

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In the matter of Guardianship of:)	1 CA-CV 06-0172
)	
JAMES S. BLACKFORD,)	DEPARTMENT E
)	
A Protected Adult,)	MEMORANDUM DECISION
_____)	(Not for Publication -
)	Rule 28, Arizona Rules
JOAN BEETS, Former Guardian of the)	of Civil Appellate
Person James S. Blackford, and Trustee)	Procedure)
of the James S. Blackford Revocable)	FILED 2-20-07
Trust,)	
)	
Appellant,)	
)	
v.)	
)	
ROBIN MICHAELSON, Court-Appointed)	
Conservator for James S. Blackford and)	
Successor Trustee of the James S.)	
Blackford Revocable Trust,)	
)	
Appellee.)	
f _____)	

Appeal from the Superior Court in Maricopa County

Cause No. PB2004-000737

The Honorable Stephen J.P. Kupiszewski, Judge *Pro Tempore*

JURISDICTION ACCEPTED; RELIEF GRANTED

Murphy Law Firm, Inc.
By Thomas J. Murphy
Attorney for Appellant

Phoenix

Robert E. Ciancola
Attorney for Appellee

Scottsdale

T I M M E R, Presiding Judge

¶1 Joan Beets appeals from a probate court order directing her to reimburse attorneys' fees to the Estate of James Blackford as an apparent sanction for contempt. Because this court lacks jurisdiction over an appeal from a civil contempt citation, we elect to treat this appeal as a special action and accept jurisdiction. *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 18, 66 P.3d 70, 73 (App. 2003); *Pace v. Pace*, 128 Ariz. 455, 457, 626 P.2d 619, 621 (App. 1981). For the reasons that follow, we grant relief by vacating the court's fee award.

BACKGROUND

¶2 In February 2004, Ms. Beets filed a petition seeking appointment as guardian of her father, James S. Blackford, on grounds that he was unable to manage his affairs because of advanced age and dementia. At that time, Ms. Beets and her father were co-trustees of a revocable trust (the "Trust"). Ms. Beets also held a power of attorney granted by Mr. Blackford in March 2003.

¶3 Following several hearings and a court investigation, the court determined in July 2004 that a limited guardianship for Mr. Blackford was necessary and that a conservatorship should be established with a private fiduciary as conservator. Ms. Beets moved for reconsideration of the order for the conservatorship, arguing that the court should reaffirm her as trustee of the Trust.

¶4 Prior to a court hearing on Ms. Beets' motion, Mr. Blackford was involved in a serious automobile accident, which

resulted in the destruction of his car. Ms. Beets informed the court of the accident, but did not inform the court that she had retained \$20,000 in insurance proceeds for the car. She asked the court to appoint a guardian over Mr. Blackford's person and allow her to manage his financial affairs as trustee and as an authorized signatory on his accounts. The court denied the motion to reconsider the conservatorship, and in October 2004 appointed Robin Michaelson as successor trustee for the Trust and conservator of the estate and appointed Dan Holland as limited guardian for Mr. Blackford. The court ordered Ms. Beets to prepare and provide within ninety days an accounting of the estate's assets.

¶15 In June 2005, Ms. Michaelson filed a petition to show cause why Ms. Beets should not be held in contempt for misuse of her power of attorney, misappropriation of Mr. Blackford's funds, and failure to cooperate with Ms. Michaelson. Among other things, Ms. Michaelson alleged that Ms. Beets had tricked Mr. Blackford by purportedly buying his car with a check for \$16,000, representing funds originally taken from an account belonging to Mr. Blackford. After Mr. Blackford wrecked the car, Ms. Beets transferred title to the vehicle into her name and collected \$20,000 in insurance proceeds under a policy issued in her name. Ms. Michaelson asked the court to order as a condition to purge contempt that Ms. Beets reimburse the \$16,000 purchase price, disgorge the \$4,000 profit realized from collection of the insurance proceeds, and pay attorneys' fees, costs, and statutory interest.

¶16 In October 2005, the court conducted a hearing on the petition and found that Ms. Beets had failed to act in a fiduciary capacity by personally accepting the insurance proceeds for the car and therefore ordered her to repay \$20,000 to the Trust. The court rejected Ms. Beets' assertion that she was entitled to the proceeds as the insured under the policy and found she had insured the vehicle on behalf of the Trust.

