DA 19-0132

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 30N

IN RE THE ESTATE OF DIXIE L. BOLAND,

Deceased,

PAUL EDWARD BOLAND and MARY GETTEL,
As Heirs of the Estate of Dixie L. Boland,

Appellants,

v.

CHRIS BOLAND and BARRY BOLAND,

Appellees.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DP 16-017
Honorable Jessica T. Fehr, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Mary Boland Gettel, Paul Edward Boland, Self-represented, Great Falls, Montana

For Appellees:

Robert B. Pfennigs, Mark T. Wilson, Jardine, Stephenson, Blewett & Weaver, P.C., Great Falls, Montana

Submitted on Briefs: October 30, 2019

Decided: February 4, 2020

Filed:

Clerk

Justice Dirk M. Sandefur delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Paul Edward Boland (Paul) and Mary Gettel (Mary) appeal the January 2019 order of the Montana Thirteenth Judicial District Court, Yellowstone County, denying their motion for post-judgment relief from the court's November 2018 order removing and replacing them as co-personal representatives of the estate of Dixie L. Boland. We affirm.

¶3 This case arises from one of several ongoing disputes among estate heirs regarding the respective estates of their parents, Ed Boland (Ed) and Dixie L. Boland (Dixie).[1] Ed died testate on December 26, 2014. Dixie died testate a year later on January 4, 2016. Ed and Dixie's adult children (Chris Boland, Barry Boland, Paul Boland, Mary Gettel, and Jacquie Boland) are now the surviving heirs of both estates.[2] The administration of Ed's estate remains pending before the Montana Eighth Judicial District Court in Cascade County (Cause ADP-15-1525). The administration of Dixie's estate remains pending in the underlying Thirteenth Judicial District matter (Cause DP-16-0017). The administration of both estates has been plagued by protracted, personally acrimonious litigation across

[1] See *Boland v. Boland*, 2019 MT 236, ¶ 2 n.1, 397 Mont. 319, 450 P.3d 849.

[2] Dixie was also an heir of Ed's estate.

multiple district court cases between Paul and Mary on one side and Chris and Barry on the other.

¶4 Chris and Barry initially obtained appointment as co-personal representatives of Ed's estate. However, in July 2015, the Eighth Judicial District Court granted Paul's motion to remove Barry and then appointed Paul as co-representative in conformance with Ed's will.[3] Contested litigation arose in Ed's estate based, *inter alia*, on Paul and Mary's claim that Chris and Barry owed the estate various substantial sums of money. However, in March 2018, the court found that they owed no debts or unaccounted-for sums to Ed's estate other than two previously acknowledged sums. Undaunted, Paul and Mary filed a motion for post-judgment relief pursuant to M. R. Civ. P. 60(b) based, *inter alia*, on various assertions of evidentiary error. However, in a series of rulings on the motion and related issues under M. R. Civ. P. 11, the court denied the Rule 60(b) motion, found Paul and his counsel in violation of Rule 11, and then removed Paul as co-personal representative of Ed's estate as a Rule 11 sanction and pursuant to § 72-3-526(2)(a), MCA.[4] We affirmed those rulings on October 1, 2019. *Boland*, ¶ 63, *reh'g denied*, Nov. 5, 2019.

¶5 At the time of Ed's death, Dixie had long been suffering from disabling health problems and had previously executed a 2013 will in which she nominated Chris as her

[3] Ed's will apparently nominated Chris and Paul as co-personal representatives.

[4] The court essentially found that Paul had frivolously involved Ed's estate in costly litigation and that he and counsel had engaged in vexatious litigation, disrupted and multiplied the proceedings, mocked the court's integrity, and turned the litigation into a "three-ring circus." In addition to removing Paul as co-personal representative of Ed's estate, the court further sanctioned Paul and counsel based on their frivolous allegations of unethical conduct by the court.

