of the case whether to assess fees for attorney Hirsch's services as a sanction.

[4] The court noted at the emergency hearing that it would appoint a neurologist to examine Lamar.

counsel. The court denied Betty's request and struck her petition for appointment as trustee.

¶9 Hirsch then filed, pursuant to Rule 11, Arizona Rule of Probate Procedure 33, and Arizona Revised Statutes (A.R.S.) section 14-5314(A) (Supp. 2011), a petition for an award of attorneys' fees incurred in responding to Betty's motion for neurological examination. Over Lynch's objection, the court ruled that Betty and Lynch would be jointly and severally liable for $9651.04 in attorneys' fees incurred by Hirsch in his representation of Lamar. Lynch timely appealed that order.

¶10 We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) and (9) (Supp. 2011).

ISSUE

¶11 Lynch contends the probate court improperly imposed Rule 11 sanctions against him and denied him an opportunity to present evidence regarding his good-faith preparation of Betty's petition.

DISCUSSION

¶12 As an initial matter, we reject Lamar's argument that Lynch's challenge to the court's imposition of Rule 11 sanctions is barred by the doctrine of claim preclusion because Lynch did not appeal from the court's May 26, 2010 ruling holding him jointly and severally liable with Betty for attorneys' fees incurred by Lamar for the services of attorney Coll as a

sanction under Rule 11. The May 26, 2010 order granting Coll attorneys' fees was not a final, appealable judgment because it did not dispose of the entire action and did not contain language of finality pursuant to Rule 54(b). *See Ivancovich v. Meier*, 122 Ariz. 346, 353, 595 P.2d 24, 31 (1979) (stating statutory provision concerning appeal of an order entered in formal probate proceedings only applies to orders similar to a final judgment or decree). Moreover, even if the May 26, 2010 order had been an appealable judgment, Lynch's response to Hirsch's petition for attorneys' fees could properly be considered a timely motion to set aside judgment under Rule 60(c) because he sought to vacate the court's Rule 11 determination and its award of Coll's fees.[5] *White v. Davidson*, 46 Ariz. 1, 4, 46 P.2d 1073, 1075 (1935) (stating the substance, not the name, of a pleading determines its character).

¶13 We turn, then, to Lynch's challenge to the probate court's determination that he violated Rule 11 by filing the petition, which we review for an abuse of discretion. *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection*, 177 Ariz. 316, 319, 868 P.2d 329, 332 (App. 1993). An attorney's signature on a pleading or other document constitutes certification that the attorney has read the document, and "that

[5] Lynch filed his response on November 12, 2010, less than six months after the court entered the May 26 order.

to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Ariz. R. Civ. P. 11(a). An attorney violates Rule 11 when the attorney "knew, or should have known by such investigation of fact and law as was reasonable and feasible under all the circumstances, that the claim or defense was insubstantial, groundless, frivolous, or otherwise unjustified." *Boone v. Superior Court*, 145 Ariz. 235, 241, 700 P.2d 1335, 1341 (1985). Sanctions are appropriate when an attorney files a pleading with no reasonable basis or for the purpose of harassment, coercion, extortion, or delay. *Id*. at 241-42, 700 P.2d at 1341-42. We apply an objective standard of reasonableness in considering such conduct. *Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 230, 866 P.2d 889, 898 (App. 1993) (stating objective standard consists of what a "professional, competent attorney" would do in similar circumstances).

¶14 Betty admitted at the hearing that Dr. Luberto had not told her he was concerned that the Alcalas were manipulating Lamar's assets. Also, Betty offered no evidence that Lamar was incapacitated and in need of a guardian and conservator, let

alone that the court should act on an expedited basis. Nevertheless, Lynch contends the petition was objectively reasonable and filed for a proper purpose and after reasonable inquiry because he relied on Betty's statements and her verification of the petition.

¶15 Under these circumstances, Lamar did not make a reasonable inquiry to determine whether the petition was well-grounded in fact. *See Standage*, 177 Ariz. at 230, 866 P.2d at 898 (stating attorney has an obligation to review and re-evaluate his client's position as the facts of the case develop). To the contrary, in support of his motion to strike the petition, Lamar submitted affidavits from individuals who prepared and/or witnessed Lamar's execution of the challenged testamentary documents and avowed that Betty's counsel had not contacted them concerning Lamar's capacity. It appears the only effort Lynch made to verify Betty's allegations was his inappropriate meeting with Dr. Luberto, where he appeared under the guise of a patient seeking medical treatment. By itself, that discussion, wherein Dr. Luberto disclaimed any concerns about Lamar's care, should have caused Lynch to further inquire as to the veracity of Betty's allegations. After reviewing the record, we determine the probate court did not abuse its discretion in finding that Lynch violated Rule 11.

