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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In the Matter of the Estate of Elmer S Frasch, and The Frasch Family Trust

ELMER S. FRASCH

DECEASED

WAYNE D. FRASCH, *Petitioner/Appellee*,

v.

LILY FRASCH-WINEMILLER, *Respondent/Appellant*.

No. 1 CA-CV 18-0722
FILED 11-19-2019

Appeal from the Superior Court in Maricopa County
No. PB2017-003655
The Honorable Andrew G. Klein, Judge

REVERSED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge David D. Weinzwieg and Judge Joshua Rogers¹ joined.

H O W E, Judge:

¶1 Lily Frasch-Winemiller appeals the trial court’s finding that the settlement agreement she entered with Wayne Frasch was voidable based on mutual mistake and unilateral mistake. For the following reasons, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 Wayne Frasch is the personal representative, successor trustee, and a beneficiary of the Frasch Family Trust (“Trust”). Wayne’s sister Lily Frasch-Winemiller² is a beneficiary of the Trust. Upon the death of their father, Elmer Frasch, Wayne petitioned to distribute the Trust, claiming in pertinent part that he receive (1) trustee fees, (2) reimbursement of expenses incurred on behalf of his father, (3) offsets for one-half the value of property located at 9085 Picabo Road (“Picabo”) and 2210 Lelaray Street (“Lelaray”), and (4) \$50,000 to offset the rental income Lily received for the Picabo property. Lily opposed the petition and counterclaimed that Wayne (1) failed to perform a proper accounting, (2) asserted Trust ownership over assets the Trust did not own, and (3) attempted to receive compensation he was not eligible for. Lily also filed a claim against the

¹ The Honorable Joshua Rogers, Judge of the Arizona Superior Court, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

² Because the parties share the name Frasch, this Court, with respect, will refer to them individually by their first names.

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estate, seeking conveyance of title to the Picabo and Lelaray properties. Wayne moved to dismiss Lily’s counterclaims and opposed her claim against the estate. The parties agreed to participate in a settlement conference and the court stayed the proceedings.

¶3 At the settlement conference, Wayne claimed that he was entitled to an equalization payment because Lily received the Picabo property. After discussing the issues, the parties reached a settlement agreement and the terms were stated on the record, which were memorialized in the trial court’s July 2018 Minute Entry. The parties agreed that Wayne would (1) receive a \$90,000 equalization for payments or assets that Lily had previously received; (2) distribute the Picabo and Lelaray properties to Lily; (3) liquidate and split the stocks equally; (4) sell the house located in Midland, Michigan, and split the profits equally; and (5) split the Trust’s residue equally. The parties also agreed to hold back \$50,000 to cover taxes, accounting fees, and other administrative fees, with any remainder split equally between Wayne and Lily. The distribution was scheduled ten business days from the settlement date.

¶4 When the assets were distributed, Wayne claimed the \$90,000 equalization payment did not include equalization for Lily’s receipt of the Picabo property and did not account for his entitlement to one-half the value of the property from the residue of the estate. Lily disagreed, asserting that the equalization payment included the Picabo property. Lily moved to enforce the settlement agreement, but Wayne opposed the motion, arguing that the settlement agreement was voidable based on mutual mistake or a good faith unilateral mistake. The settlement judge found that no meeting of the minds occurred and that the settlement agreement was voidable due to either a mutual mistake or a good faith unilateral mistake by Wayne. Lily timely appealed.

JURISDICTION

¶5 This Court has an independent duty to determine whether it has jurisdiction over an appeal. *Baker v. Bradley*, 231 Ariz. 475, 478 ¶ 8 (App. 2013). Arizona Revised Statute § 12-2101(A) sets forth specific instances in which this Court has jurisdiction over an appeal. Lily argues this Court has jurisdiction under § 12-2101(A)(3) and (A)(9).

¶6 This Court does not have appellate jurisdiction under A.R.S. § 12-2101(A)(3). Section 12-2101(A)(3) grants this Court appellate jurisdiction “[f]rom any order affecting a substantial right made in any action when the order in effect determines the action and prevents

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judgment from which an appeal might be taken.” Arizona Rule of Civil Procedure (“Rule”) 54(b) and (c) language is not required. *Brumett v. MGA Home Healthcare, L.L.C.*, 240 Ariz. 420, 430 ¶ 19 (App. 2016). The court’s minute entry does not resolve the action, but rather continues the case for further proceedings. Nor does the order prevent a judgment from which an appeal might be taken. The settlement agreement itself does not contain the required Rule 54(c) language and the parties stipulated to setting aside the finality language the settlement agreement did contain. As a result, the minute entry does not prevent enforcement of the settlement agreement, from which an appeal might be taken.