¶17 At the conclusion of the hearing, the court stated it was considering an order finding Ms. Beets in "contempt of the orders of the Court" and requiring her to reimburse attorneys' fees to Mr. Blackford's estate. The court explained its reasoning as follows:

It's my findings and my belief today and why I was considering the attorney's fees issue, is I would consider this a breach of the fiduciary duty and a contempt of the orders of the Court, and that's what I would be entering my order and my responsibility for the attorney's fees is a finding of contempt. She had the order. She said she knew she had a duty to insure this vehicle. She did it, sort of, and then appropriated the funds that's not in the best interest, nor is it in the spirit of the orders of the Court. So I would make a contempt finding and that would be the direction that I would be awarding the attorney's fees.

. . . .

I think she tried to do what she needed to do. The problem was, is when she got the \$20,000 check, even by her own testimony, I don't think that she thought that that was hers. And she thought she had an angle to grab it, and that's the impression that I get, and that's why I've made the findings that I've made.

After Ms. Beets protested any award of fees, the court granted her an opportunity to submit a brief on the issue and further permitted Ms. Michaelson to file a responsive brief.

¶18 In January 2006, after considering the parties' briefs and the record, the court ordered Ms. Beets to pay \$10,319.25 for attorneys' fees to the estate as a result of her "improprieties." As a basis for the fee award, the court reiterated that Ms. Beets "failed to act in a fiduciary capacity as she was required to do so as Conservator/Trustee for Mr. Blackford and the Trust by personally accepting the insurance claim proceeds" for the car. The order did not mention contempt. After the entry of judgment, Ms. Beets appealed the decision to award attorneys' fees.

DISCUSSION

¶19 Ms. Beets argues that the trial court erred because it had no authority to impose attorneys' fees against her in connection with finding that she had breached her fiduciary duties. Ms. Michaelson responds that the court properly awarded fees pursuant to the court's contempt power, as a violation of the Arizona Adult Protective Services Act, Arizona Revised Statutes ("A.R.S.") sections 46-451 through 46-503 (2005), and as a penalty for abusing her power of attorney, A.R.S. § 14-5506 (2005). We review whether the court had a basis for awarding fees de novo as a question of law. *State v. Shipman*, 208 Ariz. 474, 475, ¶ 3, 94 P.3d 1169, 1170 (App. 2004).

I. Contempt

¶10 The probate court possessed power to find Ms. Beets in civil contempt¹ if she disobeyed a court order directing a lawful act. *Ong Hing*, 101 Ariz. at 98, 416 P.2d at 422; A.R.S. § 12-864 (2003).² To prevail in her petition for a contempt order, Ms. Michaelson bore the burden of showing by clear and convincing evidence that Ms. Beets "violated a specific and definite order of the court." *Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999).

¶11 Ms. Beets contends the court could not have properly held her in contempt for failing to pay the insurance proceeds to the estate because no court order had directed her to take this action. Unfortunately, the probate court did not specify the orders it deemed violated. At oral argument before this court, Ms. Michaelson could not point to any order of the court that Ms. Beets violated and thereby gave rise to a contempt finding.³ Similarly,

¹ Other categories of contempt are criminal contempt, direct contempt, and indirect contempt. *Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 416, 422 (1966) (explaining each category). In light of the court's comments at the hearing that Ms. Beets was in contempt of its prior orders and its failure to mention criminal contempt, it appears the court found her in civil contempt.

² Section 12-864 provides as follows:

Contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and contempts committed by failure to obey a lawful writ, process, order, judgment of the court, and all other contempts not specifically embraced within this article may be punished in conformity to the practice and usage of the common law.

³ In her answering brief, Ms. Michaelson contends that Ms. Beets failed to comply with the court's order to reimburse \$20,000 to the

our review of the record did not unearth an order requiring Ms. Beets to pay the insurance proceeds to the estate. And even though Ms. Beets was ordered to provide an accounting, the court did not order her to turn over estate assets, which could have included the insurance proceeds. Although the court eventually entered an order requiring Ms. Beets to turn over the insurance proceeds, it did so only after conducting the order-to-show-cause hearing and deciding the estate was entitled to those proceeds. No such order existed prior to that hearing. Thus, the court lacked authority to find Ms. Beets in contempt of court for failing to pay the insurance proceeds to the estate.⁴ *Ong Hing*, 101 Ariz. at 98, 416 P.2d at 422; *Affordable Media*, 179 F.3d at 1239; A.R.S. § 12-864.