¶16 Lynch complains the court denied him an opportunity to be heard before it assessed Rule 11 sanctions against him. Before imposing Rule 11 sanctions, the court must ensure that the subject party has been afforded notice and an opportunity to be heard on the charges. *Precision Components, Inc. v. Harrison, Harper, Christian & Dichter, P.C.*, 179 Ariz. 552, 555, 880 P.2d 1098, 1101 (App. 1993). We apply a de novo standard of review to determine whether the proceedings leading to the probate court's decision comported with due process. *See Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 355, ¶ 16, 132 P.3d 290, 294 (App. 2006) (reviewing de novo alleged denial of due process).[6]

¶17 Lynch contends he only received the request for Rule 11 sanctions immediately prior to the emergency hearing and therefore had no opportunity to respond. As *Precision Components* notes, however, "'[t]he existence of Rule 11 itself constitutes a form of notice since the rule imposes an

[6] Although we held in *James, Cooke & Hobson, Inc.*, 177 Ariz. at 319, 868 P.2d at 332, that an appellate court must review all aspects of a trial court's Rule 11 determination for an abuse of discretion, that ruling related only to the merits of the Rule 11 determination, whereas our review of the due process afforded Lynch is separate from the merits of the trial court's decision. *See Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 837 (9th Cir. 1987) (vacating a sanction order entered without notice of the court's intention to impose sanctions and without affording the sanctioned law firm a meaningful opportunity to explain its conduct).

affirmative duty on an attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed; an attorney could not assert that he or she had no notice or knowledge of the standards of conduct that the rule itself provides.'" 179 Ariz. at 556, 880 P.2d at 1102 (quoting *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th. Cir. 1987). Further, *Precision Components* stated that the trial court in that case explained in detail its reasoning for imposing sanctions and the actual sanctions imposed, which was fair and sufficient notice. *Id*. at 556, 880 P.2d at 1102. *Precision Components* additionally noted that the trial court did not prevent the attorneys from arguing against the sanctions at the hearing or thereafter. *Id*.

¶18 Here, the record shows that the trial court explained to Lynch why it was considering imposing sanctions. Contrary to Lynch's assertion that he was not given the opportunity to respond, he subsequently addressed the court after the discussion of Rule 11 sanctions and did not ask to be heard on the issue or object to the hearing itself.[7] Lynch also did not ask the court to grant him additional time to respond or file a

[7] Even though the court denied Lynch's *pro hac vice* request, it did not prevent Lynch from addressing the court in general or in another capacity.

motion for reconsideration, even after the court announced its view that the petition omitted "significant material facts" and contained "material misrepresentations," and ruled that it would impose Rule 11 sanctions against Betty, and possibly Lynch.[8] Accordingly, we find no denial of due process.

¶19 Lamar requests an award of attorneys' fees on appeal pursuant to Arizona Rule of Civil Appellate Procedure (ARCAP) 25 on the grounds that Lynch's appeal is frivolous. ARCAP 25 authorizes an award of fees as a sanction if an appeal "is frivolous or taken solely for the purpose of delay." "The determination to award or decline attorney's fees [pursuant to ARCAP 25] is within this Court's discretion," *Ariz. Dep't of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446, 937 P.2d 363, 368 (App. 1996), and we impose ARCAP 25 sanctions with "great reservation." *Ariz. Tax Research Ass'n v. Dep't of Revenue*, 163 Ariz. 255, 258, 787 P.2d 1051, 1054 (1989). Although we conclude that Lynch's arguments on appeal were non-meritorious, they were not totally baseless and the record does not establish frivolousness, intentional delay, or an improper motive. *See Hoffman v. Greenberg*, 159 Ariz. 377, 380, 767 P.2d 725, 728 (App. 1988) ("The line between an appeal which has no

[8] Further, on appeal, Lynch does not explain what evidence he would have presented to the probate court or what it would have shown.

merit and one which is frivolous is very fine, and we exercise our power to punish sparingly."). We therefore deny Lamar's request for an award of fees under ARCAP 25.

CONCLUSION

¶20 For the foregoing reasons, we affirm.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICIA A. OROZCO, Presiding Judge

_/s/_____
JOHN C. GEMMILL, Judge