

STATE OF MICHIGAN
COURT OF APPEALS

In re DINA MASCARIN LIVING TRUST.

DEANNA MASCARIN, TRUSTEE,

Appellee,

v

ELIZABETH ADKISSON,

Appellant.

UNPUBLISHED

April 15, 2021

No. 352816

Oakland Probate Court

LC No. 2016-373802-TV

Before: TUKEL, P.J., and SERVITTO and RICK, JJ.

PER CURIAM.

Elizabeth Adkisson appeals as of right from the probate court’s order referring the arbitration award to the arbitrator for clarification or correction. On appeal, Elizabeth argues the probate court erred when it referred the matter back to arbitration because the effect of that order denied her motion to confirm the award and granted Deanna Mascarin’s motion to reinstate the petition and correct the award. Deanna also challenges this Court’s jurisdiction on appeal, claiming Elizabeth does not have an appeal as of right because the probate court’s order was not a final order.

We agree that Elizabeth has not appealed from a final order and, therefore, does not have an appeal as of right. However, in the interest of judicial economy, we treat her claim of appeal as an application for leave granted and will address the sole issue of whether the probate court erred when it referred the matter back to the arbitrator for clarification or correction. The remaining issues raised by Elizabeth are not ripe.

I. BACKGROUND

Elizabeth and Deanna are daughters of Dina Mascarin. Before Dina’s death, she established a living trust, dated July 10, 2003, which she last amended on March 5, 2013 (“Trust”).

Deanna is named as the successor trustee of the Trust, and Deanna and Elizabeth are the beneficiaries under the Trust.

On November 30, 2016, Elizabeth filed a petition with the probate court asking the court to exercise jurisdiction over the Trust and supervise it. Elizabeth asserted Deanna, as trustee, did not provide Elizabeth with information regarding the location and disposition of trust property. The parties eventually entered into a settlement agreement and decided they would arbitrate any remaining disputes.

The parties did eventually go to arbitration to resolve Elizabeth's objections to the account statements made by Deanna. The arbitrator made rulings favorable to each party, but denied Deanna's request to charge her attorney fees related to the arbitration to the Trust, concluding that such fees were barred under *In re Sloan Estate*, 212 Mich App 357; 538 NW2d 47 (1995). Thereafter, Elizabeth filed a motion to confirm the award with the probate court, and Deanna filed a motion to reinstate the petition and correct the arbitration award.

At a hearing on the motions, the probate court expressed concern with the legal conclusion of the arbitrator that Deanna's fees were barred by *Sloan*. The probate court did not necessarily believe the conclusion was erroneous but wanted a more detailed explanation from the arbitrator as to how she came to that conclusion. Accordingly, the probate court entered an order referring the matter back to the arbitrator to clarify, modify, or correct her decision as it related to the *Sloan* issue. This appeal followed.¹

II. JURISDICTION

Elizabeth argues her claim of appeal as of right is proper under the court rules and statutes because the effect of the probate court's order denied her motion to confirm the arbitration award and granted Deanna's motion to reinstate the petition and correct the award. Deanna, however, notes the probate court never actually ruled on those motions. Deanna also argues the order entered by the probate court was not a final order.

A. STANDARD OF REVIEW

"[W]hether this Court has jurisdiction is a question of law that this Court reviews de novo." *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). "[J]urisdictional defects may be raised at any time, even if raised for the first time on appeal." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 97; 693 NW2d 170 (2005). "[A] court at all times is required to question sua sponte its own jurisdiction" *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999).

¹ Elizabeth filed a claim of appeal as of right and an application for leave to appeal. This Court dismissed Elizabeth's application for leave to appeal, stating "Appellant may raise the issues presented in this application in her claim of appeal." *In re Dina Mascarin Living Trust*, unpublished order of the Court of Appeals, entered May 20, 2020 (Docket No. 352824).

B. ANALYSIS

Under MCR 7.203(A)(1), this Court has jurisdiction over an appeal of right from “[a] final judgment or final order” Those terms are defined, as relevant to this case, as “the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order[.]” MCR 7.202(6)(a)(i).

MCR 5.801 relates to appeals from the probate court to this Court. Under that court rule, “[a] party or an interested person aggrieved by a final order of the probate court may appeal as a matter of right as provided by this rule.” MCR 5.801(A). Orders appealable as of right under MCR 5.801 are limited to:

(1) a final order, as defined in MCR 7.202(6)(a), affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C);

(2) a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a trust created under a will. [MCR 5.801(A)(1) and (2).]

The court rule lists various categories of orders appealable as of right under MCR 5.801(A)(2). However, regardless of the category, the order must still be a “final order affecting the rights or interests of an interested person” MCR 5.801(A)(2). Lastly, an appeal as of right to this Court exists for any of the reasons listed in MCL 691.1708(1):

- (a) An order denying a motion to compel arbitration.
- (b) An order granting a motion to stay arbitration.
- (c) An order confirming or denying confirmation of an award.
- (d) An order modifying or correcting an award.
- (e) An order vacating an award without directing a rehearing.
- (f) A final judgment entered under this act. [MCL 691.1708(1).]

