IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE ESTATE OF MARY AGNES RILEY, DECEASED.

R.J. RILEY, REGINA M. RILEY, F. MARTIN RILEY, NEYSA KALIL, NORA J. SIMONS, CECELIA RILEY, JUDE S. RILEY, LORETTA LACORTE, AND JULIA RILEY
Appellants.

v.

JOHN D. BARKLEY, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY AGNES RILEY,
Appellee.

No. 2 CA-CV 2014-0145
Filed May 29, 2015

Appeal from the Superior Court in Pima County
No. P26266
The Honorable Kyle A. Bryson, Judge

DISMISSED

COUNSEL

Jonathan W. Reich, P.C.
By Jonathan W. Reich, Tucson
Counsel for Appellants

Mesch, Clark & Rothschild, P.C.
By J. Emery Barker, Tucson

Haralson, Miller, Pitt, Feldman & McAnally, P.L.C.
By Gerald Maltz, Tucson
Counsel for Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Howard concurred.

E S P I N O S A, Judge:

¶1 Appellants, R.J. Riley, Regina M. Riley, F. Martin Riley, Neysa Kalil, Nora J. Simons, Cecelia Riley, Jude S. Riley, Loretta LaCorte, and Julia Riley (the Objectors), are beneficiaries of the estate of Mary Riley. They challenge several of the trial court's rulings concerning the estate, contending that it abused its discretion by declining to remove the estate's successor personal representative, declining to disqualify the successor personal representative's legal counsel, and awarding the successor personal representative his attorney fees. Because we lack jurisdiction over the Objectors' appeal, we dismiss it.

Factual and Procedural Background

¶2 Mary Riley died testate in 1996 designating her thirteen children as her beneficiaries. Two of them, Joseph Riley and Mary Benge, were appointed co-personal representatives of the estate. In July 2006, they resigned their appointments, and John Barkley was appointed successor personal representative.[1] Joseph Riley and Mary Benge subsequently filed an accounting, followed by an

[1]Further references to Barkley are to him in his capacity as successor personal representative of the estate.

amended accounting. Barkley objected to both filings and sought a surcharge from the former co-personal representatives. In March 2009, a mediation resulted in a settlement agreement between Barkley, on behalf of the estate, and Joseph Riley and Mary Benge.

¶3 After a hearing on the merits of the settlement agreement, the probate court approved it, concluding it was reasonable and had been entered into in good faith. That ruling was appealed, and our supreme court held the settlement agreement could not be approved pursuant to A.R.S. §§ 14-3951 and 14-3952. *See In re Estate of Riley*, 231 Ariz. 330, 295 P.3d 428 (2013).

¶4 Following the supreme court's ruling, in April 2013, Barkley filed a petition pursuant to A.R.S. §§ 14-3704 and 14-3705 requesting the court approve the settlement agreement and "allow[ing him] to file a Final Account and Report, a Proposal for Distribution and close this estate." A week later, the Objectors filed an "Objection to Successor Personal Representative's Petition for Instructions and Cross-Petition for Removal of Successor Personal Representative, Surcharge of Personal Representative and/or Disqualification of Personal Representative's Attorney." In their objection, the Objectors maintained that the settlement agreement was unenforceable and requested the court deny Barkley's petition for instructions and grant them their attorney fees and costs. In the cross-petition, the Objectors asserted that Barkley's settlement of the claims and advocacy for the settlement agreement, rather than proceeding to trial against Joseph Riley and Mary Benge, "shows that [he] is acting in breach of his duties and continues to do so" and requested Barkley's removal and replacement as successor personal representative. They further argued Mesch, Clark & Rothschild, P.C. (MC&R) should be disqualified from representing Barkley because it had been retained by R.J. Riley and, without his consent, had "acted contrary to [his] interests."

¶5 After trial on the cross-petition, the probate court considered the parties' filings, the evidence presented, and the arguments of counsel, and, in July 2014, issued an under-advisement ruling finding no breach of duty to the estate by Barkley's actions "in attempting to settle the estate and obtain court approval of that settlement." It further found R.J. Riley to be a "former client" of

MC&R, not a current client, and determined that "[t]he hardships to . . . Barkley in disqualifying his counsel outweigh the potential injustice to the former client, R.J. Riley." The court ordered that Barkley's attorney fees relating to the cross-petition be paid by the estate.

¶6 The Objectors filed a motion for new trial in September 2014, contending the trial court's ruling on the cross-petition was "based upon factual and legal errors." The court denied the motion and the Objectors brought this appeal.

