ARKANSAS COURT OF APPEALS

DIVISION II
No. CA08-212

ROBERT S. YOUNG APPELLANT V. HELEN V. YOUNG, Grantor and Beneficiary of the Helen V. Young Trust; THOMAS C. YOUNG; PAUL YOUNG, III; SLOAN YOUNG, a Minor; and PAUL YOUNG, IV, a Minor, Beneficiaries APPELLEES	**Opinion Delivered** December 10, 2008 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT, [NO. CV04-592-5] HONORABLE GARY L. CARSON, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Appellant Robert Young challenges a judgment awarded to his brothers, appellees Thomas Young and Paul Young, III, successor trustees of the Paul Young, Jr. and Helen V. Young Trusts, and minor beneficiaries of the Helen V. Young Trust, against him in a dispute involving funds that appellant improperly obtained from the siblings' mother, Helen Young, grantor and beneficiary of the Helen V. Young Trust. We find no error in the trial court's decision and affirm.

This action began when appellant filed a claim for declaratory judgment in 2004 against his mother, the grantor and beneficiary of the trust; Thomas Young; Paul Young, III; Sloane Young, a minor; and Paul Young, IV, a minor, beneficiaries of the trust. Appellees filed a counterclaim for judgment against appellant. The case was tried in October 2005 before Washington County Circuit Court Judge Michael Mashburn. In his findings announced from

the bench in January 2006, Judge Mashburn stated that appellant had procured a June 3, 2003 amendment to the trust; that he did not credit appellant's testimony; that appellant had asserted undue influence on Mrs. Young, who suffered from dementia; and that he wanted the guardian of Mrs. Young's estate, Lauren Adams, to file an accounting. In addition to invalidating the June 3, 2003 amendment to the trust, the trial court found that every document that Mrs. Young signed after June 2003 was procured by one of the three brothers and was void. In the order filed on February 3, 2006, the court voided every document executed by Mrs. Young on and after June 3, 2003, and incorporated by reference its findings of fact and conclusions of law announced at the hearing.

Using Mrs. Young's guardianship case number, PR-2004-249, Ms. Adams filed her report in February 2006. Attached to this report was an accounting for the years 2000 through 2003. In her report, she stated that appellant's family had received substantially more than the other brothers and their families in 2003 and that appellant had refused to turn over his mother's social-security income. She also stated that the Social Security Administration had opened an investigation into whether any of those funds were misappropriated. On April 28, 2006, the circuit court (Judge Mashburn) sent a letter to Ms. Adams, appellants, and appellees' attorney, stating that it was sending them copies of the guardian's report. It noted that, although the report contained a certificate of service, Ms. Adams had not mailed the report on February 7, 2006, as she had indicated.

On February 12, 2007, appellees filed a motion for judgment and order regarding the accounting. They stated:

> 3. At the conclusion of this trial, the Court ordered that an accounting be conducted by Lauren Adams, who was previously appointed by this Court to serve as the Guardian of the Estate of Mrs. Young. The accounting was to be conducted for all purposes related to Ms. Young's monies, funds and accounts, including her Trust. Among other things, the accounting was to examine the commingling of funds from the Trust with the personal funds of any of the parties hereto. Furthermore, the accounting was to examine whether money belonging to Ms. Young or the Trust has been spent on the personal needs or the payment of personal debts of any of the parties hereto. The accounting was to focus on transactions dating from January 1, 2000, to December 31, 2003.
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> 4. On February 23, 2006, the Guardian of the Estate filed her Guardian's Report under seal in the Washington County Probate case involving Ms. Young, Case No. 2004-249-5. All parties hereto received a copy of the Report.

Appellees noted that Mrs. Young had died on May 28, 2006, and stated that, since that time, the guardian of the estate had filed her first and final accounting. Appellees stated that, based upon the testimony and the exhibits submitted in this proceeding; the guardian's report; the guardian's first and final accounting; and the court's order of February 23, 2006, it was clear that appellant had improperly received $168,167.70 from the trust from 2000 through 2003. They also stated that appellant had retained the Pettus Law Firm to represent him personally, in connection with the June 2003 amendment, for which the trust had paid the law firm $6,904.88; appellees asked that appellant repay the trust. They also stated that, from August 2004 through February 2006, appellant improperly took $26,579.00 of Mrs. Young's social-security income. Appellees requested judgment in the amount of $201,651.58, plus interest, which should constitute a setoff against the distributions that appellant was entitled to receive under the terms of Mrs. Young's trust and their father's trust.

