IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JESSICA EVANS,
Petitioner,

v.

HON. KENNETH LEE, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

KIM JACKSON, OLIVER CATHEY III, DONNA CATHEY,
OLIVER CATHEY JR., AND WANDA CATHEY,
Real Parties in Interest.

No. 2 CA-SA 2021-0018
Filed May 12, 2021

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Spec. Act. 7(g), (i).

Special Action Proceeding
Pima County Cause No. GC20200615

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

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By Ronald Zack and Shanelle C. Schmitz
Counsel for Petitioner

Doug Newborn Law Firm PLLC, Tucson
By Douglas J. Newborn and Jared L. Keating
Counsel for Real Parties in Interest

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 Jessica Evans seeks special-action review of the respondent judge's order denying her demand for a jury trial in a guardianship proceeding. We accept jurisdiction and grant relief.

¶2 In December 2020, Evans's mother, Kim Jackson; her aunt and uncle, Donna and Oliver Cathey III; and her maternal grandparents, Wanda and Oliver Cathey Jr. (collectively, Petitioners) filed a guardianship and conservatorship petition alleging Evans is incapacitated by bipolar disorder. A hearing was set for February 3, 2021, but was vacated after Evans objected to the petition; a scheduling conference was then set for February 22.

¶3 At that conference, a bench trial on the petition was set for April 29. Petitioners then filed an emergency petition on March 16, with a hearing held March 18, after which the respondent judge dismissed the emergency petition. The same day, Evans filed a demand for a jury trial. The parties subsequently filed a joint request to reset the trial date for "a two-day jury trial."

¶4 On April 1, the respondent judge denied Evans's jury-trial demand, stating Evans had "waived her right to a jury trial" and noting she had "participated in the selection of the [initial] trial date" and had made no jury trial request "then or at any time prior to March 18." This petition for special action followed.

¶5 In her petition, Evans asserts the respondent judge erred by denying her demand for a jury trial because she is entitled to one and she invoked that right by timely filing her demand. The denial of a jury trial is an appropriate subject for special action. *Tanner Cos. v. Super. Ct.*, 123 Ariz. 599, 599-600 (1979); *John C. v. Sergeant*, 208 Ariz. 44, ¶ 8 (App. 2004); *see also*

Ariz. R. P. Spec. Act. 1. We thus accept special-action jurisdiction, and, because the respondent had no discretion to deny Evans's demand, we grant relief. *See* Ariz. R. P. Spec. Act. 3(a).

¶6 As the parties agree, Evans is entitled to a jury trial in a guardianship proceeding to determine "issues of incapacity." A.R.S. § 14-5303(C). Rule 29(a), Ariz. R. Prob. P., states a petitioner "may obtain a jury trial" for any "issue triable of right by a jury" "by filing a written demand at any time after the proceeding is commenced, but no later than 30 days after the initial hearing on the petition." "A party waives a jury trial unless its demand is properly filed." Ariz. R. Prob. P. 29(c).[1]

¶7 Evans's jury-trial demand was filed within thirty days of the February 22 scheduling conference—the first hearing in the proceeding. Thus, the respondent judge's waiver finding could not properly be based on Rule 29(c). Nor did Evans waive her jury-trial right by participating in the hearing on the emergency petition. Emergency petitions are governed by A.R.S. § 14-5310, and, pursuant to subsection (H) of that statute, a hearing on emergency petitions is "held in the same manner as a hearing on a preliminary injunction." A court may consolidate the emergency hearing with the hearing for a permanent guardian—but doing so "does not limit the parties to any rights they may have to trial by jury." § 14-5310(H). And, although the respondent judge noted Evans did not request a jury trial at the March 18 emergency hearing, any such request would have been ineffective under Rule 29(a), which requires a written demand.

