2017 IL App (2d) 160508-U
Nos. 2-16-0508, 2-16-0578, 2-17-0140, cons.
Order filed July 14, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re S.F., a Minor	)	Appeal from the Circuit Court
	)	of Kendall County.
	)	
	)	No 13-P-97
	)	
	)	Honorable
(Correy and Sarah K., Petitioners-Appellees,	)	Joseph R. Voiland,
v. Robyn B., Respondent-Appellant).	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justice Zenoff concurred in the judgment.
Justice Burke concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Appellant's consolidated appeals from nonfinal orders are dismissed for lack of appellate jurisdiction.

¶ 2 Respondent, Robyn B., filed three appeals, now consolidated, from orders (1) removing her as plenary guardian of the minor, S.F., and appointing petitioners, Correy and Sarah K., as temporary guardians (appeal number 2-16-0508); (2) denying her motion to remove the court's designated guardian *ad litem*, to appoint a new guardian *ad litem*, and to vacate the court's previous order (appeal number 2-16-0578); and (3) granting a money judgment against respondent on the guardian *ad litem*'s petition for fees and denying respondent's motion to stay

enforcement pending appeal (appeal number 2-17-0140). Petitioners filed a motion to dismiss the first two appeals on jurisdictional grounds. We ordered the motion and respondent's objections taken with the case. We now grant the motion and dismiss all three consolidated appeals for lack of jurisdiction.

¶ 3 I. BACKGROUND

¶ 4 On December 31, 2015, petitioners filed a petition to remove respondent as plenary guardian of S.F. and to appoint themselves as joint plenary guardians. In January, 2016, with the parties' agreement, attorney Linda Salfisberg, a guardian *ad litem* in earlier proceedings, was reappointed. The petition was set for hearing on May 27, 2016. On May 20, respondent moved to dismiss the petition, arguing that petitioners lacked standing, and to vacate the hearing date, arguing that the court could not make a determination of S.F.'s best interests without first finding respondent unfit. The trial court denied both of respondent's motions on May 25, 2016.

¶ 5 On May 27, 2016, the court, *sua sponte*, proceeded with a hearing to determine whether respondent should be removed as S.F.'s guardian. Following the hearing, the court entered an order removing respondent as plenary guardian and appointing respondents to be temporary guardians of S.F. pending completion of an investigation by the reappointed guardian *ad litem* and a full hearing on respondent's petition. The May 27, 2016, order contained language stating that it was entered "w/o prejudice" and that there "is no just reason to delay enforcement or appeal of this order." Respondent's subsequent motion to vacate the May 27, 2016, order was denied on June 17, 2016, and respondent filed a notice of appeal on June 27, 2016.

¶ 6 Subsequently, respondent filed a motion to remove the guardian *ad litem* on conflict of interest grounds, appoint a new guardian *ad litem*, and vacate the order of May 27, 2016. On July 15, 2016, the trial court denied the motion to remove the guardian *ad litem*, stating "[t]here

is no just reason for delay of enforcement or appeal pursuant to Illinois Supreme Court Rules." The court also denied the motion to appoint a new guardian *ad litem*. Finally, the court stated that the motion to vacate the order of May 27, 2016, "is denied for lack of jurisdiction." Respondent filed a notice of appeal on July 20, 2016. This court granted her motion to consolidate this appeal with appeal number 2-16-0508, and petitioners moved to dismiss both appeals for want of jurisdiction.

¶ 7 On January 9, 2017, the guardian *ad litem* filed a petition for fees. The parties had agreed to split the costs of the guardian *ad litem* and did not object to the reasonableness of her petition. Respondent, however, challenged whether she still owed an equal amount, arguing that she had been removed as plenary guardian by the May 27, 2016, order and was no longer a party to the action. The trial court rejected this argument on the grounds that the May 27, 2016, order was not permanent and the court had continued the petition to have respondent removed as guardian. The court ordered respondent to pay an equal share of the fee and denied her motion to stay enforcement of the judgment pending appeal.

