# STATE OF MICHIGAN

# COURT OF APPEALS

*In re* GLADYS V. RAGSDALE TRUST.

JOHN M. CHASE III, Trustee of the GLADYS V. RAGSDALE TRUST, and VALERIA J. TOSTIGE,

Appellees,

v

MARK RAGSDALE,

Appellant.

UNPUBLISHED
June 20, 2024

No. 358720
Wayne Probate Court
LC No. 2011-766680-TV

Before: GARRETT, P.J., and K. F. KELLY and N. P. HOOD, JJ.

PER CURIAM.

Appellant, Mark Ragsdale (Mark),[1] appeals as of right a September 8, 2021 order allowing the first and final account of John M. Chase III, the second successor trustee of the Gladys V. Ragsdale Trust (the Trust), allowing the payment of $4,600 in fiduciary fees, and directing the release of the remaining assets of the Trust pursuant to a schedule of distributions. On appeal, however, Mark challenges a variety of other final orders that are outside of the proper scope of this appeal. This primarily includes the February 14, 2020 order removing Mark as trustee, ordering a surcharge, and ruling that appellee Valeria J. Tostige (Valeria) was not entitled to damages on her claim for breach of fiduciary duty. But it also includes the December 14, 2020 order determining the amount of the surcharge and the January 4, 2021 order denying Mark's motion for sanctions. Mark failed to file a timely claim of appeal from any of these final orders that predated the September 8, 2021 order. The issues he now raises are, therefore, not properly before the Court. We decline to address them and affirm.

## I. BACKGROUND

[1] For ease of reference, we will refer to the family members in this case by their first names.

This case arises out of a contentious probate dispute that at various points involved the circuit court, the bankruptcy court, and eventually the probate court. The dispute was largely between Mark and his sister, Valeria, about the assets of their now-deceased mother, Gladys Ragsdale (Gladys), and those of her estate.

In 2006, Gladys loaned approximately $40,000 to her daughter, Valeria, to purchase a restaurant. In 2007, Gladys established the Trust. In 2008, Valeria experienced business difficulties and stopped making payments on the loan, after having previously repaid $7,200 to Gladys. In 2009, Gladys became mentally incapacitated, and her son Mark succeeded her as the trustee of the Trust.

The lower court file from which this appeal arises concerns the supervised administration of the Trust, but there have been other lawsuits related to this proceeding, including a 2012 civil suit that Mark filed against Valeria, a bankruptcy case, and a 2015 probate court case. In 2012, Mark filed on behalf of the Trust a collection action against Valeria to collect on the debt, stemming from Gladys's personal loan to Valeria. In that action, Mark alleged that Gladys had assigned all of her personal assets to the Trust, thus empowering him to pursue collection of Gladys's personal loan to Valeria. Valeria did not respond, and the court entered a default judgment against her in May 2013. Shortly thereafter, Valeria filed for bankruptcy. An adversary proceeding between Mark and Valeria took place in bankruptcy court. During that proceeding, Valeria asserted that Mark had committed a fraud on the probate court by falsely representing that Gladys had assigned to the Trust her personal interest in the promissory note evidencing her loan to Valeria. The bankruptcy court declined to resolve the issue of whether Mark falsely represented that Gladys assigned her interest in the note to the Trust, leaving it for the probate court to resolve. In 2015, Valeria sued Mark and the Trust in probate court. There, she asserted claims for fraud on the court and breach of fiduciary duty, again alleging that Mark had misrepresented in his 2012 action that Gladys had assigned to the Trust her interest in the loan. The probate court granted summary disposition to Mark and the Trust on Valeria's claims. In *Tostige v Ragsdale*, unpublished per curiam opinion of the Court of Appeals, issued December 19, 2017 (Docket No. 334094), this Court affirmed the grant of summary disposition on the claim for fraud on the court but reversed the grant of summary disposition on the claim for breach of fiduciary duty and remanded for further proceedings on that claim.

