

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

FILED BY CLERK

NOV 27 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re THE GUARDIANSHIP/
CONSERVATORSHIP OF BESSIE B.
GARNER

) 2 CA-CV 2011-0178
) DEPARTMENT A

) MEMORANDUM DECISION

) Not for Publication
) Rule 28, Rules of Civil
) Appellate Procedure

_____)
)
) DENICE R. SHEPHERD, as guardian and
) conservator for BESSIE B. GARNER,

) Plaintiff/Appellee,

) v.

)
) ARTHUR BURNS, an unmarried man,

) Defendant/Appellant.
)
_____)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. GC20051109

Honorable Charles V. Harrington, Judge

DISMISSED

Denice R. Shepherd, P.C.
By Denice R. Shepherd

Tucson
Attorney for Plaintiff/Appellee

Arthur Burns

Tucson
In Propria Persona

H O W A R D, Chief Judge.

¶1 Appellant Arthur Burns appeals from the trial court's grant of summary judgment against him and its order reaffirming this grant and setting aside Bessie Garner's holographic will, in favor of appellees Garner and her conservator and guardian, Denice Shepherd. Because we do not have jurisdiction, we dismiss this appeal.

Factual and Procedural Background

¶2 The record supports the following procedural background. In late 2005, respondent Denice Shepherd filed for an emergency appointment of guardian and conservator for Bessie Garner, citing deplorable living conditions and inadequate care as reasons for court intervention and alleging that Garner may have been exploited by Arthur Burns, her caregiver at the time. After being appointed as temporary conservator and guardian, Shepherd filed a complaint against Burns alleging he had been negligent in his care of Garner and had exploited her resources to his benefit. Accordingly, the complaint requested, inter alia, that the court grant damages to Garner pursuant to A.R.S. § 46-456, remove any right of inheritance Burns might have, and award attorney and conservator fees and costs. In the absence of a timely response from Burns, the court in an unsigned minute entry granted summary judgment in favor of Shepherd but reserved ruling on damages until Shepherd presented evidence on that issue. The court did not deal with this issue further and did not rule on attorney and conservator fees and costs.

¶3 After Garner died in 2010, Shepherd filed a formal petition for probate in the same action. Following this petition, Burns filed a request that the trial court consider Garner's holographic will, which listed Burns as a beneficiary, as the correct one. The issue of civil penalties and attorney fees was listed as an issue in the parties' pre-trial

statement. In July 2011, the court held a trial on the validity of the holographic will and whether its previous order—granting summary judgment and ordering Burns removed as a beneficiary from all Garner’s estate planning documents—was controlling. After trial, on September 13, the court ruled in a signed minute entry that the earlier summary judgment was controlling.

¶4 Burns then filed a motion for new trial on September 30. While that motion was pending, he filed a notice of appeal on October 11. The trial court denied his motion for new trial in an unsigned minute entry on October 17. Burns re-filed the same notice of appeal that same day. Then on October 24, he filed a further opposition to the denial of a new trial, asking the court to amend the judgment and again requesting a new trial. On October 27, the court denied the further opposition and also noted Burns’s notice of appeal had divested it of jurisdiction. Burns subsequently filed a third and final “notice to amend appeal” on November 17, this time objecting solely to the original order denying him a new trial, although stating he previously had filed notices of appeal. Both parties filed briefs on the merits.

Discussion

¶5 Burns does not cite any authority for our jurisdiction over this appeal, as required under Rule 13(a)(3), Ariz. R. Civ. App. P., and Shepherd claims we have jurisdiction under A.R.S. § 12-2101. However, we have an independent duty to determine whether we have jurisdiction. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). Our jurisdiction is prescribed by statute, and we have no authority to entertain an appeal over which we do not have jurisdiction. *See*

Hall Family Proprs., Ltd. v. Gosnell Dev. Corp., 185 Ariz. 382, 386, 916 P.2d 1098, 1102 (App. 1995). Pursuant to A.R.S. § 12-2101(A)(1), we have jurisdiction of an appeal “[f]rom a final judgment,” which is one that “dispose[s] of all claims and all parties,” *Maria v. Najera*, 222 Ariz. 306, ¶ 5, 214 P.3d 394, 395 (App. 2009), quoting *Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981). We also have jurisdiction of an appeal “[f]rom a judgment, decree or order entered in any formal proceedings under title 14.” A.R.S. § 12-2101(A)(9); see *Ivancovich v. Meier*, 122 Ariz. 346, 353, 595 P.2d 24, 31 (1979) (“order’ pursuant to [§ 12-2101(A)(9)] means an order similar to a final judgment or decree”).

¶6 Although a court may enter a final judgment on fewer than all the claims or parties, it may only do so “upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” Ariz. R. Civ. P. 54(b); see *Nat’l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, ¶ 37, 119 P.3d 477, 485 (App. 2005) (“Without Rule 54(b) certification, the case only becomes final when a judgment or judgments are entered adjudicating all the claims, including fee claims.”); Ariz. R. Probate P. 3(A) (incorporating Arizona Rules of Civil Procedure).

¶7 In the absence of a judgment pursuant to Rule 54(b), Ariz. R. Civ. P., there exists

only a limited exception to the final judgment rule that allows a notice of appeal to be filed after the trial court has made its final decision, but before it has entered a formal judgment, if no decision of the court could change and the only remaining task is merely ministerial.