personal representative and provided for equal distribution of her estate among her five children. However, six months after Ed died, Dixie took a number of actions that substantially altered the administration of her affairs and her prior estate plan. Paul and Barry alleged that she revoked a 2013 power of attorney granted to Chris, granted a new power of attorney to Paul and Mary, executed a new will codicil in July 2015, and then executed a new will in October 2015. *Inter alia*, the new will disinherited Chris and Barry and nominated Paul and Mary as co-personal representatives instead of Chris. On December 2, 2015, a month before her death, Dixie filed a complaint in the Thirteenth Judicial District Court (Cause DV-15-1560) alleging that Chris failed to account for $100,000 removed from a joint account that he and Dixie owned and that he further failed to account for the proceeds of the liquidation of her costume shop business. Upon Dixie's death, Paul and Mary commenced the underlying estate administration matter in the Thirteenth Judicial District Court (Cause DP-16-0017) and were appointed as her co-personal representatives in accordance with her 2015 will.[5] Chris and Barry subsequently alleged that Dixie executed the new will and instituted the 2015 lawsuit against Chris as a result of undue influence exerted by Paul and Mary. In June 2016, Paul and Mary, acting as personal representatives of Dixie's estate, amended the previously filed Yellowstone County complaint against Chris (Cause DV-15-1560) to additionally claim

[5] Paul and Mary filed the Yellowstone County proceeding despite the pendency of an administration proceeding over Dixie's estate previously commenced by Chris and Barry in the Eighth Judicial District Court in Cascade County. Record indicates that Dixie was a long-time resident of Great Falls but was hospitalized in Billings at or near the time of her death.

that he failed to turn over $100,000 of $400,000 proceeds of Ed's life policy to his estate for distribution to Dixie under his will and that those actions tortiously caused Dixie to suffer emotional distress.

¶6 In February 2018, with contested litigation ongoing in parallel in Cascade County in Ed's estate (ADP-15-1525), and the Yellowstone County lawsuit against Chris (DV-15-1560), Chris and Barry filed a motion in this matter (DP-16-0017) to remove Paul and Mary as co-personal representatives of Dixie's estate pursuant to § 72-3-526(2)(a), MCA. In reference to the various ongoing disputes, Chris and Barry asserted that Dixie's estate would "essentially become valueless" unless the court removed Paul and Mary and then appointed an "independent third party who can value the multitude of claims without the emotional prejudice exhibited by [them]."

¶7 Following an earlier hearing, the District Court issued a written order in November 2018 removing Paul and Mary as co-personal representatives of Dixie's estate and replacing them with a Deputy Yellowstone County Attorney (Kevin Gillen) "as the independent [p]ersonal [r]epresentative with all rights allowed under the law." Taking "judicial notice of the proceedings [in Ed's estate] in Great Falls" and the procedural history and parties' competing assertions in this case, the court found that: (1) "significant hostility between Chris and Barry and Paul and Mary . . . has led to significant delays and full stops in the management of not only Dixie's [e]state but also Ed's [e]state"; (2) Paul and Mary had not acted in the best interests of Dixie's estate; and (3) "ongoing litigation between Chris and Barry and Paul and Mary is prohibiting [the administration of Dixie's

estate] from moving forward . . . and [is] generating massive attorneys' fees on both sides of the litigation." The court found that "irrefutable" hostility existed between the parties as manifest in the nature of the claims and assertions by the estate against Chris, Barry, and the presiding judge in Ed's estate (ADP-15-1525), the resulting removal of Paul as co-personal representative in that matter, the nature of the claims asserted against Chris in DV-15-1560, and the fact that "litigation in Dixie['s] [e]state continues to be delayed by" the "bad conduct" of Paul and Mary.

¶8 On December 14, 2018, Paul and Mary filed a motion for relief from the November 2018 judgment pursuant to M. R. Civ. P. 60(b) based on their assertions that: (1) it adversely affected their standing to continue to prosecute their parallel-pending appeal of adverse rulings in Ed's estate (ADP-15-1525); (2) the court erroneously based its predicate findings of fact on disputed matters still on appeal in Ed's estate; (3) the court erroneously removed Mary as co-personal representative based solely on Paul's alleged misconduct; and (4) the court erroneously predicated its ruling on erroneous findings of fact regarding proceedings in DV-15-1560. On January 30, 2019, the District Court issued a written order denying Paul and Mary's Rule 60(b) motion on the grounds that proceedings on appeal in Ed's estate (ADP-15-1525) had effectively preserved their standing to pursue their personal interests in that matter, that the court properly cited proceedings in DV-15-1560 merely as evidence of the hostility between the parties without regard for the ultimate merits, and that Paul and Mary failed to assert any specific legal or factual basis upon which relief is available under M. R. Civ. P. 60(b). On February 28,

2019, without reference to the underlying November 2018 order, Paul and Mary filed a notice of appeal in this Court of the January 2019 order denying their motion for Rule 60(b) relief. They also subsequently filed a district court notice of appeal of the Rule 60(b) ruling, noting it as an appealable final order as defined by M. R. App. P. 6(4)(a).

