Rel: September 18, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1190819

Virginia McDorman, as conservator for Sim T. Moseley, a protected person

v.

Ralph Carmichael Moseley, Jr.

1190820

Sim T. Moseley, a protected person, by and through Virginia McDorman, as conservator for Sim T. Moseley

v.

Ralph Carmichael Moseley, Jr.

Appeals from Jefferson Probate Court
(PR-11-3393)

SELLERS, Justice.

Virginia McDorman, conservator for Sim T. Moseley, and Sim T. Moseley, a protected person, by and through his conservator, appeal, in two separate appeals, from a judgment of the Jefferson Probate Court awarding Ralph Carmichael Moseley, Jr., attorney fees pursuant to the Alabama Litigation Accountability Act, § 12-19-270 et seq., Ala. Code 1975 ("the ALAA"). We affirm in part, reverse in part, and remand.

I. Jurisdiction

The timely filing of a notice of appeal is a jurisdictional act, which cannot be waived. Harden v. Laney, 118 So. 3d 186 (Ala. 2013). In this case, the parties do not raise the issue of subject-matter jurisdiction; we therefore address the issue ex mero motu. Thomas v. Merritt, 167 So. 3d 283 (Ala. 2013). Specifically, we consider whether these appeals are governed by Act No. 1144, Ala. Acts 1971 ("the local act"), in which case they are untimely, or by Rule 4(a)(1), Ala. R. App. P., in which case they are timely.

Section 1 of the local act grants the Jefferson Probate Court "general jurisdiction concurrent with that of the Circuit Courts of this State, in equity, in the administration

of the estates of ... minors and insane or non compos mentis persons," which would include conservatorship proceedings under the Uniform Guardianship and Protective Proceedings Act, § 26-2A-1 et seq., Ala. Code 1975.

Section 4 of the local act requires that appeals to this Court be filed within 30 days from a judgment or order of the Jefferson Probate Court:

> "Appeals may be taken from the orders, judgments and decrees of such a Probate Court, relating to the administration of such aforesaid estates, including decrees on partial settlements and rulings on demurrer, or otherwise, relating to action taken pursuant to jurisdiction conferred by this act, to the Supreme Court within thirty days from the rendition thereof, or within thirty days from the decision of such a Probate Court on a motion for new trial, in the manner and form as is provided for appeals from the Probate Courts to the Supreme Court."

(Emphasis added.)

Section 6 of the local act states that the primary intent of the local act is to "expedite and facilitate the administration of estates and such other matters as are mentioned herein in counties of over 500,000 population."

The general law governing appeals from the probate courts is set forth in Ala. Code 1975, §§ 12-22-20 through 12-22-27. Section 12-22-21, Ala. Code 1975, considers the same

procedural matter set forth in § 4 of the local act but provides that appeals from the probate court to this Court "shall be governed by the Alabama Rules of Appellate Procedure, including the time for taking an appeal." Rule 4(a)(1), Ala. R. App. P., states that a party must file a notice of appeal "within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from." In this case, the Jefferson Probate Court entered a judgment on July 1, 2019. The notices of appeals were filed in the probate court on August 12, 2019 -- more than the 30 days provided by the local act, but on the 42d day as provided by Rule 4(a)(1). Thus, we are presented with a conflict between, on the one hand, a statute and a rule prescribing the time for taking an appeal to this Court and, on the other, a local act providing a more limited time. In resolving this conflict, we look to the intent of the legislature.

"A general act may amend or repeal a local act by express words or by necessary implication." Pittsburg & Midway Coal Mining Co. v. Tuscaloosa Cnty., 994 So. 2d 250, 261 (Ala. 2008). In Connor v. State, 275 Ala. 230, 234, 153 So. 2d 787,

791 (1963)(quoting 50 Am. Jur. Statutes § 564), this Court observed, in relevant part:

> "'There is no rule which prohibits the repeal by implication of a special or specific act by a general or broad one. The question is always one of legislative intention, and the special or specific act must yield to the later general or broad act, where there is a manifest legislative intent that the general act shall be of universal application notwithstanding the prior special or specific act.'"

There being no express repeal of § 4 of the local act, the question is whether § 12-22-21, being the latest expression of the legislature, repeals by implication § 4 of the local act, thus providing that appeals from the Jefferson Probate Court to this Court must be filed within the 42-day period prescribed by Rule 4(a). We conclude that it does.

