

IN THE SUPREME COURT OF THE STATE OF MONTANA

Stephanie Zito, personal representative of the Estate of Charles Eugene Fisch,	Appellant Cause No. DA 22-0201
Appellant,	District Court Cause No. DP 2021-18
vs.	
EILEEN GEEHAN,	
Appellee.	

APPELLEE'S MOTION TO DISMISS APPEAL**AND REQUEST FOR ATTORNEYS' FEES**

On Appeal from the Montana First Judicial District Court, Broadwater County,
the Honorable Kathy Seeley, Presiding

APPEARANCES:

Michelle H. Vanisko
HINSHAW & VANISKO, PLLC
1 N. Last Chance Gulch, Ste. 1
Helena, Montana 59601
(406) 442-1925 (Voice)
(406) 442-1922 (Facsimile)

Barbara Prescott
Prescott Civil Law, PLLC
P.O. Box 596
Bozeman, MT 59711
(406) 443-0009 (Voice)
(406) 443-0609 (Facsimile)

Attorneys for Appellee Eileen Geehan

Attorney for Appellant Stephanie
Zito, Personal Representative for the
Estate of Charles Eugene Fisch

COMES NOW Appellee Eileen Geehan, by and through her counsel of record, and moves this Court for an Order dismissing Appellant's appeal.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY

On or about August 10, 2021, Charles Eugene Fisch ("Charles") died intestate at the age of 63. At the time of his death, he resided with his common-law wife, Eileen Geehan ("Eileen").

On August 17, 2021, Stephanie Zito, Charles' niece, applied to the First Judicial District of Montana, Broadwater County, for an informal probate and the appointment of a personal representative for the Estate.¹ (Docket 1.00, *Application of Informal Probate and Appointment of Personal Representative Intestacy* ("Application for Probate").) Stephanie initially identified the heirs of the estate as Charles' two living siblings, his two deceased siblings, and herself. (Docket 1.00, ¶ 3.) Stephanie named herself as an heir even though own mother is still living. (Docket 1.00.) Stephanie completely failed to name Charles' wife, Eileen, and his only living child, April Jackson ("April"), as heirs. (Docket 1.00, ¶ 3.) She also failed to identify the children of Charles' deceased siblings. *Ibid.*

¹ Hereafter, Ms. Zito will be referred to as "Stephanie" when referring to her in her individual status, and as the "Estate" when referring to the Estate of Charles Eugene Fisch.

Stephanie identified herself as a person with priority for the appointment as personal representative because she was Charles' niece and had received renunciations from his living siblings, who had nominated Stephanie to act in that capacity. Docket 1.00, ¶ 7. Stephanie was appointed personal representative of the Estate on or about August 17, 2021. (Docket 2.00.)

On August 30, 2021, Eileen filed both a *Demand for Notice* and a *Petition for Determination of Heirs* ("Petition"). (Dockets 7.00 & 8.00.) A hearing on the Petition was ultimately heard on December 17, 2021, and December 28, 2021. Thereafter, on January 28, 2022, the District Court issued its order finding Charles and Eileen were married in common law at the time of Charles' death. (Docket 21.00, *Order Re Marriage of Decedent* ("Order").) The Order was apparently e-mailed to counsel on January 28, 2022; however, Eileen, through counsel, did not receive the Order until approximately March 18, 2022. (See e-mail from Clerk of Court regarding Order, attached hereto as **Appendix 1**).² On March 22, 2022, Eileen served and filed a *Notice of Entry of Order*. (Docket 22.00.)

At about the same time, Eileen contacted the Estate and notified it of her intention of petitioning the Court to remove Stephanie as personal representative and to determine whether Stephanie objected to that action. The Estate, through

² The original email sent on January 28, 2022, went into counsel's spam folder.

counsel, stated it could not say whether it objected and it would look into it. (*See* e-mail attached hereto as **Appendix 2.**) Shortly thereafter, in response to an additional communication on the same subject, the Estate asked for additional time for the parties to work together on paying some outstanding bills and further stated that if Stephanie “could get some assurances from Eileen that there will be no problem with . . . [Stephanie] getting some things of her uncle’s, [she] would gladly step aside as PR.” (*See* email attached as **Appendix 3.**)

