

**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**  
**APR 11 2013**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

In re the Marriage of:	)	
	)	2 CA-CV 2012-0137
TERRY A. FREDERICK,	)	DEPARTMENT B
	)	
Petitioner/Appellant,	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
and	)	Rule 28, Rules of Civil
	)	Appellate Procedure
MARGARET M. DiFRANK,	)	
	)	
Respondent/Appellee.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20112311

Honorable David R. Ostapuk, Judge Pro Tempore

DISMISSED

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Terry A. Frederick	Tucson
	In Propria Persona

Margaret M. DiFrank	Tucson
	In Propria Persona

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E S P I N O S A, Judge.

¶1 Terry Frederick appeals from a decree dissolving his marriage to his former wife, Margaret DiFrank. We do not reach the merits of the appeal, however, because his

notice of appeal was premature and ineffective to invoke our appellate jurisdiction. Accordingly, we dismiss this appeal.

### **Factual Background and Procedural History**

¶2 After nine years of marriage, Frederick filed a petition for dissolution without minor children in August 2011. In November, DiFrank, on behalf of the parties' business INFO-TRACTS, LLC, filed a separate lawsuit against Frederick alleging, *inter alia*, he had embezzled business funds during the period of 1999 through 2011. The parties had formed INFO-TRACTS, LLC before they were married, and both Frederick and DiFrank worked there during the marriage. DiFrank owned fifty-one percent of the business, and Frederick owned forty-nine percent.<sup>1</sup>

¶3 At a settlement conference in the dissolution action, the parties agreed to certain distributions of personal property and bank accounts, and after a two-day bench trial, the trial court entered a decree of dissolution which distributed additional assets. However, the court did not distribute the ownership interests, assets, and liabilities of INFO-TRACTS, LLC, but deferred to any judgment made in the ongoing civil litigation. Frederick timely appealed.

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<sup>1</sup>The record indicates that a third party, Adam Kirchler, may hold a minority ownership interest in INFO-TRACTS, LLC, but his interest is not reflected in the findings of the trial court. The discrepancy is irrelevant to our analysis, as the court did not distribute the ownership shares, business assets, or liabilities. And, in any event, because Frederick has failed to file the trial transcripts, we assume they would support the court's findings and conclusions. *See* Ariz. R. Civ. App. P. 11(b) (appellant's duty to order certified transcript of parts of proceeding deemed necessary for inclusion in record); *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995) (party responsible for ensuring record on appeal contains all transcripts necessary to consider issues raised on appeal).

## Discussion

¶4 This court has an independent obligation to examine its jurisdiction. *See Ghadimi v. Soraya*, 230 Ariz. 621, ¶ 7, 285 P.3d 969, 970 (App. 2012). “If no statute or constitutional provision renders a judgment or order appealable, we lack jurisdiction to consider the appeal.” *Maria v. Najera*, 222 Ariz. 306, ¶ 4, 214 P.3d 394, 395 (App. 2009). Subject to certain exceptions, “jurisdiction of appeals is limited to final judgments which dispose of all claims and all parties.” *Musa v. Adrian*, 130 Ariz. 311, 312, 636 P.2d 89, 90 (1981); *see* A.R.S. §§ 12-120.21, 12-2101(A)(1). When more than one claim for relief is presented in an action, the trial court may direct the entry of final judgment as to one or more but fewer than all claims “only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.” Ariz. R. Fam. Law P. 78(B). In the absence of such language, any order that adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties shall not terminate the action. *Id.* Such an order is not final and appealable, and we lack jurisdiction to review it. *Ghadimi*, 230 Ariz. 621, ¶¶ 10-11, 285 P.3d at 970-71; *see also Nat’l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, ¶¶ 35-36, 119 P.3d 477, 484-85 (App. 2005) (where attorney-fee claims remained pending, ruling not final, appealable judgment absent express certification pursuant to Rule 54(b), Ariz. R. Civ. P.); Ariz. R. Fam. Law P. 1 committee cmt. (“Wherever the language in [the Arizona Rules of Family Law Procedure] is substantially the same as the language in other statewide rules, the case law interpreting that language will apply to these rules.”), 78 cmt. (Rule 78, Ariz. R. Fam. Law P., based on Rule 54, Ariz. R. Civ. P.).

¶5 Although a divorce decree may be a final judgment, *see* Ariz. R. Fam. Law P. 78(A), the decree of dissolution entered by the trial court was not final and appealable because it did not distribute the assets, liabilities, and ownership interest of the parties’ business, INFO-TRACTS, LLC. Nor did the decree contain an express determination that there was no just reason for delay or a direction that final judgment be entered, which were both required by Rule 78(B) to render the non-final decree appealable. Because substantive issues remain to be resolved, and because the court did not certify the decree as a final judgment notwithstanding those pending issues, the notice of appeal was a nullity. *See Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011).

### Disposition

¶6 Based on the foregoing, we lack jurisdiction over this matter. *See Ghadimi*, 230 Ariz. 621, ¶ 8, 285 P.3d at 970. Accordingly, the appeal is dismissed.<sup>2</sup>

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

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<sup>2</sup>Frederick, of course, may request the trial court to enter the “determination and direction” required by Rule 78(B), after this court’s mandate has issued. *See In re Marriage of Flores & Martinez*, 231 Ariz. 18, ¶¶ 10, 12, 289 P.3d 946, 949 (App. 2012) (trial court order entered before mandate issued void for lack of jurisdiction and not appealable). If the court does so, a timely appeal may be taken from that order.