Judge Mashburn's case coordinator, Ann Wood, sent a letter to appellees' counsel, appellant, and Ms. Adams on July 31, 2007, in which she stated: "Please accept this letter as notification that the above-referenced case has been scheduled for a **Hearing on Motion for Judgment re: Accounting** on **Wednesday, September 26, 2007, at 1:30 p.m**. If you have a conflict with this date, please notify me within five (5) days from receipt of this notice."

Mrs. Wood sent another letter to appellees' counsel, appellant, and Ms. Adams on August 21, 2007, stating:

> This will confirm that Mr. Young notified this office that he had a conflict with the scheduled hearing date of Wednesday, September 26, 2007, at 1:30 p.m. I advised Mr. Young that he would need to provide me with dates when he would be available for the hearing. To date, I have not received that information from Mr. Young. Therefore, the hearing on the Motion for Judgment will remain scheduled for September 26, 2007, at 1:30 p.m. I would point out that Mr. Young may participate in the hearing *via* telephone as we do have a speaker phone in the courtroom.

On September 11, 2007, appellant filed his response to the motion for judgment. He said that he had been advised by Ms. Wood that there would be a hearing on the motion at 1:30 p.m. on September 26, 2007; that he resided in New Mexico; that Ms. Wood had told him that he could participate by telephone conference; and that he intended to do so. He stated:

> 2. . . . If the scheduled hearing is intended to be no more than a status hearing to receive documents and reschedule a subsequent hearing date, Plaintiff will not be inconvenienced by his inability to attend in person. If more than a status hearing is intended, Plaintiff would expect to call six or more witnesses in his examination of the accountings. Such examination will require substantially more than one hour to complete and necessitate Plaintiff's attendance in person.
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> . . . .

3. Plaintiff has no objection to the scheduled hearing regarding an accounting but submits that the one hour time period requested by Defendants will be insufficient for the reasons stated herein. In addition, the notice of the scheduled hearing did not indicate whether the hearing would also encompass the Motion for Judgment. Plaintiff also believes that a hearing on the Motion for Judgment is premature and will also require substantial time beyond the one hour time period.

4. The Court previously ordered that an accounting be conducted by Lauren Adams, Guardian of the Estate of Helen Young. In this regard, Ms. Adams previously indicated in her Guardian's Report dated February 7, 2006 that: "As Mrs. Young's financial representative, I believe that she is entitled to an accounting prior to any decision that any one should repay any funds." Plaintiff provided documentation of all expenditures and income for periods during which he had access or control over the funds of Helen Young. To Plaintiff's knowledge, except for the information provided by him, no such accounting has been rendered and none has been provided to him. Notwithstanding the Court's Order and Ms. Adams' certificate that she provided a copy of her accounting to Plaintiff, this Court indicated by letter dated April 28, 2006 that Ms. Adams had not provided a copy to Plaintiff as she had certified. Despite repeated requests to Ms. Adams, Plaintiff never received a copy of the accounting from her. Plaintiff did receive a copy of the initial accounting rendered by Ms. Adams for periods prior to the death of Helen Young directly from the Court and none of the supporting documents which are necessary to verify the accuracy and completeness of her initial accounting. It appears that Ms. Adams has included in her distribution to Plaintiff certain funds held in trust for Plaintiff as a result of the death of his father, Paul Young Jr., which were disbursed to him by Helen Young as his trustee between 2000 and 2003. Moreover, Plaintiff believes that any accounting by Ms. Adams is incomplete because Plaintiff has never been advised of either activities subsequent to the periods covered by the first accounting or the disposition of the personal property of Helen Young, including her jewelry and furnishings, in which he has an interest. Plaintiff has never been advised of the fees taken by Ms. Adams or by Katherine Platt, Guardian of the person of Helen V. Young. Plaintiff has never received copies of income tax returns filed by Ms. Adams on behalf of Helen V. Young. Such tax returns should include the income of the Paul Young Jr. Trust which was required by both the terms of the Trust, as well as by applicable tax law to be distributed for her. Finally, Plaintiff has never been advised of the status of his request for payment of his attorney fees in initiating the guardianship proceedings on behalf of Helen V. Young which culminated in the appointments of Ms. Adams and Ms. Platt.

Appellant asked the court to confirm the intended scope of the scheduled hearing; to order Ms. Adams to provide a copy of any accounting prepared by her or used in the

preparation of her report at least two weeks before the hearing; and to defer approval of any accounting until he had been provided with those documents and given an opportunity to review them.