Jurisdiction

¶7 At the outset, Barkley contends the ruling from which the Objectors appeal is not an appealable order and maintains this court lacks jurisdiction over the appeal. Whether or not challenged, we have an independent duty to examine our jurisdiction over every appeal. *See Baker v. Bradley*, 231 Ariz. 475, ¶ 8, 296 P.3d 1011, 1014 (App. 2013); *Grand v. Nacchio*, 214 Ariz. 9, ¶ 12, 147 P.3d 763, 769 (App. 2006). Appellate jurisdiction is circumscribed by statute, and we cannot act where jurisdiction is lacking. *See Baker*, 231 Ariz. 475, ¶ 8, 296 P.3d at 1015; s*ee also State v. Bayardi*, 230 Ariz. 195, ¶ 6, 281 P.3d 1063, 1065 (App. 2012) ("If we decide a case beyond our statutory jurisdiction, the decision is of no force and effect.").

¶8 This court has jurisdiction over appeals from a judgment, decree, or order entered in any formal probate proceeding. A.R.S. § 12–2101(A)(9). "An 'order' pursuant to this section means an order similar to a final judgment or decree[.]" *Ivancovich v. Meier*, 122 Ariz. 346, 353, 595 P.2d 24, 31 (1979). "'A final judgment or decree decides and disposes of the cause on its merits, leaving no question open for judicial determination.'" *In re Marriage of Zale*, 193 Ariz. 246, ¶ 11, 972 P.2d 230, 233 (1999), *quoting Decker v. City of Tucson*, 4 Ariz. App. 270, 272, 419 P.2d 400, 402 (1966).

¶9 Under A.R.S. § 12-2101(9), "any order finally disposing of a formal proceeding in an unsupervised administration is appealable." *In re Estate of McGathy*, 226 Ariz. 277, n.2, 246 P.3d 628, 631 n.2 (2010); *see also* Ariz. Sess. Laws 2011, ch. 304, § 1 (reordering

A.R.S. § 12-2101(J) as § 12-2101(9)). A formal proceeding is "commenced by filing a petition," Ariz. R. Prob. P. 4(A), and each proceeding is "independent of any other proceeding involving the same estate." A.R.S. § 14-3107(1); *see also* Ariz. R. Prob. P. 2(O), (P) cmt. A petition is the "equivalent of a complaint in a civil action," Ariz. R. Prob. P. 17 cmt., and the opposing party's objection is the "equivalent of an answer in a civil action." *Id.* Arizona Rules of Civil Procedure relating to counterclaims and cross-claims, Rules 13 through 15, apply to counter-petitions or cross-petitions in probate matters. *See* Ariz. R. Prob. P. 17(G).

¶10 Indeed, the rules of civil procedure are generally applicable to probate proceedings. *See* A.R.S. § 14-1304 (rules of civil procedure applicable to probate proceedings unless specifically provided to contrary); Ariz. R. Prob. P. 3(A). This includes Rule 54(b), Ariz. R. Civ. P., which has been applied to appeals arising from probate proceedings. *See Kinnear v. Finegan*, 138 Ariz. 34, 35, 672 P.2d 986, 987 (App. 1983). This court has held that "where an appeal is taken from a putative Rule 54(b) judgment and there is a Rule 54(b) deficiency, this court lacks jurisdiction" to do anything other than dismiss the appeal. *Madrid v. Avalon Care Ctr.-Chandler, L.L.C.*, 236 Ariz. 221, ¶¶ 10-11, 338 P.3d 328, 331-32 (App. 2014).

¶11 Rule 54(b) provides, in relevant part:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, . . . or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of

> fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

When there is at least one outstanding claim and the trial court has not included Rule 54(b) language, the judgment is subject to modification and is not final. *Stevens v. Mehagian's Home Furnishings, Inc.*, 90 Ariz. 42, 44–45, 365 P.2d 208, 209–10 (1961); *see also Pulaski v. Perkins*, 127 Ariz. 216, 217, 619 P.2d 488, 489 (App. 1980) (noting that absence of Rule 54(b) language "defeats finality" when outstanding claims remain). A judgment that does not dispose of outstanding cross-claims between co-parties and does not contain a Rule 54(b) determination is not a final judgment. *See Valley Nat'l Bank of Ariz. v. Meneghin*, 130 Ariz. 119, 122, 634 P.2d 570, 572 (1981) (noting judgment failing to dispose of cross-claims between appellants and their co-defendants and lacking Rule 54(b) determination not final).

¶12 Here, the trial court's July 2014 ruling did not dispose of the issues between the Objectors and Barkley raised in the petition and the objection, but addressed only the cross-petition. Moreover, the court made no determination pursuant to Rule 54(b). We therefore have no authority to review the ruling as a separate, appealable order, and it is not appealable. *See Kinnear*, 138 Ariz. at 35–36, 672 P.2d at 987–88 (judgment that did not dispose of all issues and did not include Rule 54(b) language not appealable); *see also* § 12–2101; Ariz. R. Civ. P. 54(b); c*f. McGathy*, 226 Ariz. 277, ¶¶ 2, 17, 246 P.3d at 629, 631 (order disposing entirely of personal representative's petition appealable). Nor may we review the denial of the motion for a new trial, which was based on the same ruling. *See Maria v. Najera*, 222 Ariz. 306, ¶¶ 10-11, 214 P.3d 394, 396 (App. 2009) ("[a] party may not create access to appellate review merely by filing a new trial motion from a non-appealable . . . order").