¶9 "[I]n estate . . . and probate matters," an "order . . . revoking . . . letters testamentary or of administration" are "considered final and must be appealed immediately, and failure to do so will result in waiver of the right to appeal." M. R. App. P. 6(4)(a). Here, in accordance with § 72-3-103, MCA (personal representative "must be appointed . . . and be issued letters" to "acquire the powers . . . of a personal representative"), the November 2018 order removing and replacing Paul and Mary as co-personal representatives of Dixie's estate was an immediately appealable final "order . . . revoking . . . letters testamentary or of administration" as referenced in M. R. App. P. 6(4)(a). The order was thus also a "final order" as referenced in M. R. Civ. P. 60(b).

¶10 Rule 60(b) narrowly affords relief from final judgments based, *inter alia*, on: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . [or] it is based on an earlier judgment that has been reversed or vacated[,] or . . . [for which] prospective[] . . . [application] is no longer equitable; or (6) any other reason that justifies relief" from a final judgment. M. R. Civ. P. 60(b). We generally review rulings

on Rule 60(b) motions for an abuse of discretion. *Essex Ins. Co. v. Moose's Saloon, Inc.*, 2007 MT 202, ¶ 16, 338 Mont. 423, 166 P.3d 451.[6] Here, the District Court correctly noted that Paul and Mary's motion for Rule 60(b) relief did not cite any particular subsection of the rule upon which they were seeking relief. Nor did it set forth any particularized analysis or factual showing that would have entitled them to relief under any of the specific grounds enumerated in M. R. Civ. P. 60(b). Rather, in substance, the motion, with supporting brief, was essentially a motion for reconsideration of various asserted evidentiary errors and a related alleged abuse of discretion in the application of § 72-3-526(2), MCA. While those matters were certainly subject to immediate appeal, they were not matters that would have entitled Paul and Mary to post-judgment relief under any of the narrow grounds for relief provided by M. R. Civ. P. 60(b). We hold that the District Court did not abuse its discretion in denying Paul and Mary's Rule 60(b) motion for relief from the court's November 2018 judgment removing and replacing them as co-representatives of Dixie's estate.

¶11 Pursuant to M. R. App. P. 4(4)(a) (notice of appeal "shall designate the final judgment or order . . . from which the appeal is taken"), Chris and Barry assert that Paul and Mary's failure to reference the underlying November 2018 judgment in their notice of appeal of the January 2019 Rule 60(b) ruling limited the scope of their appeal to that ruling, thus precluding appellate review of the underlying order here. Paul and Barry correctly

[6] As exceptions to the general rule, we review: (1) Rule 60(b)(2) rulings (in re newly discovered evidence) for a manifest abuse of discretion; (2) Rule 60(b)(4) rulings (in re void judgments) de novo; (3) Rule 60(b) rulings granting motions to set aside a default or default judgment for a manifest abuse of discretion; and (4) Rule 60(b) rulings denying motions to set aside a default or default judgment only for a slight abuse of discretion. *Essex*, ¶¶ 16-17.

point out that Rule 60(b) is not a substitute for direct appeal and requires "more than a request for rehearing" or reconsideration. *Essex*, ¶ 22 (internal citation omitted) (the movant must show "that something prevented a full presentation of the cause or an accurate determination on the merits and that for reasons of fairness and equity redress is justified" (internal citation omitted)). However, a motion for Rule 60(b) relief timely filed before expiration of the time for appeal of the underlying order extends the time for appeal of the underlying order until "entry of the order granting or denying" the motion. M. R. App. P. 4(5)(a)(iv)(E). In turn, a timely appeal of the subsequent grant or denial of a Rule 60(b) motion filed before expiration of the time for appeal of the underlying judgment then "draws into question all previous orders and rulings excepted or objected to which led up to and resulted in the judgment" appealed from. M. R. App. P. 4(4)(a). Here, though they elected to file a Rule 60(b) motion rather than directly appeal the November 2018 order, Paul and Mary timely filed the Rule 60(b) motion prior to expiration of the thirty-day deadline for appeal. Consequently, Paul and Mary's timely appeal of the January 2019 ruling on their Rule 60(b) motion necessarily preserved their right to appellate review of the underlying November 2018 judgment here.