II. Arizona Adult Protective Services Act

¶12 Ms. Michaelson contends that the court properly awarded attorneys' fees against Ms. Beets pursuant to A.R.S. §§ 46-455(H),

estate. Although Ms. Michaelson admits that this violation was never brought to the court's attention, she nevertheless suggests that it supports the contempt order. We disagree. No evidence in the record supports Ms. Michaelson's assertion that Ms. Beets failed to repay the \$20,000 within the ninety days ordered by the court. Regardless, the court's contempt order does not mention any failure to pay the \$20,000 as a basis for fees and instead appears grounded on the events illuminated during the order-to-show-cause hearing.

⁴ Ms. Beets' counsel complains that parties before the probate court commonly bring contested, meritorious issues to the court for resolution by filing petitions for orders to show cause why another party should not be held in contempt. We cannot know if this practice is indeed employed in the probate court. We agree in principle, however, that contempt petitions should not be used as a vehicle for deciding the merits of a good faith dispute.

-456(A), (E). Section 46-456(A) essentially prohibits a person in a position of trust and confidence to an incapacitated or vulnerable adult from taking control of that person's property through deceptive means. Subsection (E) provides that the remedies set forth in § 46-455(H) apply for any violation of § 46-456(A). Those remedies include ordering the violator to pay actual and consequential damages and the costs of suit, including reasonable attorneys' fees. A.R.S. § 46-455(H)(4). According to Ms. Michaelson, therefore, the court properly awarded fees against Ms. Beets under these provisions.

¶13 We disagree with Ms. Michaelson for two reasons. First, neither the hearing transcript nor the court's order mentions §§ 46-455 and -456 nor cites these provisions as a basis for the fee award. Second, the court lacked authority to award fees under these provisions absent a separate civil action filed against Ms. Beets. Section 46-456(C) states that any person who violates § 46-456(A) is subject to treble damages "in a civil action." Similarly, the remedies provided by § 46-455(H) are available only after liability is established in a civil action filed by the state or a private party. A.R.S. § 46-455(E), (J). Because Ms. Michaelson did not bring a civil action against Ms. Beets for violating A.R.S. § 46-456(A), which would have afforded Ms. Beets attendant discovery and jury-trial rights, the probate court could not have validly based its fee award on § 46-455(H).

III. Power of attorney

¶14 Ms. Michaelson finally argues that the court properly awarded attorneys' fees against Ms. Beets for abusing her power of attorney. Section 14-5506(A), A.R.S., provides that an agent who uses the principal's money, property, or other assets for the agent's benefit is subject to civil penalties pursuant to A.R.S. § 46-456. Ms. Michaelson contends that because Ms. Beets purportedly used her power of attorney to remove Mr. Blackford's name from the title to the car in order to collect the insurance proceeds, attorneys' fees were justifiably awarded by the court. Because imposition of any civil penalties under § 46-456, however, contemplates a separate civil action, *see supra* ¶¶ 12-13, the court could not have validly awarded fees pursuant to § 14-5506(A).

CONCLUSION

¶15 For the foregoing reasons, the court lacked a basis for awarding attorneys' fees against Ms. Beets. We therefore treat Ms. Beets' appeal as a special action petition, accept jurisdiction, and grant relief by vacating that portion of the judgment awarding attorneys' fees. Ms. Beets requests an award of attorneys' fees pursuant to A.R.S. §§ 12-341 and -349 (2003). She does not explain the applicability of these provisions, and we do not find them applicable. We therefore deny that request. As the prevailing party, however, Ms. Beets may recover costs pursuant to A.R.S. § 12-342 (2003) in an amount to be determined following submission of a statement of costs in compliance with Rule 4(g), Arizona Rules of Procedure for Special Actions.

Ann A. Scott Timmer, Presiding Judge

CONCURRING:

Patricia K. Norris, Judge

Diane M. Johnsen, Judge