

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Court of Appeals of New Mexico

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Mark Reynolds

DIANA FAY,

Petitioner/Counter-Respondent-
Appellant,

v.

No. A-1-CA-42485

DAMON FAY,

Respondent/Counter-Petitioner-
Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Denise Barela Shepard, District Court Judge

Genus Law Group

Anthony Spratley

Albuquerque, NM

for Appellant

Sutin, Thayer & Browne

Stevan Douglas Looney

Albuquerque, NM

for Appellee

DISPOSITIONAL ORDER

BACA, Judge.

This matter is before us on Petitioner Diana Fay's appeal from the district court's order awarding attorney fees to Respondent Damon Fay. For the reasons that follow, we affirm.

1 1. Petitioner filed a petition to remove and replace Defendant as cotrustee
2 of their mother's trust (the Trust), alleging that Defendant failed to administer the
3 Trust in accordance with the requirements of the New Mexico Uniform Trust Code,
4 NMSA 1978, §§ 46A-1-101 to -11-1105 (2003, as amended through 2018), and
5 asked the district court to appoint her as sole trustee of the Trust. Defendant
6 answered and asserted several counterclaims alleging that Petitioner had also failed
7 to administer the Trust in accordance with the requirements of the New Mexico
8 Uniform Trust Code, and asked the district court to appoint him as sole trustee of the
9 Trust. Following a bench trial the district court removed Petitioner as cotrustee of
10 the Trust and awarded Defendant costs and attorney fees pursuant to Section 46A-
11 10-1004. Petitioner appeals the district court's order awarding attorney fees to
12 Defendant.

13 2. On appeal, Petitioner advances two general arguments. First, that
14 Section 46A-10-1004 does not authorize the district court to award fees to Defendant
15 as the prevailing party in this action. Second, that the district court abused its
16 discretion in awarding the full amount of requested attorney fees.

17 3. We have carefully reviewed the briefs, applicable law, and arguments
18 made by the parties. We have also reviewed the record.

1 4. Before turning to the merits, we address Defendant’s initial contention
2 that this Court does not have jurisdiction over the issue of whether Section 46A-
3 10-1004 allows the district court to award fees in this matter.

4 5. Jurisdictional issues present a question of law that we review de novo.
5 *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300.

6 6. In support of his contention, Defendant first correctly asserts that,
7 generally a party must file a notice of appeal within thirty days after the judgment or
8 order appealed from is filed in the district court clerk’s office. *See* Rule 12-
9 201(A)(1)(b) NMRA. Defendant then points to the judgment, wherein the district
10 court expressly indicated that it would award attorney fees pursuant to Section 46A-
11 10-1004.

12 7. Defendant contends that because the district court indicated in the
13 judgment that it would rely on Section 46A-10-1004 to award attorney fees, any
14 appeal challenging the district court’s reliance on that statute had to be brought
15 within thirty days of the entry of that order. And because Petitioner appealed, not
16 from the order of final judgment, but from the subsequently issued order setting the
17 amount of fees, which was more than thirty days after the order of final judgment,
18 the time to appeal the validity of the award of attorney fees lapsed. As a result,
19 Defendant contends, this Court lacks jurisdiction to address whether Section 46A-
20 10-1004 allows the district court to award attorney fees in this matter. We disagree.

1 8. Even assuming without deciding that Petitioner’s appeal is untimely,
2 our Supreme Court has explained that a party’s failure to file a timely appeal does
3 not divest this Court (or our Supreme Court) of subject matter jurisdiction. *See Bd.*
4 *of Cnty. Comm’rs v. N.M. Tax’n & Revenue Dep’t*, 2021-NMSC-007, ¶ 23, 480 P.3d
5 870. “This is because the timely filing of a notice of appeal does not grant
6 jurisdiction to hear the case; more precisely, the filing of a notice of appeal is a
7 mandatory precondition to the exercise of jurisdiction. Therefore, an appellate court
8 may exercise discretion to excuse or justify any improper attempt to invoke its
9 jurisdiction and an untimely appeal is not an absolute bar under certain
10 circumstances.” *Id.* (text only) (citation omitted).

11 9. Moreover, in situations where there is a judgment on the merits and a
12 prospective award of attorney fees, our Supreme Court has recognized a “twilight
13 zone of finality,” where, under certain circumstances, an order for attorney fees can
14 be treated as a collateral, outstanding matter that may be separately appealed from
15 the order of final judgment. *Trujillo v. Hilton of Santa Fe*, 1993-NMSC-017, ¶¶ 4-
16 5, 115 N.M. 397, 851 P.2d 1064; *see Exec. Sports Club, Inc. v. First Plaza Tr.*, 1998-
17 NMSC-008, ¶¶ 6-14, 125 N.M. 78, 957 P.2d 63.