The circuit court (Judge Gary Carson) sent another letter on September 14, 2007, to the parties and Ms. Adams, stating:

> This will acknowledge receipt of a pleading entitled Plaintiff and Counterclaim Defendant's Response to Motion for Judgment and Order Regarding Accounting filed by Mr. Young, pro se.
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> Please be advised that this case has been set for a hearing since July 31, 2007. The notice clearly indicates that it is a hearing on Motion for Judgment re: Accounting. Accordingly, all parties are expected to be ready to proceed on **Wednesday, September 26, 2007, at 1:30 p.m.** for said hearing. Mr. Young will need to provide a telephone number to the court if he wishes to participate in the hearing by phone.

At the hearing on the motion for judgment held before Judge Carson on September 26, 2007, Mark Broaddus and Albert Grasso appeared for appellant by telephone. Mr. Broaddus asked for some direction from the court as to what type of proceeding the hearing would be. The court responded:

> I thought I made myself perfectly clear when I sent out a letter a couple of weeks ago that this was the date set for the full and complete hearing on the Counter-Plaintiff's Motion for Judgment and for Order Regarding Accounting. I fully expected to hear testimony today. This is a regular hearing where testimony is going to be adduced, exhibits are going to be offered and introduced into evidence. The parties would have a chance to call witnesses then the matter would be presented to me for a decision. That's what we're here today for.

Appellees' attorney stated that, at the January 2006 hearing, the court had ordered the guardian to conduct an accounting to determine how much, if any, money appellant had inappropriately taken from his mother; that the guardian had issued her report on February 7,

2006; and that appellees were there to present the guardian's testimony regarding her accounting in support of the judgment they sought from appellant. Mr. Broaddus responded that they were not prepared to proceed because appellant had never been "formally" provided with a copy of the accounting used in reference to the guardian's report and had never had an opportunity to do discovery or to review the supporting documents. Appellees' counsel responded: "That's just flat mistaken. The record will reflect that on April 28, 2006, the Judge himself ordered that a copy of the accounting at issue here today be sent to all parties including Mr. Young." Ms. Adams stated that, in preparing the accounting, she had used no information, other than the bank account statements and copies of checks that appellant had provided to her, and that appellant already had the information. Mr. Broaddus insisted that they did not receive that accounting and that there had been no discovery. He asked for a continuance and an opportunity to conduct discovery. The court said: "You've had a year to do discovery, at least a year."

Mr. Broaddus again stated that appellant had not received the accounting. Appellees' attorney pointed out that, in his response to the motion for judgment, appellant had acknowledged that he had received a copy of the accounting, regardless of what he had told his counsel. The court replied: "Mr. Broaddus, I don't know how things operate in Chicago, but here if you want to do discovery, you take the bull by the horns and initiate discovery. Mr. Young has had a year to do that. Over a year." Ms. Adams then stated:

> Yes, on April 25, 2006, I received a call from Judge Mashburn's case coordinator, Ann. I had submitted the accounting and my information under seal to the Court in February. They broke the seal on the 25th, called me and asked me if I had sent it out

> to the parties and I indicated no, I had not. The judge ordered Ann to send copies to all of the parties, which I understand that she did and that he has had it since that time. The court reviewed Judge Mashburn's April 28, 2006 letter and stated:
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> Mr. Robert Young has had that since April of 2006, and this matter needs to be resolved. This was the date set for the hearing. He's had every opportunity to do discovery, he's known about this accounting since Judge Mashburn made his last order, he knew it was coming and today was the date set for hearing it.

Mr. Broaddus said that, notwithstanding appellant's response to the motion, he had indicated that he was not going to be able to be present that day and that he needed additional time to appear and present witnesses. The court replied: "That's why I sent him a letter after I received that pleading making it clear we were having this hearing today. I don't know how much clearer it could be." At that point, Mr. Broaddus stated that they would respectfully decline to participate in the evidentiary hearing.

Appellees went forward with the testimony of Ms. Adams, who testified about her preparation of the guardian's report that she had submitted under seal on February 7, 2006. She said that, at that time, she had intended to put copies in the mail and had placed a certificate of service on the document; however, she did not actually send the report out after she had submitted it under seal. She stated that the report and accounting were eventually mailed by direction of the court when it unsealed them in April 2006. She said that appellant had not contacted her and that she had had no conversations with him after the report was mailed. She said that Judge Mashburn had set the parameters for her examination of the records and had requested that the accounting begin with the year 2000. She described her review of the records in detail and discussed the increased amounts of money that appellant and his family

received from 2000 to 2003. She also said that there had been changes in the handwriting on the checks, and that she believed that Mrs. Young had not actually signed some of them. She stated that the purpose of her accounting was to determine whether there was an appearance of impropriety in the way the account was handled when appellant was in charge of it and that it appeared that he had taken advantage of his mother. She also stated that appellant had received $168,167.70 in "gift overages" from the trust. Ms. Adams said that the Social Security Administration had determined that appellant had received $26,579 of his mother's social-security income, and that appellant had agreed to write her a check for those funds, but did not do so; ultimately, he informed her that he would not return the money because he had spent it. Ms. Adams also stated that it was appropriate that appellant repay the $6,904.88 that the guardianship had paid to Mr. Pettus for work on a trust document that was later ruled invalid.