¶13 The Objectors maintain we should find we have jurisdiction because "[p]robate matters are fluid, can last years, involve numerous claims and legal issues, and sometimes numerous

trials which may not resolve the case finally" and therefore "are not like civil or criminal claims where an appeal can wait until the complaint is completely resolved and settled at one trial." Indeed, a probate case may involve "various proceedings . . . within the case," Ariz. R. Prob. P. 2(O), (P) cmt., and continue for many years. As the Objectors point out, our supreme court held in *McGathy* that parties to an unsupervised administration may appeal the final disposition of each formal proceeding within a probate case. 226 Ariz. 277, ¶ 17, 246 P.3d at 631. The Objectors, however, stop short of the court's reasoning that the utility of unsupervised administration would be "severely undermined" if parties were required to wait for a "final order distributing the estate." *Id*. ¶ 16. To the extent *McGathy* may apply here, our conclusion is entirely consistent with that decision. The "proceeding" here was initiated by Barkley's April 2013 petition and has yet to be finally resolved. Significantly, the avenue for addressing rulings that do not dispose of a proceeding, Rule 54(b), was not utilized. *See S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, ¶ 19, 977 P.2d 769, 775 (1999) (Rule 54(b) "designed as a compromise between the policy against interlocutory appeals and the desirability, in a few cases, of an immediate appeal to prevent an injustice").

¶14 The Objectors also argue that this court exercised jurisdiction over a probate ruling issued by the trial court in 2009, *see In Re Estate of Riley*, 228 Ariz. 382, 266 P.3d 1078 (App. 2011), "despite the fact that additional unresolved issues remained open and pending in the Estate at that time." Although such issues may have been pending at the time, the trial court's 2009 ruling, later appealed to this court, was an order that finally disposed of a formal proceeding initiated by a "petition for approval of compromise of controversies" filed in June 2009, *id.* ¶ 4, and, therefore, was appealable. As noted above, various probate proceedings may occur within a probate case, each initiated by the filing of a petition, and each independent of the other. *See* A.R.S. § 14-3107(1); Ariz. R. Prob. P. 2(O), (P) cmt.; Ariz. R. Prob. P. 4(A).

¶15 Finally, the Objectors assert that the "trial in this case [on the cross-petition] . . . is an independent matter," which was resolved by an order of the trial court, whereas Barkley's April 2013

petition "has not even been set for trial." We disagree that the cross-petition is necessarily independent of the petition. As argued by the Objectors, the determination of whether the trial court erred in not removing Barkley as successor personal representative pursuant to their cross-petition depends primarily on finding the settlement agreement unenforceable, an issue still to be addressed in the court's ruling on Barkley's petition. This only illustrates why parties desiring to appeal an order in an ongoing proceeding must seek a Rule 54(b) ruling from the trial court and the express determination required by the rule. *See Kinnear*, 138 Ariz. at 35, 672 P.2d at 987 (noting Rule 54(b) applicable to probate proceedings). That not having been done, we have no jurisdiction over the appealed ruling. *See Madrid*, 236 Ariz. 221, ¶ 10, 338 P.3d at 331.

Attorney Fees and Costs

¶16 Both the Objectors and Barkley request that their attorney fees be awarded from the estate for this appeal. The Objectors contend they are so entitled "if this Court reverses the probate court ruling," citing Rule 21, Ariz. R. Civ. App. P., and *In re Estate of Brown*, 137 Ariz. 309, 312, 670 P.2d 414, 417 (App. 1983) (general rule of equity that persons who employ attorneys for preservation of common fund may have their attorney fees paid from that fund). We have not reversed the trial court's rulings, but rather dismissed the appeal for lack of jurisdiction, and we deny the Objectors' request.

¶17 In support of his request for attorney fees and costs, Barkley cites Rule 21 and A.R.S. § 14-3720, which provides: "[i]f any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorneys' fees incurred." There being no indication, or allegation by the Objectors, that Barkley has not defended this appeal in good faith, we award him his necessary expenses and reasonable attorney fees from the estate upon his compliance with Rule 21. *See In re Estate of Headstream*, 214 Ariz. 530, ¶ 27, 155 P.3d 1054, 1060 (App. 2007).

Disposition

¶18 For the foregoing reasons, the appeal is dismissed.