In 1971, the legislature authorized this Court to promulgate a new system of rules to govern procedure in appeals to this Court, the Court of Civil Appeals, and the Court of Criminal Appeals -- the purpose being to simplify existing appellate procedure and to assure the speedy determination of every proceeding on its merits. Act No. 964, Ala. Acts 1971.[1] Pursuant to its rule-making authority, this

[1]We note that § 150, Ala. Const. 1901 (Off. Recomp.), provides: "The supreme court shall make and promulgate rules governing the administration of all courts and rules governing

Court adopted the Alabama Rules of Appellate Procedure, which became effective December 1, 1975.[2] The legislature has expressly indicated that the Alabama Rules of Appellate Procedure govern procedure in this Court and the courts of appeals unless stated otherwise. Specifically, in 1977, as part of its adoption of the "Code of Alabama 1975," the legislature included § 12-1-1, Ala. Code 1975, which provides that

> "[a]ny provisions of this title regulating procedure shall apply only if the procedure is not governed by the Alabama Rules of Civil Procedure, the Alabama Rules of Appellate Procedure or any other rule of practice and procedure as may be Adopted by the Supreme Court of Alabama."

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practice and procedure in all courts ...." See also § 12-2-19(a), Ala. Code 1975, recognizing that "the Supreme Court now has the initial primary duty to make and promulgate rules governing practice and procedure in all courts ...."

[2]When the local act was enacted in 1971, the Alabama Rules of Appellate Procedure were not in existence, and appeals to this Court or to a court of appeals, unless otherwise prescribed, were governed by statute and generally were required to be filed within <u>six</u> <u>months</u> of the order or judgment appealed from. Title 7, § 788, Code of Alabama 1940 (1958 Recomp.). Given the stated intent of the local act, i.e., to expedite and facilitate the administration of estates, the 30-day time frame provided in the local act was apparently intended to shorten the 6-month time frame then in existence for filing a notice of appeal in some appeals and to standardize the time for taking an appeal.

See also, e.g., Appendix III, Ala. R. App. P. (providing a list of statutes modified by the adoption of the Alabama Rules of Appellate Procedure, including some statutes providing 30 days in which to appeal from probate court).

Based on the foregoing, we conclude that § 12-22-21, providing that "[a]ppeals to the Supreme Court shall be governed by the Alabama Rules of Appellate Procedure, including the time for taking an appeal," prevails as the latest expression of legislative will and thus repeals by implication § 4 of the local act providing that appeals to this Court be filed within 30 days of the entry of the order or judgment appealed from. To hold otherwise would create an exception only for appeals to this Court from the Jefferson Probate Court that would become a trap for the unwary.[3] Having a uniform time standard for taking an appeal not only supports judicial economy and aids lawyers with a single rule,

[3]By similar local act, the legislature granted the Mobile Probate Court jurisdiction concurrent with the Mobile Circuit Court in the administration of estates. Act No. 974, Ala. Acts 1961. As originally enacted, Act No. 974 provided for appeals to this Court within 30 days of the entry of the order or judgment of the probate court. In 1991, the legislature amended § 5 of Mobile's local act to provide that appeals from the Mobile Probate Court lie to this Court within the 42-day period prescribed in the Alabama Rules of Appellate Procedure. See Act No. 91-131, Ala. Acts 1991.

but it also eliminates, as presented here, a dual and conflicting system for which there is no rational basis. Because we confirm that the notices of appeal were timely and that jurisdiction is therefore proper, we now address the merits of the appeals before us.

II. Facts and Procedural History

Virginia is the guardian of her son Sim. She is also the conservator of Sim's estate. Sim has a brother, Ralph Carmichael Moseley III ("Mike"), who was born during the marriage of Virginia and Ralph. Sim also has a half brother, Slate McDorman, who was born during the marriage of Virginia and her current husband, Clarence L. McDorman, Jr.

In February 2013, Mike, as brother and next friend of Sim, petitioned the Jefferson Probate Court to, among other things, remove Virginia as Sim's conservator because of an alleged conflict of interest, appoint Ralph as successor conservator, and order an accounting of the conservatorship.[4] Ralph filed a response consenting to the relief sought in the petition and specifically to being appointed as successor

[4]Mike asserted in the petition that the alleged conflict stemmed from a trust action pending in the Barbour Circuit Court in which Virginia had been named a respondent both individually and in her capacity as Sim's conservator.

conservator for Sim. The probate court thereafter ordered Virginia to file a full accounting for the entirety of the conservatorship.

During the pendency of the proceeding, a dispute arose about an IRA Ralph had created and funded for Sim's benefit. During discovery, Virginia requested that Ralph produce a copy of "any and all receipts, checks, or other documents reflecting contributions made by you to the IRA" belonging to Sim. Ralph answered that "[t]here has not been an IRA for a number of years."

On February 28, 2014, Slate, acting as counsel for Virginia, sent Ralph a letter confirming everyone's desire that the IRA matter be concluded without further effort and expense. That letter states, in pertinent part:

> "We need to reschedule a time for your deposition and I ask that you provide available dates. It is important that your testimony be taken in time for us to include anything relevant in [Virginia's] accounting. Please contact me with dates you are available so that I may schedule your deposition.
>
> "However, I believe everyone is in agreement that this matter should be concluded without further effort and expense. Although we still have questions regarding Sim's IRA account and these questions must be answered for [Virginia's] accounting, the largest remaining issue of contention appears to be who will be responsible to pay the court costs and fees

> requested in [the] petition filed last February. It was requested in this petition that Sim be taxed all costs and fees in our matter. Judge King granted this request. Even though Sim has no means to pay these costs as SSI payments are non-attachable, Sim is upset knowing that he is responsible for these costs. If we can resolve the issue of who is responsible for these fees, I believe we can quickly conclude the remaining issues.
>
> "....
>
> "In an effort to move toward reconciliation and to avoid additional fees, I ask if you and/or Mike will consider paying the current outstanding expenses on Sim's behalf so that we can begin placing this behind us. My mom[, Virginia,] has spent a considerable sum recently on accountants and others regarding her accounting for Sim's conservatorship. She is not in a position to pay anything toward the outstanding fees. However, if this matter is not resolved, the fees will only increase to the detriment of Sim."

(Emphasis added.)

On April 23, 2014, Virginia submitted to the probate court an accounting for the conservatorship, along with a "Settlement Agreement" executed by Sim and by Virginia as Sim's conservator releasing Ralph from any and all claims related directly or indirectly to Ralph's funding or removing funds from an IRA Ralph had attempted to establish on behalf of Sim. The agreement states:

> "In accordance with Alabama Code section 26-2A-l52(19), Sim T. Moseley, by and through his

> Mother and Curator/Conservator Virginia Thomas McDorman, does hereby agree that in exchange for the total compromise payment of Five Thousand and no/lO0ths Dollars ($5000) from Sim's father Ralph Moseley, any and all claims disputes or controversies of any kind against Ralph Moseley, including but not limited to anything, arising from or in any way related directly or indirectly to Ralph Moseley funding or removing funds from an IRA account attempted to be established on behalf of Sim T. Moseley, are hereby fully released and discharged, with no admission of liability. Each party shall bear their own attorney fees, and Sim T. Moseley shall bear all court costs in this matter."

(Emphasis added.)

Virginia also filed with the accounting an affidavit signed by Ralph stating that he agreed to withdraw any request that Virginia be removed as conservator for Sim's estate and affirming that his payment of $5,000 pursuant to the agreement was in exchange for a full release of all claims against him.

In December 2015, more than a year and a half after the agreement and Ralph's affidavit were executed, Virginia and Sim filed a motion to set aside the agreement, as well as a motion to show cause why Ralph should not be held in contempt of court. Virginia and Sim alleged that Ralph had fraudulently induced them to execute the agreement by failing to truthfully answer discovery and, more specifically, by withholding information about an IRA with Charles Schwab & Company, which,

they claimed, Ralph had established, funded, and maintained using Sim's name and Social Security number. They further stated that in 2013 Ralph closed the IRA and that in 2014 he filed a fraudulent tax return on behalf of Sim, listing the IRA distribution as income -- causing Sim to owe federal taxes and impacting his qualification for various governmental disability benefits. They further explained that the Internal Revenue Service ultimately determined that Sim had been the victim of identity theft and removed the tax deficiency from Sim's records. Virginia and Sim finally noted that Virginia, as Sim's conservator, had filed an action against Ralph in the Jefferson Circuit Court alleging fraud and intentional infliction of emotional distress.

Ralph responded to the motion to set aside the agreement, asserting that the allegations in the motion were without merit because, he said, during the discovery process, his counsel had informed Virginia's counsel that the Charles Schwab IRA existed and that Ralph had named Sim as the owner of the IRA. Ralph stated that, with this knowledge, Virginia's counsel wrote him a letter confirming everyone's desire that the IRA matter should be concluded without further

effort and expense. Thus, Ralph argued that Virginia and Sim were aware of the Charles Schwab IRA when they signed the agreement. Ralph requested that the probate court award him attorney fees he incurred as a result of responding to and opposing the motion to set aside the agreement and the motion to show cause why he should not be held in contempt of court.