18 10. Our Supreme Court has explained that the principles of finality “are
19 intended to assist the courts in promoting judicial efficiency and preventing
20 piecemeal appeals.” *Exec. Sports Club, Inc.*, 1998-NMSC-008, ¶ 11; *see Principal*

1 *Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 12, 116 N.M. 412, 863 P.2d 447
2 (“There is a strong policy in New Mexico of disfavoring piecemeal appeals, and of
3 avoiding fragmentation in the adjudication of related legal or factual issues.”
4 (citation omitted)); *see also Trujillo*, 1993-NMSC-017, ¶ 3 (“The rationale is that
5 the term ‘finality’ is to be given a practical, rather than a technical, construction to
6 satisfy the policies of facilitating meaningful appellate review and of achieving
7 judicial efficiency.”). Accordingly, appellate court jurisdiction is generally limited
8 to final orders with certain exceptions. *See Carrillo v. Rostro*, 1992-NMSC-054,
9 ¶ 14, 114 N.M. 607, 845 P.2d 130.

10 11. However, our Supreme Court has “specifically recognized that it is
11 impossible to devise a formula to resolve all marginal cases coming within the
12 twilight zone of finality,” *Trujillo*, 1993-NMSC-017, ¶ 4, and further acknowledged
13 that “matters involving the award and valuation of attorney[] fees continue to create
14 ambiguity with respect to the finality of judgment, and cases involving these matters
15 are, therefore, of marginal finality.” *Exec. Sports Club, Inc.*, 1998-NMSC-008, ¶ 12.

16 12. While certainly not every attorney fee award can be characterized as
17 collateral or marginal, ultimately, the principles of finality “are meant to draw a
18 bright-line rule only for purposes of protecting against the premature exercise of
19 appellate jurisdiction.” *Id.* ¶ 11.

1 13. Defendant has not—nor have we on our own—identified any
2 circumstances that would suggest that we would be prematurely or imprudently
3 exercising our jurisdiction to consider whether Section 46A-10-1004 permitted the
4 district court to award attorney fees in this matter.

5 14. In short, Defendant’s contention that this Court lacks jurisdiction is
6 predicated solely on the alleged untimeliness of Petitioner’s appeal. But because an
7 untimely appeal does not deprive this Court of jurisdiction to entertain an appeal,
8 and because attorney fee issues create ambiguity and orders of marginal finality, we
9 reject Defendant’s argument. *Cf. Exec. Sports Club, Inc.*, 1998-NMSC-008, ¶ 9
10 (rejecting the argument that the court should dismiss the appeal as untimely due to
11 the appellant appealing from an order denying a motion for attorney fees instead of
12 the appealing from the entry of judgment).

13 15. We turn now to Petitioner’s arguments. Petitioner first argues that
14 Section 46A-10-1004 does not provide the district court authority to award attorney
15 fees in this matter because the statute does not authorize one trustee to charge another
16 trustee with the costs of a personal defense to allegations of misconduct. Petitioner
17 contends that, because she challenged Defendant’s use of trust assets, rather than the
18 validity of the trust itself, the district court expanded the statute beyond its scope by
19 awarding attorney fees to Defendant.

1 16. Based on our review of the record, it appears the issue of whether
2 Section 46A-10-1004 authorized the district court to award attorney fees in this
3 matter was not preserved. Although we “do not apply the preservation requirement
4 in an unduly technical manner,” *In re Est. of Baca*, 1999-NMCA-082, ¶ 15, 127
5 N.M. 535, 984 P.2d 782 (internal quotation marks and citation omitted), preservation
6 is also not a mere formality—it allows the district court to correct any potential error,
7 ensures that the opposing party has an opportunity to meet and defend against the
8 objection raised, and ensures that a sufficient record is created to allow this Court to
9 review the district court’s decision for error. *See Sandoval v. Baker Hughes Oilfield*
10 *Operations, Inc.*, 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791.

11 17. In this case, during the hearing on Defendant’s motion for attorney fees,
12 Petitioner’s counsel did not raise this issue to the district court. In fact, during the
13 hearing, Petitioner’s counsel indicated to the district court that the court had statutory
14 authority to award attorney fees. Because Petitioner did not raise the claim of error
15 she now asserts on appeal, we do not consider the issue further. *See Benz v. Town*
16 *Ctr. Land, LLC*, 2013-NMCA-111, ¶ 24, 314 P.3d 688 (“To preserve an issue for
17 review on appeal, it must appear that appellant fairly invoked a ruling of the trial
18 court on the same grounds argued in the appellate court.” (internal quotation marks
19 and citation omitted)).