On remand, the probate court granted summary disposition to Valeria with respect to liability on her claim for breach of fiduciary duty, leaving the issue of damages for an evidentiary hearing. In the present case, Valeria also filed a motion to remove Mark as trustee and surcharge him, primarily on the basis that Mark had made material misrepresentations in his 2012 collection action. The probate court decided to consider all of these issues in the lower court file from which the instant appeal arises, i.e., the supervised Trust administration case, in lieu of maintaining Valeria's 2015 action as a separate proceeding. All of these issues were litigated in a three-day evidentiary hearing held in the fall of 2019. On February 14, 2020, the probate court issued an opinion and order removing Mark as trustee, surcharging him, and ruling that Valeria was not entitled to damages on her claim for breach of fiduciary duty because she had failed to mitigate

her damages.[2] On November 25, 2020, the probate court issued an opinion determining the amount of the surcharge, and on December 14, 2020, it issued an order for the opinion. Meanwhile, Mark filed a motion for sanctions against Valeria. The probate court denied Mark's motion for sanctions in an opinion and order entered on January 4, 2021.

Mark did not file a claim of appeal following the entry of any of these orders. Instead, Mark filed the instant appeal from the probate court's September 8, 2021 order allowing Chase's first and final account, allowing the payment of $4,600 in fiduciary fees to Chase, and directing the release of the remaining assets of the Trust pursuant to a schedule of distributions.

Early in the appeal process, Valeria filed a motion to dismiss the appeal for lack of jurisdiction, which this Court denied. *In re Gladys V Ragsdale Trust*, unpublished order of the Court of Appeals, entered November 18, 2021 (Docket No. 358720). After Mark filed his brief on appeal, Valeria filed another motion to dismiss the appeal for lack of jurisdiction. Valeria argued that the issues Mark raised on appeal did not concern the September 8, 2021 order from which this appeal arises but rather concerned earlier final orders from which Mark had failed to file a timely appeal. In denying Valeria's second motion to dismiss the appeal for lack of jurisdiction, this Court explained:

> The motion to dismiss is DENIED. The Court has jurisdiction of the appeal, which was timely filed from the September 8, 2021 order. This denial is without prejudice to appellee challenging in the appellee brief whether issues raised by appellant are properly before the Court. [*In re Gladys V Ragsdale Trust*, unpublished order of the Court of Appeals, entered June 9, 2022 (Docket No. 358720).]

This appeal followed.

## II. JURISDICTION

We start by addressing our jurisdiction. In her brief on appeal, as in her prior motions to dismiss, Valeria argues that this Court lacks jurisdiction with respect to the issues Mark now raises on appeal. She essentially argues that the issues Mark raises on appeal are not properly before this Court because the issues do not concern the September 8, 2021 order—the final order from which Mark filed his claim of appeal. Instead, the issues Mark raises on appeal pertain to earlier final orders from which Mark could have filed a timely appeal, but did not. When understood in this light, we agree with Valeria's argument.

"Whether this Court has jurisdiction to hear an appeal is always within the scope of this Court's review." *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009) (citations omitted). See also MCR 7.216(A)(10) (providing that the Court may in its discretion dismiss an appeal for lack of jurisdiction or for failure of the appellant to pursue the case in conformity with the rules). Even though we have already granted leave to appeal, we must still

[2] Following Mark's removal, Chase was appointed as the second successor trustee of the Trust.

review our jurisdiction before proceeding to the issues raised in this appeal. See *Chen*, 284 Mich App at 191.

Statute and court rule provide the jurisdiction of this court. See Const 1963, art 6, § 10; *Walsh v Taylor*, 263 Mich App 618, 622; 689 NW2d 506 (2004). Therefore, whether this Court has jurisdiction is a question of law which we consider de novo. *Chen*, 284 Mich App at 191. We likewise consider the scope of this Court's jurisdiction de novo. *In re McCarrick/Lamoreaux*, 307 Mich App 436, 445; 861 NW2d 303 (2014).

In her appellee brief, Valeria argues that this Court lacks jurisdiction to consider the issues raised by Mark on appeal. To the extent she is contending that the issues Mark raises on appeal are not properly before this Court, she is correct. More precisely, the Court has *jurisdiction* of this appeal from the September 8, 2021 final order, but because Mark has raised no issue concerning that order, we conclude that the issues he has raised are not *properly before the court*. His appellate arguments relate to earlier final orders (i.e., a final order affecting the rights or interests of an interested person in a proceeding involving a decedent's estate, a postjudgment order awarding or denying attorney fees and costs, etc.) from which he could have filed a timely appeal, but failed to do so. Therefore, the issues that Mark raises on appeal are not properly before this Court and will not be considered by this Court.

As stated, this Court's jurisdiction is governed by statute and court rule. *Chen*, 284 Mich App at 191. The Legislature has provided this Court with jurisdiction to hear appeals of right from probate court orders and judgments that are defined by the court rules as final orders. See MCL 600.308(1). See also *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 353; 833 NW2d 384 (2013).

Relevant here, MCR 5.801(A)(1) provides that an order appealable as of right to this Court includes "a final order, as defined in MCR 7.202(6)(a), affecting the rights or interests of a party to a civil action commenced in the probate court under MCR 5.101(C)[.]" MCR 7.202(6)(a) defines a final order in a civil case to include, among other things, "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order," MCR 7.202(6)(a)(*i*), and "a postjudgment order awarding or denying attorney fees and costs under court rule or other law," MCR 7.202(6)(a)(*iv*). See also MCR 5.802(A) (providing that chapter 7 of the Michigan Court Rules generally governs appeals from the probate court).

MCR 5.801(A)(2) provides that an order appealable of right to this Court also includes:

> a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a trust created under a will.

Such final orders are defined to include, among other things, an order "appointing or removing a fiduciary . . . ," MCR 5.801(A)(2)(a), an order "allowing or disallowing an account, fees, or

administration expenses," MCR 5.801(A)(2)(x), and an order "surcharging or refusing to surcharge a fiduciary . . . ," MCR 5.801(A)(2)(y).

Mark filed a claim of appeal from the probate court's September 8, 2021 order allowing Chase's first and final accounting of the Trust, authorizing the payment of fiduciary fees to Chase, and directing the release of the remaining assets of the Trust pursuant to a schedule of distributions. Because the September 8, 2021 order allowed an account and authorized the payment of fees, the order was a final order for which an appeal of right is allowed under MCR 5.801(A)(2)(x). On September 29, 2021, Mark filed a timely claim of appeal from the September 8, 2021 order. See MCR 7.204(A)(1)(a) (providing that an appeal of right in a civil case must be taken within 21 days of the judgment or order that is being appealed). This Court, therefore, has jurisdiction with respect to the September 8, 2021 order and any issues related to that order.

But Mark has not raised any issues on appeal concerning the September 8, 2021 order. Instead, his appellate arguments concern earlier final orders from which he did not file a timely appeal: a February 14, 2020 order resolving the issues of damages, breach of fiduciary duty, and removal of Mark as successor trustee, among others. "When a final order is entered, a claim of appeal from that order must be timely filed. A party cannot wait until the entry of a subsequent final order to untimely appeal an earlier final order." *Surman v Surman*, 277 Mich App 293, 294; 745 NW2d 802 (2007). See also *Nowland v Rice's Estate*, 138 Mich 146, 148; 101 NW 214 (1904) (refusing to consider issues regarding an earlier final order that was not separately appealed). For this reason, although we have jurisdiction over this case, the issues are not properly before us. See *Nowland*, 138 Mich at 148. We, therefore, will address why each of the issues Mark raises on appeal stem from some other final order from which he failed to file a timely claim of appeal.

A. SUMMARY DISPOSITION ON BREACH-OF-FIDUCIARY-DUTY CLAIM

Several issues that Mark raises on appeal stem from the February 14, 2020 order, which was a final order for several reasons. As it relates to Mark's first claim regarding the trial court's order granting summary disposition of Valeria's breach-of-fiduciary-duty claim, that order was final because it resolved the last remaining aspect (damages) of the last remaining claim (breach of fiduciary duty) in the 2015 case. See MCR 7.202(6)(a)(*i*). In his first issue, Mark argues that the probate court erred by granting summary disposition to Valeria with respect to liability on her claim for breach of fiduciary duty, which was part of a civil action that she filed in the probate court, i.e., the 2015 case. After the grant of summary disposition on liability, the only remaining issue in the 2015 case concerned whether Valeria was entitled to damages. The probate court considered the damages issue in the ongoing Trust administration case, i.e., the lower court file from which the instant appeal arises. After holding an evidentiary hearing in the fall of 2019 on that damages issue as well as Valeria's separate petition to remove and surcharge Mark, the probate court issued its February 14, 2020 opinion and order determining that Valeria was not entitled to damages on her claim for breach of fiduciary duty because she failed to mitigate her damages. This was the final order. See MCR 7.202(6)(a)(*i*). See also MCR 5.801(A)(1). The February 14, 2020 order was a final order concerning Valeria's civil action because the court previously resolved the issue of liability by summary disposition, and the court ruled in the February 14, 2020 opinion and order that no damages would be awarded on that claim. Further, the only other claim in the 2015 civil action was Valeria's claim for fraud on the court, which was dismissed years earlier, and the dismissal of that claim was affirmed by this Court in 2017. Therefore, the February

14, 2020 order disposed of all the claims and adjudicated the rights and liabilities of all the parties with respect to the issues in Valeria's 2015 civil action. It was thus a final order under MCR 7.202(6)(a)(*i*).[3] Mark did not file a timely appeal of right from that order. He is thus precluded from raising issues regarding that order in the instant appeal from a subsequent final order.

B. REMOVAL OF SUCCESSOR TRUSTEE AND SURCHARGE

In his fourth issue on appeal, Mark argues that the probate court erred by removing him as the successor trustee and by surcharging him. As noted, a final order from which there is an appeal of right includes an order "appointing or removing a fiduciary . . . ," MCR 5.801(A)(2)(a), an order "allowing or disallowing an account, fees, or administration expenses," MCR 5.801(A)(2)(x), and an order "surcharging or refusing to surcharge a fiduciary . . . ," MCR 5.801(A)(2)(y). In its February 14, 2020 opinion and order, the probate court removed Mark as trustee and decided to surcharge him. The surcharge was quantified in the November 25, 2020 opinion and December 14, 2020 order. Also, both the February 14, 2020 order and the December 14, 2020 order decided fee requests and were thus final for that additional reason. See MCR 7.202(6)(a)(*iv*). Mark failed to file a timely appeal of right from the February 14, 2020 and December 14, 2020 final orders. The removal and surcharge issues, therefore, are not properly before the Court in the present appeal from the subsequent final order of September 8, 2021.[4]

C. SETOFF ON VALERIA'S SHARE FOR THE 2013 DEFAULT JUDGMENT

[3] It is true that the probate court had closed the lower court file in the 2015 civil action and then considered the damages issue from that civil action as part of the ongoing Trust administration proceeding. The civil action was effectively consolidated with the Trust administration proceeding, even though the civil action was administratively closed and only the lower court file number for the Trust administration proceeding appeared on the probate court's orders that are at issue. Therefore, the claims from the civil action were finally resolved in the February 14, 2020 order, making it, for all practical purposes, the final order with respect to the claims in the civil action. However, even if the procedural posture meant that the February 14, 2020 order was not entered as part of the civil action and that it would not be considered a final order under MCR 7.202(6)(a)(*i*), the order would still be considered final under MCR 5.801(A)(5), which provides that an order appealable as of right to this Court includes "an order entered in a probate proceeding, other than a civil action commenced in a probate court, that otherwise affects with finality the rights or interests of a party or an interested person in the subject matter[.]" The February 14, 2020 order affected with finality Mark's rights or interests with respect to Valeria's claims that she had asserted in her civil action and would thus be considered a final order under MCR 5.801(A)(5) if the order is considered to have been entered only in the ongoing Trust administration proceeding and not as part of the 2015 civil action filed by Valeria. In either event, the February 14, 2020 order is a final order for appeal purposes, and as discussed later, it was final for additional reasons.

[4] Although the distribution of the Trust assets effectuated by the September 8, 2021 order reflected an apparent deduction of Mark's share as required by the surcharge, this does not alter the fact that the probate court had already entered final orders deciding to impose the surcharge and quantifying the surcharge.

In his second issue, Mark argues that the probate court erred by refusing to permit the Trust to set off the amount of the default judgment against Valeria's share of the distribution of the Trust assets. However, Mark's appellate argument on this issue is intertwined with the issues ultimately resolved in the February 14, 2020 final order. In a March 29, 2019 summary disposition ruling, the probate court ruled that the Trust was not entitled to impose a setoff on Valeria's share of the distribution from the Trust assets. The court stated that an evidentiary hearing would be held regarding the remaining issue of damages as well as Valeria's pending petition to remove and surcharge Mark. Following the evidentiary hearing, the probate court issued its February 14, 2020 opinion and order resolving those remaining issues. In deciding to remove and surcharge Mark, the probate court relied in part on the fact that Mark knew or should have known that Gladys's interest in the promissory note was not properly assigned to the Trust. In his appellate argument regarding setoff, Mark addresses MCL 700.3903, which provides:

> The amount of a successor's noncontingent indebtedness to the estate if due, or its present value if not due, shall be offset against the successor's interest. However, *the successor has the benefit of a defense that would be available to the successor in a direct proceeding for recovery of the debt*. [Emphasis added.]

As emphasized in this quotation, resolution of the setoff issue requires consideration of whether Valeria has a defense that would have been available in a direct proceeding for recovery of the debt. She does. And issues central to that determination were litigated and ultimately resolved at the time of the February 14, 2020 opinion and order. The court had already decided in an earlier order that the Trust was not entitled to a setoff, and the court concluded in its February 14, 2020 opinion that the Trust lacked an interest in the promissory note. If he intended to raise the setoff issue on appeal, Mark should have raised it in a timely appeal taken from the February 14, 2020 final order. Mark failed to take any such appeal. He may not now raise this issue in his present appeal from the subsequent final order of September 8, 2021.

## D. EVIDENTIARY ERROR AT 2019 HEARING

In his third issue, Mark argues that the probate court made an evidentiary error during the 2019 evidentiary hearing. He asserts that the court erred by excluding from evidence an e-mail between the parties' attorneys. But the probate court held the 2019 evidentiary hearing to address damages, removal, and surcharge issues that were resolved in the February 14, 2020 opinion and order. Mark, therefore, should have raised any issue concerning an alleged evidentiary error at that hearing in a timely appeal from the February 14, 2020 final order. He failed to file such an appeal and may not raise this issue in his present appeal from the subsequent final order of September 8, 2021.

## E. DENYING MARK'S REQUEST TO USE TRUST ASSETS TO PAY ATTORNEY FEES

In his fifth issue, Mark argues that the probate court erred in its February 14, 2020 opinion and order by denying his request to use Trust assets to pay his attorney fees incurred in this litigation. However, as noted, the February 14, 2020 order was final for multiple reasons. In addition to other reasons, the February 14, 2020 order was final because the order disallowed fees. See MCR 5.801(A)(2)(x). Mark failed to file a timely appeal from that final order and may not use the instant appeal from a subsequent final order to challenge the February 14, 2020 order.

## F. DENYING MARK'S MOTION FOR SANCTIONS

In his sixth issue, Mark argues that the probate court erred in its January 4, 2021 opinion and order by denying Mark's motion for sanctions against Valeria. His motion for sanctions was based on the purported lack of factual or legal support for Valeria's claims asserted in her 2015 civil action as well as allegedly false statements made by Valeria or her counsel. However, by denying Mark's request for sanctions with respect to Valeria's civil action, the order was final as "a postjudgment order awarding or denying attorney fees and costs under court rule or other law[.]" MCR 7.202(6)(a)(*iv*). Even if we were to view the January 4, 2021 order as having been entered only in the ongoing Trust administration proceeding, and not as part of the civil action that had been closed and effectively consolidated with the Trust administration proceeding, the January 4, 2021 order would still be a final as an order disallowing fees. See MCR 5.801(A)(2)(x). The January 4, 2021 order, therefore, was a final order one way or another. Because Mark failed to file a timely appeal from the final order of January 4, 2021, he may not now raise issues pertaining to that order in his current appeal from the subsequent final order of September 8, 2021.

## G. LANGUAGE IN THE ORDERS

In his reply brief on appeal, Mark notes that the December 14, 2020 order and the January 4, 2021 order each contain language stating that the order was not a final order and did not close the case. This language, however, is not dispositive. MCR 2.602(A)(3) provides: "Each judgment must state, immediately preceding the judge's signature, whether it resolves the last pending claim and closes the case. Such a statement must also appear on any other order that disposes of the last pending claim and closes the case." According to the staff comment[5] to the 1998 amendment adding this provision to the court rule, the goal of the amendment was to facilitate docket management. This Court has indicated that such language in a lower court's order is not dispositive of whether the order is, in fact, a final order appealable by right to this Court. See *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61; 807 NW2d 354 (2011) (ruling that a trial court's order was *not* a final order appealable as of right to this Court, despite language in the order stating that it disposed of the last pending claims in the matter and closed the case). Therefore, the language in the December 14, 2020 and January 4, 2021 orders indicating that they were not final orders is not dispositive.

## III. ALTERNATIVELY GRANTING LEAVE

Mark argues in the alternative that this Court could treat his claim of appeal as a granted application for leave to appeal. See *id*. (treating a "claim of appeal as a granted application for leave to appeal."). Though empowered to do so, we decline this invitation. In general, a delayed application for leave to appeal must be filed within six months of the order or judgment being appealed. MCR 7.205(A)(4)(a). Mark filed his claim of appeal on September 29, 2021, more than six months after the respective entries of the final orders from which his appellate arguments arise.

[5] We recognize that staff comments to the Michigan Court Rules are not binding authority but they may be persuasive in interpreting a rule or its terms. See *Bradley v Marathon Ins Co*, 345 Mich App 126, 136; 3 NW3d 559 (2022).

Because a delayed application would have been untimely when he filed his claim of appeal, we decline to treat the claim of appeal as a granted application for leave to appeal.

Accordingly, although this Court possesses jurisdiction with respect to any issues related to the September 8, 2021 order from which this appeal arises, Mark has raised no issues concerning that order. Instead, all of his appellate issues relate to earlier final orders that were not timely appealed. Mark has thus failed to articulate a basis on which he would be entitled to appellate relief with respect to the order being appealed. "[A] party's failure to brief an issue that necessarily must be reached precludes appellate relief." *Riverview v Sibley Limestone*, 270 Mich App 627, 638; 716 NW2d 615 (2006); see also *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (noting that when an appellant fails to dispute the basis of a lower court's ruling, this Court need not even consider granting relief). We, therefore, affirm because Mark has failed to raise any issue related to the September 8, 2021 order from which this appeal arises, and his appellate arguments are related to earlier final orders that were not timely appealed and as such are not properly before this Court in this appeal.

## IV. VEXATIOUS APPEAL

In her brief on appeal, Valeria asks that this Court sanction Mark for pursuing a vexatious appeal and remand the case to the probate court to determine damages. See MCR 7.216(C)(1) and (2). But a party's request for sanctions must be brought in a separately-filed motion rather than in an appellate brief. *Barrow v Detroit Election Comm*, 305 Mich App 649, 683-684; 854 NW2d 489 (2014), citing MCR 7.216(C)(1) and MCR 7.211(C)(8). Because Valeria has not filed such a motion, and only requests sanctions in her appellate brief, we deny the request. Valeria, however, may file a motion for sanctions "within 21 days after the date of this Court's opinion disposing of [this appeal]." *Barrow*, 305 Mich App at 684, citing MCR 7.211(C)(8). We, therefore, "deny the request for appellate sanctions without prejudice." *Barrow*, 305 Mich App at 684.

We affirm.

/s/ Kristina Robinson Garrett
/s/ Kirsten Frank Kelly
/s/ Noah P. Hood