On June 29, 2016, the probate court held a hearing on the motions to set aside the agreement and to show cause why Ralph should not be held in contempt of court. Virginia and Sim did not testify at that hearing. On September 2, 2016, the probate court entered an order denying the motions, concluding, in relevant part, that the very words of the agreement demonstrated that Virginia and Sim knew or reasonably should have known about the existence of any IRA and any distribution therefrom and that Virginia and Sim had released all claims against Ralph relating to any IRA. The probate court further determined that the attempts by Virginia and Sim to set aside the agreement were without merit, and it ordered them to pay Ralph's attorney fees. Ralph thereafter filed a fee petition with an affidavit from his counsel seeking $19,920 in attorney fees and $188.77 in expenses.

Virginia and Sim, through his counsel of record, each filed a motion to reconsider the September 2016 order, arguing for the first time that, when they executed the agreement, the only IRA they were aware of was an IRA established during Sim's employment at Children's Hospital of Alabama in Birmingham. They contended that, had they known about the Charles Schwab IRA, they would not have executed the agreement. Virginia and Sim attached to the motions their affidavits explaining their lack of knowledge of the Charles Schwab IRA.

On October 11, 2017, the probate court entered an order denying the motions to reconsider; the court ordered Virginia and Sim to pay Ralph's attorney fees within 30 days. The probate court declined to consider the affidavits that Virginia and Sim attached to their postjudgment motions, noting:

> "[Virginia's] and Sim's suggestions that the Settlement and Release should be set aside because it was induced by fraud was presented in the December 2015 Motion to Show Cause and Motion to Set Aside Settlement, and argued to the Court [on June 29, 2016]. Because no circumstances prevented Sim or [Virginia] from offering testimony at or before the June 29 hearing, the newly presented affidavits of Sim and [Virginia] ... may not be considered by this Court. Regardless, [Virginia] and Sim

> explicitly released [Ralph] from and against all claims directly or indirectly related to any IRA. The Release was not limited to a particular time frame, and therefore [Virginia] and Sim released present and future claims relating to any IRA."

Virginia and Sim thereafter filed a motion for relief from the October 2017 order or, alternatively, to certify the order as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P.

On July 1, 2019, the probate court entered a judgment disposing of all claims against Ralph, and certified its judgment as final pursuant to Rule 54(b), Ala. R. Civ. P. In that judgment, the probate court reiterated its findings regarding the validity of the agreement, discussed its September 2016 and October 2017 orders, and addressed each of the factors for an award of attorney fees as required by the ALAA. These appeals followed.

III. Standard of Review

The standard of review for an award of attorney fees under the ALAA depends upon the basis for the trial court's determination for the award. Morrow v. Gibson, 827 So. 2d 756, 762 (Ala. 2002). If a trial court finds that a claim or defense is without substantial justification because it is groundless in law, that determination will be reviewed de

novo, without a presumption of correctness. Pacific Enters. Oil Co. (USA) v. Howell Petroleum Corp., 614 So. 2d 409 (Ala. 1993). If, however, a trial court finds that a claim or defense is without substantial justification using terms or phrases such as "frivolous," "groundless in fact," "vexatious," or "interposed for any improper purpose," that determination will not be disturbed on appeal unless it is clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. Id. The latter standard is applicable here. The probate court determined that the filings by Virginia and Sim were not pleaded in good faith or that they otherwise failed to rise to the level of initiating a legal and/or equitable action, thus implying that the filings were interposed for an improper purpose.

IV. Analysis

The ALAA provides in § 12-19-272(a), Ala. Code 1975, in relevant part, that, in any civil action, "the court shall award, as part of its judgment ..., reasonable attorneys' fees" against any party who has brought a civil action "that a court determines to be without substantial justification,

either in whole or part." The ALAA defines "without substantial justification" in § 12-19-271, Ala. Code 1975, as an action that is "frivolous, groundless in fact or in law, or vexatious, or interposed for any improper purpose, including without limitation, to cause unnecessary delay or needless increase in the cost of litigation, as determined by the court." Finally, the ALAA provides in § 12-19-273, Ala. Code 1975, that, when a court awards attorney fees under the ALAA, it must "specifically set forth the reasons for such award."

