

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1096

September Term, 2016

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WAYNE CULLEN

v.

PAUL V. ZEHFUSS

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Wright,  
Nazarian,  
Arthur,

JJ.

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Opinion by Arthur, J.

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Filed: June 13, 2017

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The appellant in this case filed a notice of appeal from two orders of the orphans' court that had been entered 188 days and 145 days, respectively, before his notice of appeal. The court struck his notice of appeal because he did not file it within the prescribed 30-day time period. We affirm the order striking his notice of appeal.

### **DISCUSSION**

Since the death of Diane Kirsch in 2012, her estate has been enmeshed in a dispute between Wayne Cullen and Paul V. Zehfuss. Mr. Cullen was a long-time friend of Ms. Kirsch and the primary intended beneficiary of her estate plan. She appointed Mr. Cullen to serve as personal representative of her estate and as successor trustee of trusts she had created. Mr. Zehfuss, the brother of Ms. Kirsch, is her only surviving heir-at-law.

Mr. Zehfuss and Mr. Cullen filed competing petitions in the Orphans' Court for Montgomery County regarding the distribution of Ms. Kirsch's minority interest in a Virginia-based company. On September 22, 2015, the orphans' court entered an order directing Mr. Cullen to distribute that interest from the estate to Mr. Zehfuss.

Ten days later, Mr. Cullen moved to alter or amend that order under Rule 2-534. The court denied his motion in an order entered on November 4, 2015.

Two weeks later, Mr. Cullen noted an appeal from those two orders, expressly in his capacity "as personal representative" of the estate. Mr. Zehfuss moved to dismiss that appeal on the ground that Mr. Cullen lacked standing to appeal in his capacity as personal representative. *See generally Alston v. Gray*, 303 Md. 163 (1985).

Mr. Cullen responded by filing a second notice of appeal on March 28, 2016. His second notice of appeal stated that he was appealing from the orders of September 22,

2015, and November 4, 2015, even though many months had passed since the entry of those orders.<sup>1</sup> This time, he purported to appeal both “individually” and “as Trustee” of the trusts created by Ms. Kirsch.

In the orphans’ court, Mr. Zehfuss moved to strike Mr. Cullen’s second notice of appeal, observing that the notice was “woefully overdue” because it had been filed “145 days after” the order entered on November 4, 2015. The orphans’ court granted the motion and struck the notice of appeal from March 28, 2016. Mr. Cullen noted this appeal from the order striking his second notice of appeal.<sup>2</sup>

Rule 8-203(a) authorizes a “lower court,” including an orphans’ court, to strike a notice of appeal that has not been filed within the time prescribed by Rule 8-202. *See Edery v. Edery*, 213 Md. App. 369, 385 (2013). Rule 6-464(a) similarly authorizes the orphans’ court to strike a notice of appeal on a few specific grounds, including when the notice has not been filed within the prescribed time period.

Rule 8-202(a) provides that, in general, a notice of appeal must be filed “within 30 days after entry of the judgment or order from which the appeal is taken.” In civil actions, when a party files a timely motion to alter or amend under Rule 2-534, the notice of appeal must be filed within 30 days after entry of either a notice withdrawing the

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<sup>1</sup> In his brief, Mr. Cullen repeatedly asserts that he filed the notice of appeal on March 28, 2016, as a “precautionary measure” after the motion to dismiss the earlier appeal he had taken as personal representative. In his submissions to the orphans’ court, Mr. Cullen described his second notice of appeal as a “Supplemental Notice of Appeal.”

<sup>2</sup> An order striking a notice of appeal is an appealable, final judgment. *See Edery v. Edery*, 213 Md. App. 369, 379 n.8 (2013).

motion or an order disposing of the motion. *See* Md. Rule 8-202(c).

In the present case, Mr. Cullen did not file a notice of appeal within 30 days after the order of September 22, 2015. Instead, he filed a timely motion to alter or amend under Rule 2-534. The orphans' court denied his motion in the order docketed on November 4, 2015. Thus, under Rule 8-202(c), the deadline for filing a notice of appeal from those orders was 30 days after November 4, 2015. *See Edery v. Edery*, 213 Md. App. at 382-84.

Mr. Cullen filed his March 28, 2016, notice of appeal 145 days after the entry of the order denying the motion to alter or amend. Unquestionably, Mr. Cullen did not file that notice of appeal within any time period prescribed by Rule 8-202. He did not file that notice of appeal "within 30 days after" the entry of an order from which his appeal was taken, nor did he file that notice "within 30 days after" the entry of the order denying his motion to alter or amend.

Mr. Cullen has devoted a great deal of paper and ink in arguing that the September 22 and November 4 orders were interlocutory orders and not final judgments. The nature of those orders, however, was immaterial to whether the notice had been filed within the prescribed period. Rule 8-202 governs the time for filing a notice of appeal from "the judgment *or order* from which the appeal is taken." Md. Rule 8-202(a) (emphasis added); *see In re Guardianship of Zealand W.*, 220 Md. App. 66, 78-79 (2014). The orphans' court had not even entered an order of any kind in the 30-day period preceding March 28, 2016.

Although he failed to make the argument in opposition to the motion to strike, Mr.

Cullen contends that the orphans' court should have declined to strike his notice of appeal because, he argues, Mr. Zehfuss lacked standing to bring the motion. Even assuming that Mr. Zehfuss lacked standing, the motion to strike was not even necessary. Rule 8-203(a) and Rule 6-464(a) empower the orphans' court to strike a notice of appeal "on its own initiative[.]" The court properly could have (and indeed should have) struck the notice of appeal on its own, because even the most cursory review of the docket revealed that Mr. Cullen had filed the notice well outside any prescribed time period.

In sum, there is no merit to Mr. Cullen's contention that the orphans' court lacked power to strike a notice of appeal from two orders that had been entered onto the docket 188 days and 145 days before Mr. Cullen filed the notice.

**ORDER OF THE ORPHANS' COURT FOR  
MONTGOMERY COUNTY AFFIRMED.  
APPELLANT TO PAY COSTS.**