¶12 District courts have discretion to "remov[e] . . . a personal representative" of a decedent's estate "for cause at any time." Section 72-3-526(1), MCA. "Cause for removal exists[,]" *inter alia*, "when removal would be in the best interests of the estate." Section 72-3-526(2)(a), MCA. Depending upon the circumstances of each case, "significant hostility and alienation" among the personal representative and family member

heirs that impedes the expeditious administration and closing of an estate may be a basis, *inter alia*, for removing and replacing a personal representative in the best interests of the estate under § 72-3-526(2)(a), MCA. *In re Estate of Greenheck*, 2001 MT 114, ¶¶ 16-21, 305 Mont. 308, 27 P.3d 42.

¶13 When functioning as the finder of fact, trial courts have broad discretion to assess and determine the relative weight and credibility of evidence, particularly in the face of conflicting evidence. *In re Marriage of Horton*, 2004 MT 353, ¶ 11, 324 Mont. 382, 102 P.3d 1276; *Double AA Corp. v. Newland & Co.*, 273 Mont. 486, 494, 905 P.2d 138, 142 (1995). Trial courts similarly have broad discretion in regulating the admission of evidence. *Fink v. Williams*, 2012 MT 304, ¶ 18, 367 Mont. 431, 291 P.3d 1140; *Seltzer v. Morton*, 2007 MT 62, ¶ 65, 336 Mont. 225, 154 P.3d 561. We review district court rulings under § 72-3-526(2), MCA, and related evidentiary rulings for an abuse of discretion.

¶14 A court abuses its discretion if it exercises granted discretion based on a clearly erroneous finding of material fact, an erroneous conclusion of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. *In re Marriage of Bessette*, 2019 MT 35, ¶ 13, 394 Mont. 262, 434 P.3d 894; *Larson v. State*, 2019 MT 28, ¶ 16, 394 Mont. 167, 434 P.3d 241. We review conclusions and applications of law de novo for correctness. *In re Marriage of Bessette*, ¶ 13; *Steer, Inc. v. Mont. Dep't of Revenue*, 245 Mont. 470, 474-75, 803 P.2d 601, 603 (1990). We review lower court findings of fact only for clear error. *Ray v. Nansel*, 2002 MT 191, ¶ 19, 311 Mont. 135, 53 P.3d 870. Findings of fact are clearly erroneous

only if not supported by substantial evidence, the court misapprehended the effect of the evidence, or, based on our review of the record, we have a definite and firm conviction that the lower court was mistaken. *Larson*, ¶ 16; *Interstate Prod. Credit Ass'n of Great Falls v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). Lower court findings of fact, conclusions of law, and exercises of discretion are presumed correct. *Hellickson v. Barrett Mobile Home Transp., Inc.*, 161 Mont. 455, 459, 507 P.2d 523, 525 (1973). The appellant has the burden of demonstrating error on appeal. *In re Marriage of McMahon*, 2002 MT 198, ¶ 7, 311 Mont. 175, 53 P.3d 1266; *Hellickson*, 161 Mont. at 459, 507 P.2d at 525.

¶15 Our review of the record indicates that, regardless of conflicting evidence, the District Court's material findings of fact regarding § 72-3-526(2)(a), MCA, were supported by substantial evidence. We further find no record basis upon which to conclude that the court misapprehended the effect of the evidence or was otherwise mistaken.[7] Paul and Mary have not demonstrated that the District Court erroneously or inaccurately took judicial notice of proceedings and matters at issue in Ed's estate (ADP-15-1525) or in Yellowstone County Cause DV-15-1560.[8] We further find no basis upon which to conclude that the court abused its discretion in the admission of evidence in any material regard or in its ultimate application of § 72-3-526(2)(a), MCA. To the contrary, we hold

[7] In that regard, we note that Paul and Mary's appellate brief did not include a statement of facts with citations to the record as required by M. R. App. P. 12(1)(d). Nor did it cite to the record regarding any asserted evidentiary error.

[8] *See* M. R. Evid. 202(b)(6) (authorizing judicial notice of "[r]ecords of any court of this state"); *Estate of Kinnaman v. Mountain W. Bank, N.A.*, 2016 MT 25, ¶ 26, 382 Mont. 153, 365 P.3d 486.

that the District Court correctly removed and replaced Paul and Mary as co-personal representatives of Dixie's estate pursuant § 72-3-526(1) and (2)(a), MCA.

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶17 We affirm.

/S/ DIRK M. SANDEFUR

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON