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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

Conservatorship of the Person and Estate of
ESTHER R. BOYES.

DAVID M. BOYES,
Plaintiff and Respondent,

v.

MICHELE FOTINOS,
Defendant and Appellant.

LAURIE R. SELLS, Conservator of the
Person and Estate of Esther R. Boyes,
Respondent and Real Party in Interest.

A137647

(San Mateo County
Super. Ct. No. PRO121437)

This matter is before us on a motion to dismiss the appeal as untimely. We agree that the notice of appeal was not filed within the time allowed under California Rules of Court, rule 8.104(a)(1)(B),¹ and therefore dismiss the appeal.

The case involves the conservatorship of the person and estate of Esther R. Boyes (Esther). David M. Boyes and Michele Fotinos, both children of Esther, petitioned to be appointed Esther's conservator. Because the two siblings could not agree on the

¹ Reference to rules without further designation is to the California Rules of Court.

appropriate care for their mother, the court appointed a “private fiduciary,” Laurie R. Sells, as conservator instead.

On September 27, 2012, Sells filed a motion to have a prefiling order entered against Fotinos as a vexatious litigant under Code of Civil Procedure section 391.² Sells further requested that Fotinos be required to post security under section 391.1 before filing any further pleadings. The basis for the motion was that Fotinos had filed seven pleadings and amended pleadings in propria persona in five matters; in each of those matters Fotinos’s objections were overruled and her requested relief was denied.

On November 9, 2012, the court granted Sells’s motion in part, finding that Fotinos was a vexatious litigant within the meaning of section 391, subdivision (b)(3). It also granted the request that Fotinos be subject to a requirement of obtaining a prefiling order from the presiding judge before she would be allowed to file any “petition, application, or motion other than a discovery motion.” Fotinos was not required to seek a prefiling order before filing other “pleadings” or “objections.” She was also not required to post security. After hearing testimony that an attorney, one Patricia Barry, had been guiding and advising Fotinos with respect to her pro per filings, the court made the prefiling order applicable to Barry, as well, insofar as she might seek to file any “petition, application, or motion other than a discovery motion, for any order on behalf of Ms. Michele Fontinos without first obtaining leave of the presiding judge.” The court found that Barry had been “a mere conduit for unmeritorious filings.” Indeed, it was the inclusion of Barry as a vexatious litigant that seems to form the basis of the present appeal.

Putting to one side the question of Fotinos’s standing to raise such an argument, we note that neither an order declaring a party to be a vexatious litigant, nor an order requiring security, is directly appealable, but an appeal may be taken from a judgment entered thereafter. (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 635.) On the other hand, when an order designating a person a vexatious litigant includes a prefiling order

² Undesignated statutory references are to the Code of Civil Procedure.

under section 391.7, although not expressly made appealable by section 904.1 or any other statute, the order requiring the litigant to obtain a prefiling order arguably is immediately reviewable under section 904.1, subdivision (a)(6), as an injunction. (*Luckett v. Panos* (2008) 161 Cal.App.4th 77, 90.) For purposes of this motion, we will assume the order in the case before us is appealable.

The question presented by this motion is what was the date on which the appeal period started to run? Sells claims it was November 15, 2012, when she served on Fotinos notice of entry of the trial court's order dated November 9. Under that theory the last day for Fotinos to file an appeal would have been January 14, 2013. (Rule 8.104(a)(1)(B).) Since the notice of appeal was not filed until January 16, Sells claims the notice of appeal was untimely and the case should be dismissed.

Fotinos, on the other hand, claims the notice of appeal was timely because, in addition to the detailed written order filed November 9, 2012, the court on November 15, 2012, signed a prefiling order on Judicial Council form MC-700, which was filed on November 16. Like the court's order on November 9, 2012, the standardized form named Barry, too, as a vexatious litigant with respect to her filings on behalf of Fotinos. The form order prohibits the vexatious litigant from filing "any new litigation in propria persona in the courts of California without approval of the presiding judge of the court in which the action is to be filed." The standardized form also instructs the clerk of the court to forward a copy of the MC-700 form to the Judicial Council.

Even if the 60-day appeal period began to run on November 16, however, it would have expired on January 15, 2013, and the appeal still would not be timely. However, Fotinos argues that, because neither the court clerk nor Sells served the MC-700 on her, the 60-day appeal period never started to run and had not expired by the time the notice of appeal was filed on January 16, 2013. Without citing that provision, Fotinos seems to take the position that she was entitled to a 180-day appeal period under rule 8.104(a)(1)(C).

The court's order of November 9 was the one which imposed a prefiling order requirement on Fotinos. The additional step of filing a form MC-700 appears to have

fulfilled one primary purpose: those forms are to be forwarded to the Judicial Council so that the vexatious litigant's name may be added to a statewide list of those subject to a pre-filing order requirement. (§ 391.7, subd. (f).) We do not view this as an order appealable independently of the November 9 order. We see no reason why Fotinos should be given a second opportunity or a longer period to appeal when the issue had been determined on November 9, and she was fully informed of it by service of the order on November 15. We deem the appeal period to have begun on November 15, 2012, when Sells served the November 9 order on Fotinos.

We reject Fotinos's argument that some claimed deficiency in the notice of entry of order precludes it from having the effect of triggering the start of the appeal period. A copy of the court's written order was attached to the notice of entry of order and thus clarified any misunderstanding as to the scope of the court's order. Rule 8.104(b) requires us to dismiss the appeal.

While Fotinos urges us to liberally construe the notice of appeal (see rule 8.100(a)(2)), no amount of construction makes this appeal timely. And while she argues that the court's order is void and of no effect—and therefore subject to collateral attack at any time—she is not entitled to a direct appeal in violation of rule 8.104.

DISPOSITION

The appeal is ordered dismissed.

Richman, J.

We concur:

Kline, P.J.

Lambden, J.