¶8 Thus, the question is whether Evans waived her jury-trial right by initially agreeing to a hearing before the trial court. We conclude she did not. A party is not bound by an initial decision to forgo a jury trial if it later files a demand. *See Hackin v. Pioneer Plumbing Supply Co.*, 10 Ariz. App. 150, 153-54 (1969). In that case, we addressed when a party could be

[1]Rule 29(b) states a party "is deemed to have waived a jury trial on all issues not specified in the demand." That provision is not implicated here—Evans demanded a jury trial on "all issues triable of right by a jury, including the issues of incapacity, the necessity to provide for the proposed ward's demonstrated needs, that the proposed ward's needs cannot be met by less restrictive means, and [the] choice for appointment of proposed guardians."

relieved of an initial agreement to waive a jury trial in a civil proceeding.[2] In a consolidated action in the trial court, the defendants did not timely request a jury trial. *Id.* at 153. The parties stipulated to a bench trial, but the defendants later requested a jury trial, which the trial court denied. *Id.* We concluded, first, that the earlier stipulation was not binding, stating jury-trial requests should be "[r]egarded tolerantly" and the defendants' untimely demand was "a sufficient effort to be relieved" of the earlier stipulation. *Id.* We determined the jury-trial right had instead been waived because the request was untimely. *Id.*

¶9 We further determined the trial court did not abuse its discretion in denying defendants' untimely request in one of the actions after considering "the rights of the litigants" and "the burden of shifting a trial to the jury docket." *Id.* at 154. However, as to the other action, we concluded the filing of an amended complaint made the litigation "sufficiently different," such that "the waiver of a jury trial . . . is not binding as to the . . . amended complaint." *Id.*

¶10 Thus, under *Hackin*, Evans was not bound by her earlier agreement to forgo a jury trial. And, because her jury-trial demand was timely—unlike the defendants' demand in *Hackin*—the respondent judge had no discretion to deny Evans a jury trial regardless of any potential burden it might place on the docket.[3] *See id.* at 153-54; *see also* § 14-5303(C) ("[An] alleged incapacitated person is entitled to be represented by counsel, to present evidence, to cross-examine witnesses, including the court-appointed examiner and investigator, and to trial by jury."). Indeed, the preference for jury trials expressed in *Hackin* is even more salient here given the "profound impact" guardianship has "on the rights of a ward." *In re Guardianship of Sommer*, 241 Ariz. 308, ¶ 9 (App. 2016) (noting a person "placed under a guardianship and conservatorship . . . loses, or may lose, many constitutionally protected rights"). Notably, the respondent's ruling

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[2]At the time *Hackin* was decided, the civil rules required a party to demand a jury trial. *See* 10 Ariz. App. at 152-53. That is no longer the case; Rule 38, Ariz. R. Civ. P., states that "a party need not file a written demand or take any other action in order to preserve its right to trial by jury."

[3]We therefore need not reach Evans's argument that, because the emergency petition included an amended petition, "[t]he hearing on March 18 could then be considered an initial hearing on the amended petition," giving Evans thirty days from that date to file her jury-trial demand.

on Evans's demand for a jury trial does not even mention, much less base the denial of a jury trial on, any burden the request would have on the court's docket.

¶11 Petitioners' response brief is virtually devoid of authority. It seems they argue either that Evans waived her right to a jury trial by conduct or is estopped from seeking a jury trial after agreeing to a bench trial. But the waiver-by-conduct argument fails in the face of *Hackin*—as we have explained, the decision to agree to a bench trial does not preclude a party from later making a timely demand for a jury trial. And, regarding estoppel, Petitioners have made no effort to show that they did anything in reliance on Evans's initial agreement to forgo a jury trial or that they are prejudiced by Evans's decision to later demand a jury trial—indeed, they agreed to a schedule that called for a jury trial. *See Doherty v. Leon*, 249 Ariz. 515, ¶ 18 (App. 2020) (reliance and prejudice necessary element of equitable estoppel).

¶12 We accept special-action jurisdiction and grant relief. We reverse the respondent judge's order denying Evans's demand for a jury trial.