¶ 8 Respondent moved this court for stay of judgment pending appeal, filed appeal number 2-17-0140, and moved to consolidate this appeal with her prior appeals. We entered orders granting respondent's unopposed motion for stay of judgment pending appeal and granting the motion to consolidate appeals.

¶ 9 II. ANALYSIS

¶ 10 Appellate jurisdiction is limited to review of final judgments unless an order falls within a statutory or supreme court exception. *In re Guardianship of J.D.*, 376 Ill. App. 3d 673, 675, (2007). A judgment is final for purposes of appeal if it determines the litigation on the merits or some definite part thereof so that, if affirmed, the only thing remaining is to proceed with the

execution of the judgment. *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989). "The reason for requiring finality of judgments is to prevent a multiplicity of suits and piecemeal appeals." *In re Estate of Devey*, 239 Ill. App. 3d 630, 632 (1993). See also *In re Estate of French*, 166 Ill. 2d 95, 109 (1995) (piecemeal appeals "cause delays and often waste judicial effort"). The function of a reviewing court is limited to review of issues decided by the trial court and cannot be extended to issues not passed upon at trial. *Devey*, 239 Ill. App. 3d at 633.

¶ 11 Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) provides that, if multiple claims are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all claims only if the trial court makes an express written finding that there is no just reason to delay enforcement or appeal, or both. A claim is any right, liability, or matter raised in an action. *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 464 (1990). Without a Rule 304(a) finding, a final order disposing of fewer than all claims is not an appealable order and does not become appealable until all of the claims are resolved. *Id.*

¶ 12 A Rule 304(a) finding has no effect, however, on a nonfinal order; if the order is, in fact, not final, inclusion of the special finding does not confer appellate jurisdiction. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 24. A trial court's order entered "without prejudice" is not a final and appealable order. See *Flores v. Dugan*, 91 Ill. 2d 108, 114 (1982). See also *Arnold Schaffner, Inc. v. Goodman*, 73 Ill. App. 3d 729, 731 (1979) (the recitation, "without prejudice," indicates that an order is on its face a non-appealable order). Because Rule 304(a), by its own terms, applies only to final judgments or orders (Ill. S.Ct. R. 304(a) (eff. Feb. 26, 2010)), Rule 304(a) is inapplicable to orders entered "without prejudice." *Chraca v. U.S. Battery Mfg. Co.*, 2014 IL App (1st) 132325, ¶ 19.

¶ 13 Appeal 2-16-0508

¶ 14 The order from which respondent first appeals is, on its face, not final and appealable. Although the order of May 27, 2016, removed respondent as plenary guardian of S.F. and appointed petitioners as temporary guardians, the order states that it is entered without prejudice and that the appointment of petitioners is subject to a final report of the guardian *ad litem* and a full hearing on the petition for removal and other relief. The order plainly did not fix absolutely and finally the rights of the parties and dispose of the entire controversy or a definite and separate portion thereof. *In re Estate of York*, 2015 IL App (1st) 132830, ¶¶ 20–22; *Stephen v. Huckaba,* 361 Ill. App. 3d 1047, 1051–52 (2005); see also *Arnold Schaffner, Inc.*, 73 Ill. App. 3d at 731 (order entered without prejudice is on its face a non-appealable order). Accordingly, the May 27, 2016, order does not bestow jurisdiction on this court, regardless of the trial court's inclusion of Rule 304(a) language. *Blumenthal*, 2016 IL 118781, at ¶ 24.

¶ 15 In fact, in explaining the May 27, 2016, order during a subsequent proceeding, the trial court contradicted its inclusion of Rule 304(a) language. At the hearing on the guardian *ad litem*'s fee petition, respondent's counsel sought to reduce respondent's responsibility for the guardian *ad litem's* fees, arguing that following the May 27, 2016, order, respondent was no longer a party to the action. The trial court queried:

> "Are you conceding the issue that your client . . . is no longer entitled to step back into the shoes of the guardianship if the Court . . . after a hearing determines that it is in the best interest of the child that your client be revested with guardianship?"
>
> * * *
>
> "[T]he order appointing the Krickebergs was not permanent in any nature, and . . . the Court specifically continued the Krickebergs' petition to have [respondent] removed as guardian . . . ."

