IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE ESTATE OF ARNOLD H. RAMSAY

THERESA TERRY HOULE
Plaintiff/Appellant,

v.

KIM BABJAK
Defendant/Appellee.

No. 2 CA-CV 2015-0012
January 28, 2016

Appeal from the Superior Court in Pima County
No. PB20130449
The Honorable Kyle A. Bryson, Judge

DISMISSED

COUNSEL

Stephen L. Crawford, Phoenix
Counsel for Plaintiff/Appellant

Harriette P. Levitt, Tucson
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Vásquez and Chief Judge Eckerstrom concurred.

M I L L E R, Judge:

¶1 Theresa Houle appeals the probate court's ruling that Arnold Ramsay revoked his 1992 will and died intestate. For reasons outlined below, we determine we lack jurisdiction and dismiss the appeal.

Factual and Procedural Background

¶2 Ramsay died in March 2013, after which Houle, his step-daughter, petitioned for formal probate of a 2003 will. The court determined the will was invalid due to problems with Ramsay's signature and the notarization and concluded Ramsay died intestate.

¶3 During litigation regarding the estate, Houle discovered a photocopy of a 1992 will, and filed another petition for formal probate. Ramsay's step-granddaughter Kim Babjak objected, arguing the original was presumed to be destroyed because of statements in the invalid 2003 will as well as affidavits of friends who stated he said he was leaving everything to her. The court held a trial in which several witnesses testified, and on December 4, 2014, it issued a signed under-advisement ruling finding that Ramsay had revoked the 1992 will and died intestate. The ruling did not contain the language set forth in Ariz. R. Civ. P. 54(b) or 54(c).

¶4 Houle's notice of appeal from the ruling was dated January 5, 2015, but stamped as filed on January 6, 2015. This court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction, and the parties filed supplemental memoranda on the issue.

Jurisdiction

¶5 This court has an independent duty to determine whether it has jurisdiction over an appeal. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997). Appellate jurisdiction is defined by statute. *Baker v. Bradley*, 231 Ariz. 475, ¶ 8, 296 P.3d 1011, 1015 (App. 2013). If we lack jurisdiction over an appeal, we must dismiss it. *Id*.

¶6 Only final judgments are appealable as a general rule. *Ghadimi v. Soraya*, 230 Ariz. 621, ¶ 7, 285 P.3d 969, 970 (App. 2012); *see* A.R.S. § 12-2101(A)(1). Absent "an express determination that there is no just reason for delay and . . . an express direction for the entry of judgment," a decision that adjudicates one or more but fewer than all claims "shall not terminate the action as to any of the claims or parties" and remains "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Ariz. R. Civ. P. 54(b). Rule 54(c), Ariz. R. Civ. P., adds: "A judgment shall not be final unless the court states that no further matters remain pending and that the judgment is entered pursuant to Rule 54(c)." The parties do not dispute that the probate court's December 4, 2014 ruling contains neither Rule 54(b) nor Rule 54(c) language.

¶7 Houle argues the ruling was nevertheless appealable pursuant to A.R.S. § 12-2101(A)(9), which allows appeal "[f]rom a judgment, decree or order entered in any formal proceedings under title 14." The words "judgment," "decree," and "order" are synonymous in this context; each connotes "a final disposition of a litigant's rights." *State v. Birmingham*, 96 Ariz. 109, 111, 392 P.2d 775, 776 (1964); *accord Ivancovich v. Meier*, 122 Ariz. 346, 353, 595 P.2d 24, 31 (1979). The notice of appeal specifies that the only issue is whether Ramsay revoked his 1992 will. Yet by not including a Rule 54(b) determination that there was no just reason to delay appeal, the probate court concluded that the matter could be appropriately dealt with in an appeal from the final decree distributing Ramsay's estate. *Cf. Ivancovich*, 122 Ariz. at 353, 595 P.2d at 31 (declining to consider order charging certain taxes against residual estate on appeal before final decree distributing estate). We

are without jurisdiction to consider the merits of its ruling at this time,[1] *see id.*, just as we are without jurisdiction to review on appeal its decision not to enter Rule 54(b) language, *see S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶ 20 & n.5, 977 P.2d 769, 775 & n.5 (1999). Babjak's attempt to stipulate to jurisdiction is also unavailing. *See Natale v. Natale*, 234 Ariz. 507, ¶ 8, 323 P.3d 1158, 1160 (App. 2014) (parties may neither stipulate to jurisdiction nor waive its absence).

Disposition

¶8 The probate court's ruling was not an appealable judgment. We therefore lack jurisdiction and dismiss the appeal.

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[1]Even assuming for the sake of argument that the probate court's ruling was an appealable order, we would still lack jurisdiction because Houle's notice of appeal was untimely. *See Edwards v. Young*, 107 Ariz. 283, 284, 486 P.2d 181, 182 (1971) (if appellant fails to perfect appeal in prescribed time limit, appellate court lacks jurisdiction and must dismiss). The court's under-advisement ruling is dated December 4, 2014. Thus, the deadline for Houle to file a notice of appeal was January 5, 2015. *See* Ariz. R. Civ. App. P. 9(a), 5(a); Ariz. R. Civ. P. 6(a). Although the notice of appeal was dated January 5, 2015, the clerk of the court's stamp indicates it was filed January 6, 2015. *See* Ariz. R. Civ. P. 5(h); *State v. Chacon*, 221 Ariz. 523, ¶ 6, 212 P.3d 861, 864 (App. 2009) ("[L]egal papers are considered filed when they are . . . filed with the clerk of the court.").

Houle attached to her jurisdictional memo an affidavit from trial counsel, alleging the delivery service to which counsel entrusted the notice of appeal negligently failed to file it on time as it promised. However, excusable neglect is not a cognizable basis to avoid dismissal of an untimely appeal, contrary to the suggestion of both parties in their jurisdictional memos. *In re Pima Cty. Juv. Action No. S-933*, 135 Ariz. 278, 280, 660 P.2d 1205, 1207 (1982); *see Chacon*, 221 Ariz. 523, n.4, 212 P.3d at 864 n.4; *see also* Ariz. R. Civ. App. P. 5(b) (neither superior court nor appellate court may extend time for filing notice of appeal, subject to narrow inapposite exception).

We deny Babjak's request for attorney fees on appeal pursuant to Ariz. R. Civ. App. P. 21(a)(2). We also deny Babjak's request for costs on appeal because no "judgment was given in the court below" and she joined in Houle's unsuccessful jurisdictional argument. *See* A.R.S. § 12-342(A).