¶7 This Court does not have appellate jurisdiction under A.R.S. § 12-2101(A)(9), either. Section 12-2101(A)(9) grants this Court appellate jurisdiction from a judgment or order entered in trusts and estates proceedings. Rule 54(b) or (c) language is required. *Brumett*, 240 Ariz. at 433 ¶ 34. Rule 54(b) applies when the court directs entry of a final judgment as to one or more claims, but fewer than all claims. Ariz. R. Civ. P. 54(b). The trial court’s minute entry voiding the settlement agreement does not contain Rule 54(c) language. While the minute entry does contain Rule 54(b) language, Rule 54(b) does not apply. The court’s minute entry voiding the settlement agreement does not direct an entry of final judgment as to one or more claims. Rather, the trial court’s minute entry continues the case.

¶8 However, “we may elect to treat an appeal as a petition for special action, despite our lack of appellate jurisdiction.” *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 594 ¶ 16 (App. 2007). We accept special action jurisdiction here because (1) the trial court erred in voiding the settlement agreement; (2) the grant of special action relief will effectively terminate the litigation; and (3) there is no “equally plain, speedy, and adequate remedy by appeal.” *See id.*

PRELIMINARY ISSUE

¶9 A settlement judge ruling on the enforceability of a settlement agreement that he or she facilitated raises ethical concerns. Arizona Code of Judicial Conduct Rule (“Rule”) 2.11(A) provides that “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned,” including when the “judge has . . . personal knowledge of facts that are in dispute in the proceeding” or when “[t]he judge knows that the judge . . . is likely to be a material witness in the proceeding.”

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¶10 The settlement judge in this case has personal knowledge of the parties' objective manifestations of assent. He participated in and facilitated the negotiations between Lily and Wayne, which occurred off the record. He also memorialized the terms of the settlement agreement in his minute entry, which is the subject of this dispute. As a result, the settlement judge would be a material witness in a proceeding challenging the enforceability of the settlement agreement.

¶11 After reviewing the record, however, the parties waived these ethical concerns. Under Rule 2.11(C), parties and their lawyers may waive disqualification of a judge who would otherwise be disqualified under Rule 2.11(A)(1). The parties made such a waiver in their stipulated order partially setting aside the settlement agreement, which provides that the settlement judge "continues to retain jurisdiction to resolve any disputes that may arise out of the settlement, as stated in the Minute Entry Order." While the parties in this case waived the settlement judge's disqualification, we would caution settlement judges to be mindful of the ethical implications. In the criminal context, for example, this Court recognized the potential issues that arise when a settlement judge makes substantive rulings. *See, e.g., Parent v. McClennen*, 206 Ariz. 473, 476 ¶¶ 12-14 (App. 2003). However, because the parties agreed to let the settlement judge retain jurisdiction to resolve disputes arising out of the settlement agreement, we turn to the merits of the parties' arguments.

DISCUSSION

¶12 Lily argues that the trial court erred in voiding the settlement agreement based on mutual mistake or unilateral mistake. We review de novo whether a settlement agreement is enforceable. *See Robertson v. Alling*, 237 Ariz. 345, 347 ¶ 8 (2015); *see also Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 234 Ariz. 18, 20 ¶ 9 (App. 2014) (noting that a contract's validity and enforceability is a mixed question of law and fact that is subject to de novo review).

¶13 Wayne correctly concedes on appeal that no mutual or unilateral mistake occurred when the parties entered the settlement agreement. A claim of "mutual mistake" requires proof that the parties made a mistake about the basic assumption of the settlement, *Hall v. Elected Officials' Ret. Plan*, 241 Ariz. 33, 41 ¶ 25 (2016), and Wayne presented no such evidence. Likewise, a claim of "unilateral mistake" requires proof that "the other party knew of and unfairly took advantage of the other party's error," *Hartford v. Indus. Comm'n of Ariz.*, 178 Ariz. 106, 111 (App. 1994), and Wayne presented no such evidence.

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¶14 Wayne argues for the first time on appeal that the trial court properly voided the settlement agreement for a lack of mutual assent. While we do not consider arguments raised for the first time on appeal, Wayne’s argument is meritless. Mutual assent is an essential element of an enforceable contract. *Muchesko v. Muchesko*, 191 Ariz. 265, 268 (App. 1997). But “mutual assent is based on objective evidence, not on the hidden intent of the parties.” *Hill-Shafer P’ship v. Chilson Family Tr.*, 165 Ariz. 469, 473 (1990). The focus is on the parties’ objective manifestations of assent. *Id.* at 474. Any misunderstandings of the parties must be reasonable under the specific facts of the case. *Id.* at 475.

¶15 The evidence shows that Wayne and Lily mutually assented to the settlement agreement. Both parties were present when the terms of the settlement agreement were read into the record and both parties entered into the settlement agreement knowingly, voluntarily, and intelligently. Both parties also stated that no promises, other than those contained in the settlement agreement, were made to them. Lastly, both parties stated that they wanted the court to approve the settlement agreement.