The trial court's clarification that the May 27, 2016, order was not final comports with our conclusion that we lack jurisdiction over the appeal taken from that order.

¶ 16 Respondent asserts on appeal that the May 27, 2016, order is appealable under Rule 304(b)(1). Rule 304(b)(1) provides an exception to the requirement of a trial court's written finding before an appeal may be taken from a final judgment as to one or more but fewer than all claims; under Rule 304(b)(1), no such finding is required if the judgment or order is "entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party." Ill. S.Ct. R. 304(b)(1) (eff.Feb.26, 2010). However, not every order entered in a guardianship proceeding may be immediately appealed pursuant to Rule 304(b)(1). See generally *Stephen*, 361 Ill. App. 3d at 1051 (only final orders fit within Rule 304(b)(1)). For appellate jurisdiction, the order must "finally" determine the right or status of a party. *In re Estate of Vogt*, 249 Ill. App. 3d 282, 285 (1993). See also *Estate of Prather v. Sherman Hosp. Sys.,* 2015 IL App (2d) 140723, ¶ 58 (order appointing guardian *ad litem* to investigate and submit a report to be considered by the court was not final and appealable because "an order does not finally determine the right or status of a party when it contemplates future action." (Internal quotation marks omitted.)).

¶ 17 Here, the May 27, 2016, order temporarily removed respondent as guardian of S.F., but it did not finally determine respondent's rights or status in the lawsuit. Because it was entered without prejudice and was contingent upon the completion of the guardian *ad litem*'s investigation and a full hearing, the order contemplated future action and was not final and appealable.

¶ 18 In her objections to the motion to dismiss for lack of jurisdiction, respondent argues that the May 27, 2016, order was final because it necessarily incorporated the order of May 25, 2016,

which denied respondent's motion to dismiss the petition due to petitioners' lack of standing. The May 25, 2016, order itself, however, was not final and appealable. See *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 132 (2008) ("A trial court's denial of a motion to dismiss is an interlocutory order that is not final and appealable."). Furthermore, the standing ruling did not finally determine respondent's rights with respect to S.F.'s guardianship; rather, it was the initial finding regarding standing in a procedure that would, as set forth in the May 27, 2016, order, and later clarified in open court, depended upon a subsequent hearing to finally resolve the guardianship issues raised by petitioners.

¶ 19 Appeal 2-16-0578

¶ 20 Respondent's second appeal is from the trial court's order of July 15, 2016, denying her motion to remove the guardian *ad litem* on conflict of interest grounds, to appoint a new guardian *ad litem*, and to vacate the order of May 27, 2016. Although the trial court again included Rule 304(a) language in the order, the order is not final. Because respondent's motion was denied, the Guardian *ad litem*'s appointment remains pending. As with a denial of a motion to dismiss, the case continues until a final order is entered, determining the entire litigation or terminating respondent's rights. If, in entertaining an appeal at that time and considering all possible errors, we conclude that the Guardian *ad litem* should have been removed, then the judgment may be reversed or vacated in all or in part. In other words, the claimed error would not be rendered moot by the entry of a judgment on the merits of the entire case. See *Estate of Prather*, 2015 IL App (2d) 140723, ¶ 47 (an appeal from a final judgment draws into issue all previous interlocutory orders that produced the final judgment).

