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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	)	
	)	2 CA-CV 2013-0002
ALEX FRANK FOX,	)	DEPARTMENT A
	)	
Petitioner/Appellant,	)	MEMORANDUM DECISION
	)	Not for Publication
and	)	Rule 28, Rules of Civil
	)	Appellate Procedure
SAMMI JEAN FOX,	)	
	)	
Respondent/Appellee.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20112220

Honorable Stephen C. Villarreal, Judge

DISMISSED

West, Elsberry, Longenbaugh & Zickerman, PLLC
By Anne Elsberry
Tucson
Attorneys for Petitioner/Appellant

The Wallin Law Firm, PLLC
By D. Stephen Wallin
Phoenix
Attorneys for Respondent/Appellee

M I L L E R, Judge.

¶1 Alex Fox appeals the trial court's decree of dissolution of marriage. The timing of Alex's two notices of appeal requires us to determine whether we have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).[1]

Factual and Procedural Background

¶2 The proceedings pertinent to our jurisdictional inquiry are as follows. After a bench trial, the trial court issued a signed, under-advisement ruling dividing certain property that had not been decided in an earlier settlement conference, including retirement benefits and bank accounts. In its September 13, 2012 ruling it ordered Sammi's counsel to "prepare a decree for the Court's signature reflecting the Court's ruling and the parties' agreements concerning the distribution of other property no later than thirty (30) days." The ruling also noted Alex's counsel "may object, if appropriate, to the submitted decree as provided for in the Arizona Rules of Family Law Procedure."

¶3 On October 12, 2012, Alex filed a notice of appeal. A month later, the trial court issued *sua sponte* another signed ruling in which it found "the Ruling dated September 13, 2012 is not a final order of this Court [therefore] the Notice of Appeal and Affidavit in Lieu of Bond are premature." The court also found that Sammi had not complied with that portion of its September ruling that directed her to lodge a proposed

[1]Alex asserts this court has jurisdiction of the appeal pursuant to A.R.S. § 12-2101(B) (any order or judgment referred to in subsection A made by a judge "is appealable as if made by the court"), without specifying the specific subsection. In his supplemental brief, he specifies it is an appeal from a final judgment, which we consider under subsection (A)(1).

decree within thirty days and placed the case on the court's inactive calendar for sixty days, to be followed by dismissal without further notice. Sammi lodged a proposed decree on November 21, 2012, which the court signed and entered on December 12, 2012. Alex filed an "amended" notice of appeal on January 17, 2013.

¶4 The issue of an untimely notice of appeal was not raised in either party's briefs. We directed Alex to show cause why the case should not be dismissed for lack of jurisdiction because the initial notice of appeal was filed prematurely and the second notice was filed more than thirty days after the entry of final judgment. Alex filed a timely supplemental memorandum.

Jurisdiction

¶5 We have an independent duty to review our jurisdiction, *Santee v. Mesa Airlines, Inc.*, 229 Ariz. 88, ¶ 2, 270 P.3d 915, 915-16 (App. 2012), which is specifically defined by statutes, *Garza v. Swift Transp. Co.*, 222 Ariz. 281, ¶ 12, 213 P.3d 1008, 1011 (2009), and we must dismiss an appeal if we lack jurisdiction, *Robinson v. Kay*, 225 Ariz. 191, ¶ 4, 236 P.3d 418, 419 (App. 2010). A case decided outside our statutory jurisdiction is of no force and effect. *State v. Bayardi*, 230 Ariz. 195, 197, 281 P.3d 1063, 1065 (App. 2012).