¶16 Additionally, Wayne’s objective manifestations of assent indicate that the \$90,000 equalization payment included any offset for the Picabo property. The settlement judge indicated that based on his notes, “when the parties tried to come up with an equalization amount for Wayne, 50% of the value of the Picabo property was part of the consideration.” Wayne did not indicate that he would receive a separate equalization payment for the Picabo property upon its distribution to Lily. Additionally, upon distribution of the residue, Wayne did not mention that an equalization payment for the Picabo property would be deducted from Lily’s share. Lastly, Wayne indicated that no other promises other than those made on the record were made to him.

¶17 The language in the settlement agreement stating that the equalization payment applied to payments or assets “that Lily has previously received” could be interpreted to support Wayne’s argument that the equalization payment did not include the Picabo property. When considering the testimony from the hearing, however, Wayne’s interpretation is unsupported. When the terms of the settlement were read into the record, for example, Wayne stated that he “shall receive \$90,000 in equalization off the top of the liquid funds of the trust.” No limiting language was included, which supports the interpretation that the equalization payment included items not already in Lily’s possession. This interpretation is further evidenced by Wayne’s argument that the equalization payment included trustee’s fees and other pre-death expenses

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that he incurred on his father's behalf, which were not payments Lily had previously received. When considering the language of the settlement agreement, and the testimony at the hearing, Wayne's objective manifestations of assent were that the \$90,000 equalization payment included the Picabo property.

¶18 Wayne's understanding that the \$90,000 equalization payment did not include the Picabo property, and his understanding that he would receive one-half the value of the property as part of the residue of the estate, are not reasonable under the circumstances and are unsupported by the language of the settlement agreement. When the terms of the settlement agreement were read into the record, the parties agreed that Lily would receive title to the Picabo property. Neither party, however, indicated that Wayne was entitled to receive a separate equalization payment for one-half the value of the Picabo property.

¶19 Further, the settlement agreement did not mention how to calculate the Picabo property's value, when the valuation would take place, or how to distribute payment. The settlement agreement set forth specific details regarding the sale and distribution of the Michigan property but did not contain such detail regarding the Picabo property. Even when the parties discussed what property fell into the residue of the estate, neither party indicated that one-half the value of the Picabo property would be deducted from Lily's share before distribution. Rather, the parties simply agreed to split the residue evenly. Wayne's misunderstanding is unreasonable given the circumstances of this case.

¶20 Wayne argues that this Court should defer to the settlement judge's factual findings, because he personally observed and participated in the negotiations that resulted in the settlement agreement. Before ruling on the enforceability of the settlement agreement, however, the settlement judge acknowledged that he "rarely remembers the specific details from any settlement conference" and "can only look to the language of the settlement agreement and [his] notes." Because the settlement judge relied on the agreement and his notes, which are part of the record, we need not defer to his factual determinations.

¶21 Based on the language of the settlement agreement and the surrounding circumstances, Wayne's objective manifestations indicate the \$90,000 equalization payment included the Picabo property and Wayne's misunderstanding is not reasonable. Therefore, the trial court erred in finding a lack of mutual assent.

ATTORNEYS' FEES

¶22 Lily requests that Wayne pay for her attorneys' fees pursuant to A.R.S. § 12-341.01(A). Lily further requests that Wayne pay interest from August 2, 2018, until the date the settlement amount is paid in full at a rate of ten percent. *See* A.R.S. § 44-1201(A). Because Lily is the prevailing party, we grant her request for reasonable attorneys' fees and interest upon compliance with Arizona Rule of Civil Appellate Procedure ("ARCAP") 21.

¶23 Lily also requests that the attorneys' fees and interest be paid by Wayne individually, rather than from the \$50,000 holdback so Lily does not bear half the cost. Because Lily does not cite any authority supporting this request, it is denied. *See* ARCAP 21(a)(2).

¶24 Wayne, as Trustee, requests his reasonable attorneys' fees incurred on appeal. Lily requests that Wayne, as an individual, pay for the attorneys' fees incurred by counsel for the Trust. Under A.R.S. § 14-11004(A), a trustee is entitled to reimbursement from the trust for reasonable fees, including attorneys' fees, that arise out of and relate to the defense of a proceeding involving the administration of a trust. This Court has discretion to order that the fees incurred by the trustee be paid by any other party to the proceeding. A.R.S. § 14-11004(B). We grant both requests and order that Wayne, in his individual capacity, pay for the reasonable attorneys' fees incurred by counsel for the Trust on this appeal upon compliance with ARCAP 21.

¶25 Lastly, Lily requests that Wayne pay interest on her distribution of the proceeds from the sale of the Michigan property from the date it should have been received until the date received. This Court could not find authority supporting this request and Lily cited to no authority. Further, the settlement agreement did not specify a sale date for the Michigan property, nor has this Court been made aware that the property was sold. Because no ascertainable date exists to measure when Lily should have received the proceeds of the sale, we deny this request.

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CONCLUSION

¶26 For the foregoing reasons, we reverse and remand for further proceedings.



AMY M. WOOD • Clerk of the Court
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