¶ 21 If the Guardian *ad litem*'s appointment ends before the entry of a final judgment in the case, Rule 304(a) language would not be necessary because either party could appeal pursuant to

Rule 304(b), which allows an interlocutory appeal from an order entered in the administration of a guardianship that finally determines a right or status of a party. Ill. S.Ct. R. 304(b)(1) (eff. Feb.26, 2010). However, in order to win her appeal, respondent would need to show that she has been prejudiced by the alleged conflict of interest. See *In re Paul L.F.*, 408 Ill. App. 3d 862, 864–65 (2011) (absent a *per se* conflict of interest, for example where the same attorney appears on behalf of both the respondent mother and the minor at different times during the same proceedings, prejudice is not presumed). A showing of prejudice requires a final judgment on the primary issue in the litigation and prejudicial error arising out of the claimed error. Until the final judgment, any error and any prejudice are subject to amelioration. Prior to such a judgment, an appeal under either Rule 304(a) or Rule 304(b)(1) is impracticable.

¶ 22 The case cited by the partial dissent, *Estate of Kime*, 95 Ill. App. 3d 262 (1981), is distinguishable. In *Kime*, the trial court denied the petitioner's motion to remove the attorney for the executor based on a conflict of interest. In holding that the trial court's order "finally determined" the petitioner's "right to have [the attorney] removed," and, therefore, was immediately appealable under Rule 304(b)(1), the appellate court did not identify any matter that would subject this determination to a subsequent hearing. *Kime*, 95 Ill. App. 3d at 269. Here, we conclude that the viability of any appeal from the denial of respondent's motion to remove the guardian *ad litem*, including an appeal under Rule 304(b)(1), requires a showing of prejudicial error. Although jurisdiction is not dependent on establishing prejudice, until the trial court holds the hearing it has planned in the primary issue in the litigation, we would be speculating as to whether error and prejudice occurred, as the order is subject to change. In this case the inability to determine prejudice is an indication that the proceedings have not been finalized as evidenced by the record. Accordingly, the order denying respondent's motion to

remove the guardian *ad litem* does not finally determine respondent's right to have the guardian removed and is, therefore, not immediately appealable under Rule 304(b)(1). See *Stephen v. Huckaba,* 361 Ill. App. 3d 1047, 1051 (2005) (to "fit within Rule 304(b)(1)," the order "must resolve all matters on the particular issue").

¶ 23 Respondent also appeals from the denial of her motion to vacate the order of May 27, 2016. The second appeal with respect to vacating the May 27, 2016, order is ineffective because, like the first appeal, it is taken from a nonfinal order that does not confer jurisdiction on this court.

¶ 24 Appeal 2-17-0140

¶ 25 Respondent's third appeal is from the trial court's order granting the guardian *ad litem*'s petition for fees. We allowed respondent's motion to consolidate this appeal with her previous appeals, as well as her request to stand on the briefs she filed in the first consolidated action. In the exercise of our independent jurisdictional duty, we now determine that we lack jurisdiction over the appeal. See *In re Marriage of Waddick*, 373 Ill. App. 3d 703, 705 (2007) (appellate court has an independent duty to determine whether it has jurisdiction and to dismiss an appeal if it does not).

¶ 26 On February 14, 2017, the trial court heard the guardian *ad litem*'s petition for fees and entered a money judgment in favor of the guardian *ad litem* and against respondent in the amount of $6,531.00. The court entered a separate money judgment in favor of the guardian *ad litem* and against petitioners in the amount of $2,103.00 ($6,531.00 minus $4,428.00, the amount petitioners previously paid in fees). The court's order stated that there "is no just reason to delay enforcement or appeal of this order." On March 27, 2017, we ordered the payment of guardian *ad litem* fees entered against respondent held in abeyance until further order of this court.

¶ 27 Respondent stands on her previous argument that the trial court erred when it denied her motion to remove the guardian *ad litem* because a conflict of interest existed between the guardian *ad litem* and respondent. In her motion to consolidate this appeal with the earlier appeals, respondent stated that she would present the same argument in challenging the guardian *ad litem*'s fees.