¶6 Generally, we may only review appeals from final judgments that dispose of all claims and all parties. *Garza*, 222 Ariz. 281, ¶ 17, 213 P.3d at 1011; A.R.S. § 12-2101(A)(1). A series of decisions issued by the Arizona Supreme Court, however,

has provided a limited exception to this rule—known as the *Barassi* exception, based on its decision in *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981)—when a notice of appeal has been 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), *citing Barassi*, 130 Ariz. at 421-22, 636 P.2d at 1203-04; *see also Craig v. Craig*, 227 Ariz. 105, ¶ 13, 253 P.3d 624, 626 (2011) (clarifying *Barassi* exception is limited and "[i]n *all* other cases, a notice of appeal filed in the absence of a final judgment, or while any party's time-extending motion is pending before the trial court, is 'ineffective' and a nullity").

¶7 In his supplemental memorandum, Alex concedes the "amended" notice of appeal, filed on January 17, 2013, was untimely. Filed thirty-five days after the signed decree was filed with the clerk, that notice was five days late. *See* Ariz. R. Civ. App. P. 9(a) (appeal must be filed not later than thirty days after entry of judgment); Ariz. R. Fam. Law P. 81(A) (filing of judgment with clerk constitutes entry of judgment). We therefore lack jurisdiction over the appeal unless the first notice of appeal, filed on October 12, 2012, was effective.

Was the First Notice of Appeal Premature?

¶8 To determine if the first notice of appeal was effective, we must consider (1) whether that notice of appeal was premature, and (2) if it was premature, whether it

was a nullity. *Baker v. Bradley*, 231 Ariz. 475, ¶¶ 12-13, 296 P.3d 1011, 1015 (App. 2013). Alex argues that the first notice of appeal was not premature because the September 13 ruling was a final, signed ruling. Although the ruling was signed, we disagree that it was final.

¶9 As we previously noted, in the September 13 ruling, the trial court directed Sammi's counsel to prepare a proposed decree incorporating the court's findings and the parties' earlier agreements, and noted that Alex would have time to object to the proposed decree. Ariz. R. Fam. Law P. 81(C) ("In case of a judgment other than for money or costs, or that all relief be denied, the judgment shall not be settled, approved, and signed until the expiration of five (5) days after the proposed form thereof has been served."). The ruling did not purport to enter judgment, incorporate the parties' pre-trial agreements, or dissolve the marriage. *See Haywood Sec., Inc. v. Ehrlich*, 214 Ariz. 114, ¶ 14, 149 P.3d 738, 740-41 (2007) (noting importance of court's intent in determining whether rule defining "judgment" met); *see also Devenir Assoc. v. City of Phoenix*, 169 Ariz. 500, 821 P.2d 161 (1991) (signed document entitled "OPINION" not a final judgment where court ruled on summary judgment motions but did not order that judgment be entered and filed, document entitled "JUDGMENT" more than two months later). Further, to the extent there could be a question about the trial court's intent regarding finality, the ruling issued on November 19, 2012, informed the parties a final decree was required, the September 13 ruling was not a final order, and the first notice of appeal was premature.

The November ruling put both parties on notice that issues remained before a final order could be filed. We conclude the October 12 notice of appeal was premature.

Does the Notice of Appeal Fit Within the *Barassi* Exception?

¶10 Whether the premature notice of appeal is a nullity, however, depends on whether it fits within the *Barassi* exception. *Baker*, 231 Ariz. 475, ¶ 13, 296 P.3d at 1015. To make that determination, we must consider whether (a) the September 13 ruling could have changed and (b) the remaining tasks were "merely ministerial." *Craig*, 227 Ariz. 105, ¶¶ 12-13, 253 P.3d at 626.

¶11 The September 13 ruling was subject to change because the decree might have been altered by objection or motion for reconsideration. But as this court noted in *Baker*, 231 Ariz. 475, ¶¶ 10-17, 296 P.3d at 1015-16, any ruling is subject to change before a final judgment is entered. Such an interpretation would limit the *Barassi* exception to cases in which a judgment was filed, but a post-judgment motion was pending. *Id.* *Baker* concluded our supreme court "did not intend a literal application of the words 'if no decision of the court could change.'" *Id.* ¶ 15. We agree that the possibility of change alone does not necessarily preclude the existence of a *Barassi* exception.