Virginia and Sim first argue that the probate court lacked jurisdiction to award attorney fees in a related case filed against Ralph in the circuit court. We agree. While the conservatorship proceeding was pending in the probate court, Virginia, as Sim's conservator, filed an action against Ralph in the circuit court, alleging fraud and the intentional infliction of emotional distress. Ralph moved the circuit court to dismiss the action but never included a motion in that court for attorney fees under the ALAA. The probate court awarded Ralph attorney fees and expenses in the amount of $20,108.77. Virginia and Sim assert that approximately $10,915 of that amount represents fees incurred by Ralph in

defending the circuit court action. Ralph, on the other hand, contends that the attorney-fee award properly included the fees he incurred in the circuit court action, because, he says, Virginia and Sim filed the circuit court action in an attempt to circumvent the agreement they had filed in the probate court action. However, he cites no authority in support of that contention. See Rule 28, Ala. R. App. P. Under the plain language of § 12-19-272, the probate court had jurisdiction to award attorney fees regarding only fees incurred in the probate court proceeding, not the circuit court proceeding, "as part of its judgment." Accordingly, the probate court erred in awarding attorney fees relating to the circuit court proceeding, and we remand the cause with instructions for the probate court to determine the amount of fees Ralph incurred in defending the validity of the agreement in the probate court.

Virginia and Sim also contend that the probate court's award of attorney fees attributable to setting aside the agreement in the probate court was erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. As they argued below, Virginia and

Sim assert that they were justified in their attempts to set aside the agreement because, they say, the agreement was induced by fraud insofar as Ralph had allegedly failed to disclose the Charles Schwab IRA during discovery and because the Internal Revenue Service had determined that Sim had been the victim of identity theft. Ralph, on the other hand, maintains that Virginia and Sim had knowledge of the existence of the Charles Schwab IRA before executing the agreement. The record indicates that the probate court held a hearing on the matter, at which time Virginia and Sim did not testify, although there were no circumstances preventing them from doing so. The transcript of that hearing, if one exists, is not in the record. Therefore, this Court will presume that the probate court, exercising its equitable powers, correctly resolved any issue concerning the alleged fraudulent inducement in favor of Ralph. See Davis v. Davis, 278 Ala. 328, 330, 178 So. 2d 154, 155 (1965)(noting the rule that, "where no testimony is contained in the record on appeal, a decree which recites that it was granted on pleadings, proofs and testimony will not be disturbed on appeal").

In Cleghorn v. Scribner, 597 So. 2d 693, 696 (Ala. 1992), this Court stated that,

> "in the absence of fraud, a release supported by a valuable consideration, unambiguous in meaning, will be given effect according to the intention of the parties from what appears within the four corners of the instrument itself, and parol evidence may not be introduced to establish the existence of a mutual mistake of fact when the release was signed as a basis for a rescission of that release."

The agreement the parties negotiated is broad and it unambiguously releases Ralph from "any and all claims ... of any kind ... including but not limited to anything, arising from or in any way related directly or indirectly to [Ralph] funding or removing funds from an IRA account attempted to be established on behalf" of Sim. (Emphasis added.) "An" is an indefinite article, which refers to a person, place, or thing in a general or nonspecific manner. Whereas, "the" is a definite article, which refers to a specific person, place, or thing. Bryan A. Garner, The Redbook: A Manual on Legal Style § 10.38 (2d ed. 2006). Use of the indefinite article "an" in the agreement released Ralph from any and all claims relating directly or indirectly to any IRA in general, including future claims. See Jehle-Slauson Constr. Co. v. Hood-Rich, Architects & Consulting Eng'rs, 435 So. 2d 716, 720 (Ala. 1983)(noting

that, regarding future damages, "[i]f the parties had intended to limit the release to prior contract litigation, they could have specifically stated their intention in the release").

In its judgment, the probate court concluded that Virginia and Sim's attempts to set aside the agreement and their continued filings -- for more than three years after the initial motion to set it aside -- were without substantial justification. The judgment provides the factual background concerning the filings and reflects an appropriate application of the ALAA. The judgment also sets forth substantial reasons for the attorney-fee award as required by § 12-19-273. As part of its reasoning for the attorney-fee award, the probate court noted that Virginia and Sim had made little to no effort to determine the validity of their motions to set aside the agreement, "because they negotiated the agreement and terms of the [agreement] which explicitly released [Ralph] for all claims relating to any IRA." Finally, the probate court noted that Virginia and Sim received what they requested in 2014, i.e., that Ralph withdraw his objections to Virginia's serving as Sim's conservator and that Ralph pay their court costs and fee obligations. Accordingly, we conclude that the award of

attorney fees related to defending the validity of the agreement in the probate court action was not erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. Pacific Enters. Oil Co. (USA), supra.

V. Conclusion

We reverse the probate court's judgment awarding attorney fees and remand the cause with instructions for the court to determine the amount of fees attributable to defending the validity of the agreement in the probate court action. In all other respects, we affirm the judgment in favor of Ralph.

1190819--AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

1190820--AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur.