ATTORNEY FOR APPELLANT:

GREGG S. GORDON
Dale & Eke, P.C.
Indianapolis, Indiana

ATTORNEY FOR APPELLEES:

JOHN L. KELLERMAN
Batesville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ROBERT F. KECK and JANET L. RUSSELL,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 69A04-0710-CV-590
MARY ANN WALKER, Individually and as Personal Representative of the Estate of Edith M. Dawdy, SUNMAN COMMUNITY CHURCH, SUNMAN LIFE SQUAD, SUNMAN FIRE DEPARTMENT, ST. PAUL'S CEMETERY, ST. NICHOLAS CEMETERY FUND, BILL FRAZIER, EDITH ZIMMER, LESLIE ROBINSON, MARILEE HUNTER, WILBUR LUERS, NANCY GUTAPFEL, VIRGINIA TRAUTMAN, VIOLA BRUNS, ANGELA PROBST, AMERICAN CANCER SOCIETY - LOWER EASTERN AREA a/k/a THE RIPLEY COUNTY CANCER FUND, THE HEART ASSOCIATION a/k/a THE RIPLEY COUNTY HEART FUND, THE AMERICAN DIABETES ASSOCIATION a/k/a THE RIPLEY COUNTY DIABETES FOUNDATION and THE MULTIPLE SCLEROSIS ASSOCIATION,	)	
Appellees-Defendants.	)	

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl H. Taul, Judge
Cause No. 69C01-0608-PL-7

June 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Robert F. Keck and Janet L. Russell claim they are entitled to property devised to their mother, Luella Keck, in the will of Edith M. Dawdy. The trial court concluded the devise lapsed and granted summary judgment for Dawdy's personal representative and the other beneficiaries of her will ("Appellees"). Keck and Russell filed a motion to correct error, which was denied. They appeal from that order. We dismiss for lack of jurisdiction.

FACTS AND PROCEDURAL HISTORY

Dawdy executed a will that named her cousin, Luella Keck, as a residuary beneficiary. Luella passed away on July 8, 1995, but Dawdy executed two codicils after Luella's death that continued to include Luella as a beneficiary. Dawdy passed away on April 28, 2006. Her will and the two codicils were admitted to probate on May 8, 2006. Keck and Russell filed a two-count complaint. Count 1 alleged the will was invalid for various reasons. Count 2 alleged Dawdy executed the codicils knowing Luella was dead and she intended Luella's share to pass to Keck and Russell.

Keck and Russell moved for summary judgment on Count 2. The trial court ruled the devise to Luella lapsed and granted summary judgment for the Appellees. Keck and Russell filed a motion to correct error, which the trial court denied. The trial court then certified its ruling for interlocutory appeal.

DISCUSSION AND DECISION

The Appellees argue the trial court entered a final judgment, and therefore Keck and Russell could not bring this as an interlocutory appeal.[1] The trial court concluded Keck and Walker were not beneficiaries under the terms of Dawdy's will. The Appellees argue that, because Keck and Walker have no standing to challenge the validity of the will, the trial court's order disposed of both counts of their complaint.

Pursuant to Ind. Code § 29-1-7-17, any "interested person" may contest the validity of a will. "Interested persons" include "heirs, devisees, spouses, creditors, or any others having a property right in or claim against the estate." I.C. § 29-1-1-3(13). "Heirs" are "persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate." I.C. § 29-1-1-3(11).

Keck and Russell are children of Dawdy's first cousin. Pursuant to Ind. Code § 29-1-2-1(d)(6), Keck and Russell are Dawdy's heirs if she left no surviving issue, parent, issue of a parent, or grandparent. The record does not reflect whether that is the case, and

---

[1] Keck and Russell argue this issue has been waived because the Appellees did not respond to the motion to certify interlocutory order or the motion to accept jurisdiction of interlocutory appeal. However, subject matter jurisdiction "cannot be waived, and courts are required to consider the issue *sua sponte* if it is not properly raised by the party challenging jurisdiction." *Watkins v. State*, 869 N.E.2d 497, 499 (Ind. Ct. App. 2007).

there is no indication Keck and Russell have had the opportunity to establish that fact. They moved for summary judgment only on the second count of their complaint, and the trial court's orders do not dispose of the first count of their complaint.

Because the trial court's order was not a final order, Keck and Russell should not have filed a motion to correct error. A "motion to correct error, if any, shall be filed not later than thirty (30) days after the entry of a *final judgment* or an appealable *final order*." Ind. Trial Rule 59(C) (emphasis added). *See also Hubbard v. Hubbard*, 690 N.E.2d 1219, 1220-21 (Ind. Ct. App. 1998) (motion to reconsider pursuant to T.R. 53.4 may be made prior to entry of final judgment; after final judgment, a party may file a motion to correct error pursuant to T.R. 59).

Accordingly, Keck and Russell's motion should be viewed as a motion to reconsider. *See id*. (although appellee improperly designated her motion as a motion to reconsider, we treated it as a motion to correct error and considered whether it was proper under T.R. 59). A motion to reconsider does not "extend the time for any further required or permitted action, motion, or proceedings." T.R. 53.4(A). Therefore, Keck and Russell needed to file their motion for certification of interlocutory appeal within thirty days of the summary judgment order. Ind. Appellate Rule 14(B)(1)(a).

The trial court issued its summary judgment order on July 19, 2007. Keck and Russell did not request certification of an interlocutory appeal until September 13, 2007; therefore, it was not timely filed. App. R. 14(B)(1)(a) allows for late filing if the trial court makes a finding that good cause has been shown, but no such finding was made in this case. Our jurisdiction over interlocutory appeals is subject to the procedures outlined

in App. R. 14. App. R. 5(B). Therefore, we should not have accepted jurisdiction, and we now dismiss the appeal.

Dismissed.

RILEY, J., and KIRSCH, J., concur.