On April 20, 2022, before Eileen could put together the necessary paperwork to file her Petition to remove Stephanie as PR, the Estate filed the present appeal. In its *Notice of Appeal*, the Estate represented that, “all available transcripts of the proceedings in this cause have not been ordered from the court reporter contemporaneously with the filing of this notice of appeal. If all available transcripts have not been ordered, that Appellant has complied with the provisions of M. R. App. P. 8(3) contemporaneously with the filing of this notice of appeal.” (*See* Notice of Appeal.) Although a *Request of Transcript of Proceedings* was filed on April 20, 2022, it was non-compliant. The court reporter in question was never contacted by the Estate regarding either the transcripts or to make arrangements for the payment of those transcripts. Indeed, on or about May 13, 2022, the court reporter confirmed she was entirely unaware of the appeal and no

financial arrangements for payment had been made regarding the transcripts in question. (See e-mail attached as **Appendix 4.**)

On May 31, 2022, Eileen received, through counsel, an affidavit signed by April avowing that the Estate had never contacted her, the Estate's only heir besides Eileen, regarding its appeal of the Order. (See Affidavit, attached hereto as **Appendix 5.**) On June 1, 2022, Eileen received communication from counsel for the Estate stating Stephanie would, "really like to work directly with Eileen on managing the payment of debts and distribution of assets to avoid appealing the decision on common law marriage and the mounting expense of our involvement." (See e-mail attached hereto as **Appendix 6.**) On June 3, 2022, counsel followed up with another e-mail explaining her desire to open up communication regarding resolution of the matter to avoid the pending appeal. The proposal for resolution included negotiating a property distribution in favor of Stephanie, a non-heir who also happens to be the Personal Representative. (See e-mail attached as **Appendix 7.**)

As of the time of the filing this motion, the district court record was only just transmitted, sans transcripts, and no extension was requested by Appellant. Based on the argument below, the Court should dismiss this appeal, with prejudice.

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II. ARGUMENT

Eileen moves this Court for an order dismissing this appeal with prejudice and for an award of attorneys' fees. As shown herein, Appellant has no standing; and as demonstrated by the post-order interactions, the appeal was filed for an improper purpose. In addition, there is an insufficient record to make a determination on the merits of the appeal, and granting an extension absent a clear showing of excusable neglect which could not have been overcome by Appellant's exercise of reasonable diligence only serves as a means to further harass Appellee and delay Stephanie's removal as personal representative. Finally, Stephanie should be required to pay 100% of the attorneys' fees associated with this appeal, including Eileen's fees and costs on this motion, out of Stephanie's personal pocket.

A. Appellant has no Standing.

Under Montana law, "in order to have standing on appeal, a party must be able to show an interest in the subject matter of litigation which has been injuriously affected by the judgment or order." *Johnson v. Booth*, 2008 MT 155, ¶ 19, 343 Mont. 268, 184 P.3d 289 (citations omitted). Stated more succinctly, the appellant must be personally aggrieved by the Order under appeal. *See generally*, Mont. R. App. Proc., 6 (2021). Despite Stephanie having wrongfully identified herself as an heir to the Estate, the undisputed facts show she is not and heir.

Charles died intestate and Stephanie's mother is still living. Thus, there is no possible means by which Stephanie, individually, can claim a right to distribution under the intestate laws of the Montana. *See* Mont. Code Ann. § 72-2-113 (2021).

In response to the anticipated argument that the Estate is acting on behalf of the heirs, this is neither true nor does it give Stephanie standing to pursue this appeal. It is undisputed that Eileen, as an heir, opposes the appeal. The facts also show, however, that Stephanie has not contacted the only other heir to the estate, Charles' daughter, April, since the District Court's Order was issued. The affidavit attached hereto as **Appendix 5** indisputably confirms that not only was April not contacted, but she also has no interest in pursuing this appeal.

Even if April's position as heir is disputed, personal representatives' roles are limited under Montana law. Although they may ask district courts to interpret a decedent's will and answer questions regarding the administration of the estate, personal representatives have no interests which can be adversely affected by district court orders unless they, themselves, are beneficiaries under the estate. *See In re Estate of Evans*, 217 Mont. 89, 96-97, 704 P.2d 35, 40 (1985) (concluding personal representative lacked standing because she was not a personally aggrieved party since she was not a residual beneficiary to the estate and thus not personally harmed by the district court's decision).

B. This Appeal was Filed for an Improper Purpose.

Under Montana law, a “personal representative shall use the authority conferred upon [her] by this code . . . and any order in proceedings to which the personal representative is party *for the best interests of successors to the estate.*” Mont. Code Ann. § 72-3-610 (emphasis added). Based on the post-order communication between counsel, it is apparent that Stephanie has not complied with the basic requirement that personal representatives act in the best interests of the successors to the estate. To the contrary, the reason Stephanie filed her appeal was to extend the time during which she could act as personal representative in the hopes she could use that time to bargain for her own personal gain through depletion of the Estate’s assets. (*See* Appendices 3, 6 & 7, wherein Stephanie seeks “resolution” of the dispute with Eileen by asking Eileen that specific assets belonging to the Estate be given to Stephanie individually.)