1 18. Petitioner also argues that awarding attorney fees to Defendant in this
2 matter contravenes New Mexico public policy “favoring fiduciary accountability
3 and transparency.” Petitioner cites *Miller v. Bank of America, N.A.*, 2015-NMSC-
4 022, 352 P.3d 1162 for support, but in that case, our Supreme Court reaffirmed “the
5 principles of disgorgement and restoration” when a trustee breaches their duties. *Id.*
6 ¶ 1. *Miller* does not speak to any policy regarding attorney fees under Section 46A-
7 10-1004 when cotrustees use a judicial proceeding to resolve disputes about the
8 performance of trust duties. Moreover, the substance of this argument is unclear and
9 underdeveloped, and we therefore decline to address it further. *See Headley v.*
10 *Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (stating
11 that this Court has no duty to review an argument that is not adequately developed,
12 and “[w]e will not review unclear arguments, or guess at what [a party’s] arguments
13 might be”); *see also Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d
14 104 (“It is not our practice to rely on assertions of counsel unaccompanied by support
15 in the record.”).

16 19. Lastly, Petitioner argues that the district court abused its discretion in
17 awarding the full amount of attorney fees sought. Petitioner contends that many of
18 Defendant’s charges stemmed from unsuccessfully prosecuting his counterclaims
19 against Petitioner or were otherwise unrecoverable, and thus the district court should
20 have reduced the attorney fee award accordingly.

1 20. We review an award of attorney fees for an abuse of discretion. *In re*
2 *N.M. Indirect Purchasers Microsoft Corp.*, 2007-NMCA-007, ¶ 6, 140 N.M. 879,
3 149 P.3d 976. “The test is not what we would have done had we heard the fee request,
4 but whether the trial court’s decision was clearly against the logic and effect of the
5 facts and circumstances before the court.” *Id.* (internal quotation marks and citation
6 omitted).

7 21. At the hearing on Defendant’s motion for attorney fees, Petitioner’s
8 counsel identified several specific billing entries that were allegedly nonallowable.
9 However, Petitioner does not specifically challenge any of the district court’s
10 findings as to the award of attorney fees, specifically its findings that defense
11 counsel’s hourly rates and the fees that he incurred were reasonable and necessary.
12 As a result, the district court’s findings are conclusive. *See* Rule 12-318(A)(4)
13 NMRA (stating that an appellant’s argument must “set forth a specific attack on any
14 finding, or the finding shall be deemed conclusive”). Moreover, Defendant averred
15 that none of the requested fees involved the malicious abuse of process counterclaim
16 and Petitioner did not, either at the hearing or in her brief in chief on appeal, identify
17 which attorney fees were allegedly associated with Defendant’s unsuccessful
18 prosecution of his counterclaims.

19 22. There is a presumption of correctness in the district court’s rulings, and
20 the burden is on the appellant to clearly demonstrate that the district court erred. *See*

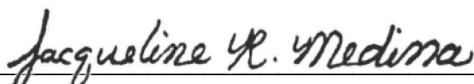
1 *Corona v. Corona*, 2014-NMCA-071, ¶ 26, 329 P.3d 701. “This [C]ourt is not
2 inclined to second-guess the [district court] in [its] determination as to the
3 reasonableness of an award of attorney[] fees unless there is a lack of evidentiary
4 basis for the court’s determination or unless the court has been shown to have clearly
5 abused its discretion.” *Schall v. Schall*, 1982-NMCA-045, ¶ 40, 97 N.M. 665, 642
6 P.2d 1124.

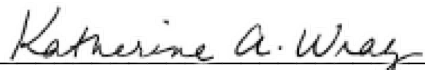
7 23. Because Petitioner has not challenged the district court’s findings, nor
8 identified any specific error in the district court’s fee determination, we conclude
9 that Petitioner has not met her burden of demonstrating that the district court erred
10 in its order awarding attorney fees. Accordingly, we affirm the district court’s order.

11 **IT IS SO ORDERED.**

12 
13 **GERALD E. BACA, Judge**

14 **WE CONCUR:**

15 
16 **JACQUELINE R. MEDINA, Chief Judge**

17 
18 **KATHERINE A. WRAY, Judge**