Smith v. Ariz. Citizens Clean Elections Comm'n, 212 Ariz. 407, ¶ 37, 132 P.3d 1187, 1195 (2006). Apart from these limited circumstances, a premature notice of appeal filed “in the absence of a final judgment . . . is ‘ineffective’ and a nullity.” *Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011), quoting *Smith*, 212 Ariz. 407, ¶ 39, 132 P.3d at 1195.

¶8 In her complaint initiating the guardian and conservatorship proceedings, Shepherd requested damages pursuant to A.R.S. § 46-456, attorney fees and costs, and conservator fees and costs. Shepherd made a similar request for relief in her motion for summary judgment, specifically requesting that Burns pay three times the amount of damages she would be entitled to under former A.R.S. § 46-456(C) (2003),¹ see 2003 Ariz. Sess. Laws, ch. 129, § 3, and attorney fees, costs, and conservator fees pursuant to the Arizona Adult Protective Services Act. The trial court granted Shepherd’s motion for summary judgment, but it issued an unsigned order without a certification of finality under Rule 54(b) and it did not address Shepherd’s claims for attorney or conservator fees. Although the court granted Shepherd damages, it did not determine the specific amount to be awarded. Because the determination of an award of attorney fees, conservator fees, and the reasonableness of an award of damages is within the discretion

¹Effective July 2009, A.R.S. § 46-456(C) was renumbered as 46-456(B) and now provides that “the court may award additional damages for an amount up to two times the amount of the actual damages.” See 2009 Ariz. Sess. Laws, ch. 119, § 9. We refer to the version of the statute in effect at the time Shepherd commenced this action. See 2003 Ariz. Sess. Laws, ch. 129, § 3; *Bouldin v. Turek*, 125 Ariz. 77, 78, 607 P.2d 954, 955 (1979) (statutes apply retroactively only if expressly stated therein or if statutory change procedural and does not affect or impair substantive rights; amendments to statute regarding measure of damages substantive).

of the court, the court's order granting summary judgment was not final and appealable. *See Maria*, 222 Ariz. 306, ¶¶ 5-7, 214 P.3d at 395; *see also Fields v. Oates*, 230 Ariz. 411, ¶¶ 10, 13, 286 P.3d 160, 163, 164 (App. 2012) (order not final if does not resolve attorney fees claim or contain Rule 54(b) language).

¶9 Once Shepherd initiated probate proceedings after Garner's death,² the trial court addressed its order granting summary judgment, specifically as to whether its order removing Burns as a beneficiary from Garner's estate planning documents was controlling as to the validity of a holographic will in Burns's possession. The pretrial statement included damages and attorney fees as issues to be determined, and the damage issue was brought to the court's attention at trial. The court stated it would set a separate hearing on the issue of damages, as set forth in the motion for summary judgment, but, on this record, never held such a hearing. At the end of the trial, the court issued a signed judgment incorporating its decision to grant summary judgment. Although it acknowledged Shepherd's request for damages in her motion for summary judgment, the court did not address the issue further. Nor did the court address Shepherd's requests for attorney and conservator fees and costs from her original petition for guardianship and conservatorship, on which the summary judgment order was based, or include a certification of finality under Rule 54(b). The determination of fees, costs, and damages

²We express no opinion as to the propriety of carrying on with the formal probate in the guardianship/conservatorship proceeding. *See* A.R.S. §§ 14-3105(C)(4) ("The court has general jurisdiction that it may exercise in a formal proceeding in any other action or proceeding concerning succession or to which an estate, through a personal representative, may be a party, including . . . [a]ctions against third parties to recover estate assets."); 14-3401(A) (formal probate commences when interested party files petition).

are all within the court's discretion and therefore do not fall within the limited *Barassi* exception. *Fields*, 230 Ariz. 411, ¶¶ 11-13, 286 P.3d at 163-64. Accordingly, this order was not final or appealable. *See Nat'l Broker Assocs., Inc.*, 211 Ariz. 210, ¶ 37, 119 P.3d at 485.

¶10 Therefore, because the trial court never issued a final, appealable order, Burns's three notices of appeal were premature. We note further that the court correctly stated it lacked jurisdiction after the first notice of appeal was filed, and it lacked jurisdiction to hold any further proceedings not in furtherance of the appeal. *See In re Lopez*, 97 Ariz. 328, 330-31, 400 P.2d 325, 326 (1965). Accordingly, we dismiss this appeal for lack of jurisdiction.

Attorney Fees

¶11 Shepherd requests costs and attorney fees pursuant to Rule 21, Ariz. R. Civ. App. P. and A.R.S. §§ 46-455, 46-456, 14-1105, 12-341.01(C) and 12-349 because Burns "pursued claims with no factual or legal support for his position" and caused Garner's estate to incur "fees and costs which were unnecessary but for his inappropriate conduct." Although Burns failed to show we have jurisdiction over this appeal, we note Shepherd provided only a cursory statement regarding our jurisdiction and failed to move to dismiss the appeal, instead filing a merits brief. Most of Shepherd's fees would have been incurred in drafting that unnecessary brief. In our discretion, we therefore deny her request for costs and attorney fees.

Conclusion

¶12 For the foregoing reasons, this appeal is dismissed.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.