¶ 28 We have determined, however, that the order denying respondent's motion to remove the guardian *ad litem* on conflict of interest grounds is not final and appealable. Thus, respondent uses a claim that is not final to rationalize why the fees should not have been assessed. If respondent is able to show that a conflict of interest resulted in prejudice to her, she may have a claim that the fees should not have seen assessed as to her. If, on the other hand, she is unable to show a prejudicial conflict of interest, then her challenge to the fee award may have been properly denied. Additionally, until the guardian *ad litem* is discharged or terminated, an offset or vacation of the enforcement of the fees against respondent may be revisited by the trial court.

¶ 29 Were we to assume jurisdiction over respondent's challenge to the fee payment order at this time, we would not be able to adjudicate it because the rights of the parties have not been sufficiently determined. In other words, enforcement of the fees cannot presently be properly reviewed because the underlying proceeding upon which our review would be based still pends and has yet to have taken place.

¶ 30 III. CONCLUSION

¶ 31 Respondent-appellant's consolidated appeals, numbers 2-16-0508, 2-16-0578, and 2-17-0140, are dismissed for lack of jurisdiction.

¶ 32 Appeals dismissed.

¶ 33 JUSTICE BURKE, concurring in part and dissenting in part.

¶ 34 I agree with the majority that we lack jurisdiction over appeal No. 2-16-0508 because the May 27, 2016, order was not final and appealable. The order contemplated a further hearing to resolve the claim. But I disagree with the determination that we lack jurisdiction over the other two appeals.

¶ 35 In appeal No. 2-16-0578, respondent appeals the trial court's denial of her motion to remove the GAL on conflict of interest grounds. Illinois Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010) allows for the immediate appeal of a judgment or order entered in the administration of a guardianship proceeding which finally determines the right or status of a party.

¶ 36 In *Estate of Kime*, 95 Ill. App. 3d 262 (1981), the petitioner sought removal of the attorney for the executor based on a conflict of interest. That motion was denied, and when the petitioner appealed more than 30 days after the entry of the order, the appellate court dismissed the appeal for lack of jurisdiction. The court held that Rule 304(b)(1) required an immediate appeal of that ruling. *Id.* at 269. The court noted that an optional appeal "could have the practical result of endangering all the actions by an executor years after they were originally taken." *Id.*

¶ 37 The holding in *Kime* applies equally to the present case. The denial of respondent's motion to remove the GAL finally determined the status of the GAL. To allow the GAL to continue representing the minor's interests in this case, when she arguably should have been removed due to a conflict, could endanger any orders entered subsequent to the ruling on respondent's motion. It is not only permissible for respondent to appeal this order, it was mandatory. See *id.*

¶ 38 The majority holds that the viability of this appeal under Rule 304(b)(1) requires a showing of prejudicial error. This conflates jurisdictional prerequisites with the merits of the appeal. If a final order is entered in a guardianship case, which was the case here, this court has jurisdiction to hear the appeal. In resolving the appeal we determine whether the appellant has shown prejudicial error.

¶ 39 In appeal No. 2-17-0140, respondent appeals the order granting the GAL's fee petition. Respondent argues only that the trial court erred in allowing fees after the GAL should have been removed pursuant to her earlier motion. The majority reasons that, since the order concerning removal is not final, the fee order is likewise not final.

¶ 40 In *Kime*, the appellate court held that the denial of the petitioner's fee petition was also immediately appealable under Rule 304(b)(1). Like in *Kime*, the trial court's fee order here finally resolved the issue of the GAL's fees. Further, the majority agrees with respondent that the fee petition ruling was linked to the decision not to remove the GAL. Since the removal decision was appealable pursuant to Rule 304(b)(1), the fee petition ruling likewise falls under that rule. See *In re Trusts of Strange ex rel. Whitney*, 324 Ill. App. 3d 37, 42 (2001) (fee petition order appealable under Rule 304(b)(1) where the request was directly related to the supervision of the administration of the trusts); see also *Lampe v. Pawlarczyk*, 314 Ill. App. 3d 455, 475 (2000) (same where the issues involved in the adjudicating the fee request are the same as the central issues in the estate action). For these reasons, I respectfully concur in part and dissent in part.