¶12 The final criterion under *Barassi* is whether the remaining tasks were purely ministerial. Alex argues there were no issues left for the trial court to decide after it issued the September 13 ruling, and the act of signing the decree was ministerial because

the property distributions not included in the ruling had already been agreed to by the parties. An act is ministerial when "the duty to be performed is described by law with such certainty that nothing is left to the exercise of discretion or judgment." *Bryant v. Bryant*, 40 Ariz. 519, 521, 14 P.2d 712, 713 (1932); *see also Fields v. Oates*, 230 Ariz. 411, ¶ 13, 286 P.3d 160, 164 (App. 2012).

¶13 The September 13 ruling included awards for Sammi's work-related stock, retirement benefits, and pension accounts, as well as an award to Alex for a community share of the combined bank accounts and an equalization payment on their two vehicles. The dissolution decree included those awards, but also addressed the division of the marital home and related loans, three vehicles, tangible personal property, potential community debt due to overpayment of social security disability, other community debt such as credit cards and medical bills, and the values of the vehicles, home, and bank accounts. Alex essentially argues that the remaining items only involved matters resolved by stipulation between the parties. Most of those were included in the stipulations, but the community debt from credit cards and medical bills was not addressed. The division of that debt was an issue that remained to be decided after the trial, with Alex seeking equal division, and Sammi asking for the debts to be divided based on which spouse's name was on the debt. In the decree, the court ultimately assigned to Sammi and Alex as their respective separate debts those each had incurred in their own names. These were material issues to be resolved before the court could issue a final ruling.

¶14 The explicit recognition by the trial court that Alex would have opportunity to object to the proposed decree before the court signed it is also significant. Although there could always be objections to clerical errors in the decree, for the reasons described earlier, substantive objections were possible or likely. Substantive objections by Alex would have required the court to make a determination that required it to exercise its discretion. Ariz. R. Fam. Law P. 81(C). Further, the court had the discretion to reject or modify the parties' stipulations. *Keller v. Keller*, 137 Ariz. 447, 448, 671 P.2d 425, 426 (App. 1983); *see also Wick v. Wick*, 107 Ariz. 382, 384-85, 489 P.2d 19, 21-22 (1971) (upholding trial court decision not to adopt separation and property settlement agreement in full).

¶15 Finally, although the November 19 ruling did not explicitly address whether the trial court intended for non-ministerial acts to be completed before it signed the final decree, we assume the court was aware of and complied with relevant law. *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 32, 97 P.3d 876, 883 (App. 2004). In this context, the court was required to determine whether the October 12 notice of appeal divested it of jurisdiction to proceed except in furtherance of appeal. *See In re Marriage of Johnson & Gravino*, 231 Ariz. 228, ¶ 9, 293 P.3d 504, 507 (App. 2012) (seemingly invalid notice of appeal does not preclude trial court from determining jurisdiction to proceed). The court would have been in the best position, especially regarding post-trial proceedings and its intent in relation to the finality of the September 13 ruling, to determine if the remaining tasks

were ministerial. Although the finality of an order or judgment is a question of law that we review de novo, *Burnette v. Bender*, 184 Ariz. 301, 304, 908 P.2d 1086, 1089 (App. 1995), the trial court's determination on factual matters is given great deference, especially where the facts address jurisdiction. *Cf. Bonner v. Minico, Inc.*, 159 Ariz. 246, 256, 766 P.2d 598, 608 (1988) (trial court determines contested jurisdictional facts where parties are not entitled to a jury).

¶16 The nature of the remaining tasks before a dissolution decree can be filed necessarily involves matters unique to facts of the particular case. Here, the court anticipated completion of a number of tasks that it did not characterize as ministerial. The court's implied factual determination that non-ministerial tasks remained to be addressed contradicts Alex's assertions to the contrary. We conclude the additional determinations in the decree, the explicit invitation to object, and the court's implicit factual conclusion show that the remaining acts were not ministerial.