Ms. Adams further testified that Mrs. Young had a pour-over will and that it would be appropriate for her trust to receive the judgment from appellant, to be applied as an offset against any distributions from the trust to him. The court asked her: "What is your opinion, Ms. Adams, as to who the recipient should be if a judgment is simply granted in favor of the counter-plaintiffs?" She replied that the trust should receive the money diverted from the trust account, and that the social security money and the funds paid to Mr. Pettus would have been assets of the guardianship estate; however, steps could be avoided by simply awarding the judgment to the trust. She stated: "In all practical purposes they are going to be the same because a pour-over will is going to make all claims of the guardianship claims of her trust as well."

The court entered into evidence its findings of fact and conclusions of law rendered on January 31, 2006, and stated:

> I find Mr. Robert Young has misappropriated funds from his mother's trust to the detriment of the other two sons who are beneficiaries. Therefore, the Court is going to give judgment in favor of the Helen V. Young Trust. Mr. Elrod, you will total the figures of $168,167.70 for overages, the $26,579 in Social Security checks, and the $6,904.88 paid to Lamar Pettus.

On October 9, 2007, the trial court entered judgment against appellant for the trust in the amount of $201,651.58, plus prejudgment interest, and attorney's fees of $65,300. Appellant then pursued this appeal.

Appellant first argues that the trial court abused its discretion in refusing to continue the September 26, 2007 hearing, claiming that he was caught "flat-footed" and was unaware that the hearing would include the introduction of evidence and the taking of testimony. Appellant contends that he was "ambushed" and that the denial of a continuance prevented him from conducting discovery and protecting his rights.

The grant or denial of a motion for continuance is within the sound discretion of the trial court. *Looney v. Rabe*, 100 Ark. App. 326, __ S.W.3d __ (2007). The court's decision on a continuance will not be reversed absent an abuse of discretion amounting to a denial of justice. *Id.* An appellant must show prejudice from the denial of a continuance, and when a motion is based on a lack of time to prepare, the appellate court considers the totality of the circumstances. *Id.* Lack of diligence is a factor to consider in denying a continuance. *Dunaway v. Garland County Fair & Livestock Show Ass'n, Inc.*, 97 Ark. App. 181, 245 S.W.3d 678 (2006). Also, when the continuance is based on a request for additional discovery, the appellant must

not only show that there has been an abuse of discretion but also that the additional discovery would have changed the outcome of the trial. *Id.*

We have no hesitation in holding that the trial court did not abuse its discretion in denying the continuance. It is clear that, in September 2007, appellant should have completely understood what the hearing would involve. The trial on the merits was in October 2005; the trial court issued its findings and conclusions in January 2006; the accounting was mailed to appellant in April 2006; and the motion for judgment clearly expressed what appellees sought from him. The trial court could not have made the nature of the hearing any clearer. It is true that appellant acted pro se for much of this lawsuit, but that is no excuse. *See Elder v. Mark Ford & Assocs.*, __ Ark. App. __, __ S.W.3d __ (Oct. 29, 2008); *Collins v. St. Vincent Doctors*, 98 Ark. App. 190, 253 S.W.3d 26 (2007). Only an utter lack of diligence could explain his failure to even begin discovery about the accounting long before the hearing.

In his second point, appellant argues that the notice he received of the hearing was so vague that it denied him procedural and substantive due process. Appellant, however, did not raise this argument below. We will not address arguments, even those with a constitutional dimension, for the first time on appeal. *Smith v. Thomas*, 373 Ark. 427, __ S.W.3d __ (2008); *see also Hartsfield v. Lescher*, __ Ark. App. __, __ S.W.3d __ (Nov. 5, 2008).

Appellant argues in his third point that the trial court abused its discretion in denying him the opportunity to "explore the full extent of the accounting that Judge Mashburn ordered rather than the limited preliminary accounting that was put before Judge Carson." He asserts that Judge Carson was misled to believe that the guardian's "preliminary" report was the only

accounting relevant to this proceeding. He states that Judge Mashburn's findings did not set forth the purpose of the accounting and that it was not supposed to be limited to a determination of how much money appellant owed the trust.