The probate court’s order referring the case back to arbitration for the purpose of clarifying or correcting the award is not a final order as that term is defined under MCR 5.801 or MCR 7.202. The order did not resolve any motion filed by the parties. Moreover, it was not “the first judgment or order that dispose[d] of all the claims and adjudicate[d] the rights and liabilities of all the parties.” See MCR 7.202(6)(a)(i). Similarly, it was not “a final order affecting the rights or interests of an interested person in a proceeding involving . . . an inter vivos trust or a trust created by a will.” See MCR 5.801(A)(2). Lastly, it was not any of the category of orders listed in MCL 691.1708(1). The probate court explicitly ruled that it was not vacating, modifying, or

correcting the arbitration award. Therefore, under MCR 7.203(A), we do not have jurisdiction over Elizabeth’s claim of appeal because the order was not a final order.

Nonetheless, we are aware of the procedural history leading to the present jurisdictional dilemma. When the probate court entered its order, Elizabeth concurrently filed a claim of appeal and an application for leave to appeal. Elizabeth was, apparently, unsure whether the probate court’s order was a final order as well. In the interests of judicial economy, this Court has treated claims of appeal from nonfinal orders as applications for leave to appeal and granted them. See *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61; 807 NW2d 354 (2011) (exercising “discretion to treat StarMed’s claim of appeal as a granted application for leave to appeal.”); *Detroit v Michigan*, 262 Mich App 542, 546; 686 NW2d 514 (2004) (“[B]ecause this appeal presents a matter of significant public interest and in the interest of judicial economy, we exercise our discretion to treat the state’s appeal as on leave granted.”); *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 200 n 1; 536 NW2d 784 (1995) (treating the plaintiff’s claim of appeal as an application for leave to appeal because the order appealed was not a final order). Moreover, we likely invited Elizabeth’s error by stating in the order dismissing Elizabeth’s application for leave to appeal that Elizabeth “may raise the issues presented in this application in her claim of appeal.” *In re Mascarin Living Trust*, unpublished order of the Court of Appeals, entered May 20, 2020 (Docket No. 352824).

However, even if we were to address the substance of Elizabeth’s appeal, Elizabeth’s arguments are simply not ripe for review at this time. The fundamental issue with Elizabeth’s argument is that, although the probate court did not explicitly rule on the cross-motions before it, the effect of the order was to deny Elizabeth’s motion and, consequently, grant Deanna’s motion. From the record, it is clear that the probate court did not rule on either party’s motion. Therefore, the only issue before this Court—one not explicitly raised by Elizabeth—is whether the probate court had the authority to refer the matter back to the arbitrator.

The remaining issues presented in Elizabeth’s brief are not ripe for determination. “The doctrine of ripeness is designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained.” *Shaw v Dearborn*, 329 Mich App 640, 657; 944 NW2d 153 (2019) (cleaned up).² “A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Oakland Co v Michigan*, 325 Mich App 247, 265 n 2; 926 NW2d 11 (2018) (cleaned up).

Elizabeth frames each issue on appeal in terms of the probate court granting or denying relief. For example, in her first issue, Elizabeth asks whether the probate court should have denied Deanna’s motion to reinstate as untimely. In her second issue, Elizabeth asks whether the probate court should have denied Deanna’s motion as substantively improper. And in her third issue, Elizabeth asks whether the probate court should have granted Elizabeth’s motion.

The record is clear that the probate court did not grant or deny the parties’ motions. And while Elizabeth asks this Court to interpret the probate court’s order as in effect granting Deanna’s

² “Cleaned up” is used to indicate that internal quotation marks, alterations, and citations have been omitted from quotations.

motion and denying her motion, neither the terms of the order nor the record support that argument. In fact, the probate court undertook a diligent process, spanning three hearings, to understand the issues and arguments. The overall sentiment from the probate court was a desire to confirm the arbitration award. But, because the probate court had legitimate concerns regarding the arbitrator's treatment of *Sloan*, it could not blindly affirm the award without further explanation from the arbitrator.

Any examination of issues outside of whether the probate court had the authority to refer the matter to the arbitrator would be improper because the probate court has not taken any other action with respect to the award. See *Oakland Co*, 325 Mich App at 265 n 2. On appeal, Elizabeth argues, for example, that the probate court could not grant Deanna's motion because it was untimely. Aside from the fact that the probate court never granted Deanna's motion, the probate court explicitly declined to rule on the timeliness of Deanna's motion. It would be improper for us to conclude that the probate court would hypothetically commit error if it were to rule one way or the other in the future.

Therefore, we will treat Elizabeth's claim of appeal as an application for leave to appeal on the issue of whether the probate court had the authority to refer the case back to the arbitrator for clarification or correction and treat all other issues in Elizabeth's claim of appeal as an application for leave to appeal, which are dismissed as not ripe.

III. ARBITRATION RULING

The only ripe issue before this Court is whether the probate court erred when it entered the order referring the matter back to the arbitrator for correction or clarification. We conclude that the probate court did not err when it referred the matter back to the arbitrator under MCL 691.1700(4)(c).

A. STANDARD OF REVIEW

"Generally, issues regarding an order to enforce, vacate, or modify an arbitration award are reviewed de novo." *Saveski v Tiseo Architects, Inc*, 261 Mich App 553, 554; 682 NW2d 542 (2004). "This Court [also] reviews de novo whether the trial court properly interpreted and applied the relevant statutes and court rules." *Franks v Franks*, 330 Mich App 69, 86; 944 NW2d 388 (2019).

B. ANALYSIS

The probate court determined it had authority to refer the matter to the arbitrator under MCL 691.1700. MCL 691.1700(4) provides:

If a motion to the court is pending under section 22, 23, or 24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award for any of the following grounds:

- (a) A ground stated in section 24(1)(a) or (c).

(b) Because the arbitrator has not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding.

(c) To clarify the award.

The probate court concluded that Elizabeth's motion to implement the arbitration award was, in effect, a motion to confirm the arbitration award under section 22, MCL 691.1702, which provides:

After a party to an arbitration proceeding receives notice of an award, the party may move the court for an order confirming the award at which time the court shall issue a confirming order unless the award is modified or corrected under section 20 or 24 or is vacated under section 23.

In Elizabeth's motion to compel implementation of the arbitration award, Elizabeth asserted the arbitration decision was "final and binding on the parties." Elizabeth alleged that Deanna had "not done what the Arbitrator requested her to do, nor has the Trustee made any distribution to Elizabeth Adkisson from the Trust." Elizabeth asked the probate court to "implement the decision of the arbitrator." Although Elizabeth's motion does not refer to MCL 691.1702, the probate court did not err when it concluded that Elizabeth's motion to compel implementation of the arbitration decision was a motion to confirm the arbitration award under that section.

Therefore, because the probate court had pending before it Elizabeth's motion, in effect filed under MCL 691.1702, it was entitled to "submit the claim to the arbitrator to consider whether to modify or correct the award" for one of three statutory reasons under MCL 691.1700(4). The probate court correctly concluded it could refer the matter back to the arbitrator "[t]o clarify the award" under MCL 691.1700(4)(c).

The probate court had concerns regarding the arbitrator's decision regarding arbitration fees in light of *Sloan*. The arbitrator concluded "Deanna's legal fees solely related to the Arbitration and not ongoing administration efforts fall in the Sloan category and are not properly charged to the Trust[.]" The probate court explained it wanted "more information to know if it's really true what appears to be true on the face of" the arbitration decision. The probate court was concerned because: "[The arbitrator] says [the fees] relate solely to the arbitration and not ongoing administration and fall into the *Sloan* category. And expenses of arbitrations is just like expenses of trials [sic] are expenses of administration."

The probate court was correct to want to examine the arbitrator's decision more fully. Under *Sloan*, "the ordinary fees and costs incurred in establishing and defending a fee petition are inherent in the normal course of doing business as an attorney, and the estate may not be diminished to pay those fees and costs." *In re Sloan Estate*, 212 Mich App at 363. However, "legal services rendered in behalf of an estate are compensable where the services confer a benefit on the estate by either increasing or preserving the estate's assets." *Id.* at 362. This Court has held that where trustees retain counsel "to protect their role as trustees, to ascertain which of them was the proper successor trustee, and to determine the proper distribution of the trust assets," it is appropriate for the trustee to charge the attorney fees against the trust. *In re Temple Marital Trust*, 278 Mich App 122, 133-134; 748 NW2d 265 (2008). However, "[w]here the fiduciary was

partially to blame for bringing about unnecessary litigation, the fiduciary rather than the estate should be responsible for the attorney's fees." *In re Nestorovski Estate*, 283 Mich App 177, 204; 769 NW2d 720 (2009) (cleaned up).

The arbitrator considered various objections made by Elizabeth, both to Deanna's duties and fees, and to her attorney's fees. Without explanation, the arbitrator considered all time spent by Deanna's attorney related to the arbitration as not chargeable to the Trust under *Sloan*. Given the broad scope of objections made by Elizabeth, the probate court was justified in seeking a more detailed explanation of the treatment of attorney fees under *Sloan*. Therefore, the probate court did not err when it referred the matter back to the arbitrator under MCL 691.1700(4). As discussed earlier, because this is the only ripe issue before this Court, we take no further action on the issues presented in Elizabeth's appeal.

Affirmed. We do not retain jurisdiction.

/s/ Jonathan Tukel
/s/ Deborah A. Servitto
/s/ Michelle M. Rick