¶17 Alex also makes three procedural arguments for the *Barassi* exception, none of which has merit. First, he argues Sammi's counsel filed the proposed decree late and had it never been filed, the under-advisement ruling would have been the only final judgment of record. But this is inaccurate because the trial court stated in its November 19 ruling that the case would have been placed on the inactive calendar and eventually dismissed if no proposed judgment decree were received. Second, Alex asserts the "amended" notice of appeal was better than a complete absence of subsequent

notices, such as in *Barassi*. Alex offers no authority for this position; moreover, if accepted, it would essentially swallow the limitations on the *Barassi* exception. Finally, Alex argues that there was no confusion or disruption in the trial process due to the filing of a premature notice of appeal. This is contradicted by the trial court's decision to file the November 19 ruling clarifying that the first notice of appeal was premature because the September 13 ruling was not a final order of the court. In any event, an absence of deleterious effect on trial court proceedings does not justify a *Barassi* exception.

Attorney Fees

¶18 Alex and Sammi both request their costs and attorney fees on appeal pursuant to A.R.S. § 25-324. We must consider "the financial resources of both parties and the reasonableness of the positions each party has taken throughout the proceedings," to determine whether to award attorney fees under the statute. A.R.S. § 25-324(A). The purpose is "'to provide a remedy for the party least able to pay.'" *Bell-Kilbourn v. Bell-Kilbourn*, 216 Ariz. 521, ¶ 13, 169 P.3d 111, 114 (App. 2007), *quoting In re Marriage of Zale*, 193 Ariz. 246, ¶ 20, 972 P.2d 230, 235 (1999). Both parties' positions were reasonable in the trial court and the affidavits of financial information show that Sammi has significantly greater financial resources than Alex. Taking into account the reasons for dismissal of the appeal and the disparate financial positions, in our discretion we decline to award either party attorney fees and costs.

Conclusion

¶19 Alex's original notice of appeal was premature and, because the *Barassi* exception does not apply, it was a nullity. The amended notice of appeal was untimely and, therefore, it was ineffective. We are without jurisdiction to consider the appeal.[2] We dismiss the appeal and decline the parties' requests for attorney fees and costs.

/s/ Michael Miller
MICHAEL MILLER, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

[2]We recognize that the dismissal of an action on procedural grounds is disfavored because it prevents consideration of the merits and not infrequently imposes a harsh result. *Fields*, 230 Ariz. 411, ¶ 24, 286 P.3d at 166 ("'[W]e favor deciding cases on their merits and try to avoid dismissing appeals on hypertechnical grounds.'"), *quoting Craig*, 225 Ariz. ¶ 14, 240 P.3d at 1273, *aff'd*, 227 Ariz. 105, 253 P.3d 624 (2011); *see also Adams v. Valley Nat'l Bank of Arizona*, 139 Ariz. 340, 342, 678 P.2d 525, 527 (App. 1984) (noting dismissal on procedural grounds "may seem harsh in . . . a particular case"). Dismissal is all the more unsettling where, as is the case here, a party makes an earnest attempt to comply with the procedural rules. Nonetheless, our jurisdiction is established by the legislature and must be strictly observed. *Garza*, 222 Ariz. 281, ¶ 12, 213 P.3d at 1010 (appellate jurisdiction established by statute); *City of Tucson v. Wondergem*, 4 Ariz. App. 291, 292, 419 P.2d 552, 553 (1966) (appellant must strictly comply with statutes establishing jurisdictional requirements). Similarly, we are bound by our supreme court's jurisprudence in the application of the jurisdictional statutes to a particular case. *See Sell v. Gama*, 231 Ariz. 323, ¶ 31, 295 P.3d 421, 428 (2013) ("The lower courts are bound by our decisions, and [the Arizona Supreme] Court is responsible for modifying that precedent."); *Baker*, 231 Ariz. 475, ¶¶ 10-17, 296 P.3d at 1015-16 (reviewing our supreme court's jurisprudence on finality of judgments).