It is clear from Stephanie’s communications, particularly when considered in light of her totally unfounded decision to name herself as an heir, that her only goal in this appeal is to take assets from the Estate for her own personal gain and at the expense of the rightful heirs. The present appeal, which was not authorized or wanted by either legal heir to the estate, was only undertaken to delay Stephanie’s removal as the personal representative. This tactic is further demonstrated by her failure to ensure the timely delivery of the record on appeal or even timely ask for

an extension to do so. Simply put, there can be no proper purpose for an appeal where the undisputed record shows the appeal is undertaken for neither the benefit of the Estate nor its heirs. This Court should therefore dismiss the appeal with prejudice to ensure there is no further harm or delay to the resolution of the Estate.

C. The Record on Appeal is Insufficient to Make a Decision on the Merits.

Even if Stephanie had standing to pursue the appeal, this Court should still dismiss her appeal for her blatant failure to comply with the rules. Montana Rule of Appellate Procedure 9(2) states that within forty days of the notice of appeal the record on appeal must be transmitted to the Supreme Court unless the time is extended. Mont. R. App. Proc., 9(1) (2021). Such an extension may only be granted if it is requested within the forty days of the filing of the notice of appeal. Mont. R. App. Proc., 9(1). The notice of appeal was filed in this case on April 20, 2022. Forty days from that date was May 30, 2022. Any request for an extension should have been filed by May 31, 2022. If the Court does not have a sufficient record, it does not have the ability to address the merits of an appeal, and upon that basis has the discretion to dismiss the appeal. *See Giambra v. Kelsey*, 2007 MT 158, ¶ 36, 338 Mont. 19, 162 P.3d 134.

In this case, Appellant's lack of request is more troubling than missing a deadline. "A personal representative is under a duty to settle and distribute the

estate of the decedent in accordance with . . . this code and as expeditiously and efficiently as is consistent with the best interests of the estate.” Mont. Code Ann. § 72-3-610 (2021). When this appeal was first filed, Stephanie failed to notify the court reporter of the necessary transcripts for appeal and failed to make the necessary financial arrangements to ensure a timely delivery of the transcripts for the appeal as required by appellate rule 8(3)(a). (See **Appendix 4.**) To the extent that she may ask for an extension now, Stephanie’s failure to take the steps necessary to ensure a timely delivery of the record combined with her failure to request an extension within the time allowed should preclude her from being granted any such relief.

Based on the above, the Court does not have a sufficient record on appeal to make a reasonable determination regarding the Order under appeal. As such, this Court should dismiss the appeal with prejudice.

D. Stephanie Should Personally Pay All Attorneys’ Fees.

Under Montana law, this Court “may . . . award sanctions to the prevailing party in an appeal . . . determined to be frivolous, vexatious, filed for purposes of harassment or delay, or taken without substantial or reasonable grounds.” Mont. R. App. Proc., 19(5) (2021). In this case, the appeal was filed for the singular purpose of delaying the removal of Stephanie as personal representative and to give her additional opportunity to try and claim Estate property through so-called

“negotiations of a resolution” with Eileen. Stephanie does not have standing to make this appeal and did not undertake it for the benefit of the Estate or its heirs. With this self-serving end goal in mind, the appeal was a clear abuse of the judicial system. As such, not only should the appeal be dismissed, but Stephanie should be ordered to pay all of the fees associated with the appeal, including those incurred by the Estate, to avoid further unnecessary and reckless depletion of the Estate’s assets.

III. CONCLUSION

Appeals are supposed to be used to bring legitimately disputed district court determinations to this Court’s attention for final resolution. They are not intended to delay final resolution of these disputes by individuals with no personal interest in their outcome and who only seek a delay for their own personal gain at the expense of the actual stakeholders. As shown above, this appeal should be dismissed with prejudice, and Stephanie should be ordered to personally pay all of the attorneys’ fees and costs associated with this appeal.

Dated: June 9, 2022.

HINSHAW & VANISKO, PLLC

By: *Michelle H. Vanisko*
Michelle H. Vanisko
Attorney for Appellee Eileen Geehan
(Electronically Signed on 6/9/2022)

CERTIFICATE OF SERVICE

I, Michelle H. Vanisko, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 06-09-2022:

Barbara Prescott (Attorney)
PO Box 596
Bozeman MT 59771
Representing: Stephanie Zito, Charles Eugene Fisch
Service Method: eService

Electronically Signed By: Michelle H. Vanisko
Dated: 06-09-2022