This point is related to the continuance argument, and the same reasoning applies here. Appellant had more than enough time to conduct discovery about the accounting, but simply did not use the opportunity to do so. Given his refusal to participate in the hearing and challenge the accounting at that time, he cannot contest its reliability on appeal.

Appellant next contends that the judgment is based upon a clearly erroneous finding of fact, that Ms. Adams filed *any* guardian's report in this proceeding. We disagree. The standard of review of a circuit court's findings of fact after a bench trial is whether those findings are clearly erroneous. *Greenwood Sch. Dist. v. Leonard,* 102 Ark. App. 324, __ S.W.3d __ (2008). Ms. Adams testified at the hearing that she filed this guardian's report in this proceeding, and the court's finding on this issue is not clearly erroneous.

Appellant also argues that Judge Mashburn ordered an accounting for all purposes, including the trust, and that the "preliminary" guardian's report that was "never filed" in this proceeding was deficient in numerous respects. Again, we find appellant's argument unpersuasive. Although the October 2005 hearing on the merits is not part of this record, Ms. Adams testified at the September 2007 hearing that it was at that hearing that the trial court established the parameters of the accounting she was to perform. She made it clear that, even though she mistakenly placed the guardianship docket number on the report, she prepared that report and accounting for this proceeding and that it was not preliminary.

Appellant next argues that the trial court erred in awarding judgment to the trust for two claims belonging to the guardianship, which was not a party to this proceeding: the amount paid by the guardianship for Mr. Pettus's attorney's fees, and the social security income. We see no reversible error in the award. Ms. Adams testified that, although two of the claims belonged to the guardianship, the fact that Mrs. Young's will had a "pour-over" clause, which therefore made it a claim of the trust, made it appropriate to award the entire judgment to the trust.

Appellant contends in his next point that the court was not authorized to award attorney's fees under a statute that was enacted after the trust was created and after this litigation was filed. Arkansas Code Annotated § 28-73-1004 (Supp. 2007), which was effective on August 12, 2005, provides: "In a judicial proceeding involving the administration of a trust, a court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

The applicable date of that statute is addressed in Arkansas Code Annotated § 28-73-1106 (Supp. 2007):

> (a) Except as otherwise provided in this chapter, on September 1, 2005:
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> (1) this chapter applies to all trusts created before, on, or after September 1, 2005;
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> (2) this chapter applies to all judicial proceedings concerning trusts commenced on or after September 1, 2005;
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> (3) this chapter applies to judicial proceedings concerning trusts commenced before September 1, 2005, unless the court finds that application of a particular provision of

> this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this chapter does not apply and the superseded law applies;
>
> (4) any rule of construction or presumption provided in this chapter applies to trust instruments executed before September 1, 2005, unless there is a clear indication of a contrary intent in the terms of the trust; and
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> (5) an act done before September 1, 2005, is not affected by this chapter.

Appellant's construction of these statutes is faulty. It is clear that the General Assembly intended that attorney's fees may be awarded in cases involving trusts created before September 1, 2005, and litigation initiated before that date, unless the trial court made a finding justifying its refusal to award them. The trial court made no such finding here. Additionally, we note that attorney's fees statutes are procedural in nature and instantly applicable to existing causes of action. *City of Ozark v. Nichols*, 56 Ark. App. 85, 937 S.W.2d 686 (1997).

Appellant also argues that the attorney's fees were excessive, not supported by substantial evidence, and amounted to an abuse of discretion. He contends that the trial court simply "rubber-stamped" the fees claimed by appellees' attorneys, and that the bill erroneously included some services rendered in relation to Mrs. Young's probate proceedings and the litigation over Paul Young, Jr.'s trust. The decision to award attorney's fees and the amount awarded are reviewed under the abuse-of-discretion standard. *Hartsfield v. Lescher*, *supra*. A trial judge is not required to award attorney's fees. *Meyer v. CDI Contractors, LLC*, 102 Ark. App. 290, __ S.W.3d __ (2008). Because of the trial judge's intimate acquaintance with the trial proceedings and the quality of service rendered by the prevailing party's counsel, we usually recognize the superior perspective of the trial judge in determining whether to award attorney's

fees. *Id*. Appellant has not demonstrated how the trial judge abused his discretion in making this award, especially in light of the years spent in litigation and the size of the judgment.

Affirmed.

ROBBINS and BAKER, JJ., agree.