

Orphans' Court for Garrett County
Case No. 12998

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 00057

September Term, 2018

BERNADETTE LIVINGSTON

v.

THE ESTATE OF BERNARD
KACZOROWSKI

Kehoe,
Berger,
Reed,

JJ.

Opinion by Reed, J.

Filed: September 25, 2019

*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.

Joseph Kaczorowski (hereinafter “Appellee”)¹ was appointed as special administrator for the Estate of Bernard Kaczorowski. Subsequently, Appellee filed a Petition to Approve Attorneys’ Fees on January 4, 2018, with the Register of Wills for Garrett County. Appellee was awarded \$10,000 and on January 22, 2018, Bernadette Livingston (hereinafter “Appellant”) filed a Response to Appellee’s Petition to Approve Attorneys’ Fees. On February 13, 2018, the Orphans’ Court ordered Appellant to pay \$10,000 in attorneys’ fees. It is from this decision that Appellant files this timely appeal. In doing so, Appellant presents the following question for our review, which we have rephrased for clarity:²

- I. Did the Orphans’ Court err when it granted Appellee’s Petition to Approve Attorneys’ Fees?

For the foregoing reasons, we reverse the decision of the Orphans’ Court and remand this case for findings in accordance with this decision.

FACTUAL AND PROCEDURAL BACKGROUND

This case initiated with a competition between family members to become the

¹ Appellee failed to appear for oral argument.

² Appellant presents the following question:

1. Did the Orphans’ Court err when it granted Appellee’s attorney fees when Appellee was the special administrator of the estate and not the personal representative of the estate?
2. Did the Orphans’ Court err when it granted Appellee’s attorney fees when the attorney fees relate to a matter filed and appealed in Joseph Kaczorowski’s individual name in which Joseph Kaczorowski never filed a request to substitute the Estate of Bernard Kaczorowski as a party pursuant to Md. Rule 8-401?

guardian of Bernard Kaczorowski, who was diagnosed with dementia. On January 12, 2015, Appellee filed a Petition for Guardianship of the Property of Bernard F. Kaczorowski. Appellee alleged that his sister, Appellant, was using invalid power of attorney to gain control of their father, Bernard Kaczorowski's, property. In Appellant's response, she denied Appellee's claims and argued that Appellee had been taking advantage of their father. Appellant also proposed that other relatives be considered for guardian of both Bernard Kaczorowski's person and property. On January 21, 2016, the Circuit Court for Garrett County issued an order appointing Harold Livingston, Appellant's husband, as guardian for Bernard's property.³

On June 12, 2016, Bernard Kaczorowski passed away and Appellee subsequently, filed a petition for probate and was appointed as personal representative. In response, Appellant filed a Petition to Caveat the Last Will and Testament of Bernard Kaczorowski to reduce Appellee's role to special administrator, who has limited powers.⁴ **[App't Br. 2]**. On July 14, 2016, Harold Livingston filed a Petition for Reimbursement of Attorneys' Fees that he and Appellant incurred between February 27, 2015, and August 31, 2015. The circuit court awarded Harold Livingston and Appellant \$31,173 in attorneys' fees. Appellee appealed the circuit court's decision. This Court in *Kaczorowski v. Livingston*,⁵

³ *Kaczorowski v. Livingston*, 2017 WL 6371666 (2017).

⁴ “A hearing on the Petition to Caveat the Last Will and Testament was set to be heard before the Circuit Court for Garrett County; however, the matter was postponed as Joseph Kaczorowski resigned on March 15, 2018 as special administrator of the estate.” **[App't Br. 2]**.

⁵ *Kaczorowski v. Livingston*, 2017 WL 6371666 (2017).

upheld the circuit court’s decision to award attorneys’ fees to Appellant and her husband.

On January 4, 2018, Appellee filed a Petition to Approve Attorneys’ Fees from March 22, 2017 through December 4, 2017 (from work entirely related to *Kaczorowski v. Livingston*). Appellant subsequently, filed a Response to Appellee’s Petition to Approve Attorneys’ Fees. On February 13, 2018, the Orphans’ Court ordered Appellant to pay \$10,000 in attorneys’ fees. Appellant has filed this timely appeal.

STANDARD OF REVIEW

The Court of Appeals stated in *Piper Rudnick, LLP v. Hartz*, 386 Md. 201 (2005):

An orphans’ court is a tribunal of special limited jurisdiction and can exercise only the authority and power expressly provided to it by law. *See* § 2–102(a); *Radcliff v. Vance*, 360 Md. 277, 286, 757 A.2d 812, 816 (2000); *Mudge v. Mudge*, 155 Md. 1, 3, 141 A. 396, 397 (1928). As such, an orphans’ court has the power to direct the allowance of counsel fees out of the estate only when authorized by statute. *Clark v. Rolfe*, 279 Md. 301, 305, 368 A.2d 463, 466 (1977); *Lusby v. Nethken*, 262 Md. 584, 585, 278 A.2d 552, 553 (1971); *Mudge*, 155 Md. at 3, 141 A. at 397. An orphans’ court must exercise sound judgment and discretion in determining whether to award counsel fees. *Wolfe v. Turner*, 267 Md. 646, 653, 299 A.2d 106, 109 (1973); *Lusby*, 262 Md. at 586, 278 A.2d at 553.

Two statutes authorize the orphans’ court to allow attorney’s fees from the estate: §§ 7–602 and 7–603.

Id. at 216-218.

“[W]hile the trial court is granted broad discretion in granting or denying equitable relief, where an order [of the trial court] involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court’s conclusions are ‘legally correct’ under a *de novo* standard of review.” *Schisler v. State*, 394 Md. 519, 535 (2006).

DISCUSSION

A. Parties' Contentions

Appellant argues that the “Orphans’ Court erroneously awarded attorney[s’] fees to Appellee” because Appellee was a special administrator and not the personal representative of the estate. [App’t Br. 3]. Appellant maintains that Appellee was not the personal representative of the Estate of Bernard Kaczorowski since September 26, 2016. Appellant contends that the filing of her Petition to Caveat the Last Will and Testament of Bernard Kaczorowski on September 26, 2016, reduced Appellee’s role as personal representative to special administrator pursuant to Md. Code Ann. Est. & Trust § 5-207(b), § 6-307(b). Appellant maintains that Appellee’s role as special administrator is essential because the powers of a special administrator is limited. Specifically, Appellant contends that special administrators do not have “the power to engage in litigation.” [App’t Br. 4]. As such, Appellant asserts that Appellee had no authority to file a “Petition to Approve Attorney[s’] Fees relat[ed] to... *Kaczorowski v. Livingston*” because Appellee’s role was reduced to special administrator on September 26, 2016.

Finally, Appellant argues that the Orphans’ Court “erroneously awarded attorney[s’] fees to Appellee since the litigation expenses at issue were for Joseph Kaczorowski in his individual name and not as special administrator of the Estate of Bernard Kaczorowski.” [App’t Br. 6]. Specifically, Appellant maintains that “if [Appellee] wanted to have the Estate of Bernard Kaczorowski serve as the appellant in the 2016 attorney fee matter (i.e. *Kaczorowski v. Livingston*...) he would have needed to request to substitute parties pursuant to Md. Rule 8-401.” [App’t Br. 6]. Appellant

contends that Md. Code Ann. Est. & Trust § 7-603 only allows personal representatives to be paid attorneys' fees and "does not allow interested persons of an estate to be paid attorney[s'] fees." [App't Br. 7].

Appellee responds that the Orphans' Court did not err when it awarded attorneys' fees to Appellee because Appellee is an interested party and incurred fees by providing services on behalf of the estate. Specifically, Appellee asserts that as special administrator he continued to work on behalf of the estate and incurred fees for doing so. Appellee argues that pursuant to Md. Code Ann. Est. & Trust § 6-403 the special administrator assumes the duties of the personal representative and thus, the Orphans' Court did not err when it awarded Appellee attorneys' fees for his services to manage the property for the estate. Additionally, Appellee asserts that this Court noted in *Kaczorowski v. Livingston*, "that courts are not limited by Md. Code Ann. Est. & Trust in the power to reimburse non-fiduciaries for attorney[s'] fees incurred by an interested party for the purpose of preserving the estate's assets." Appellee states that the facts in *Kaczorowski v. Livingston* are identical to the facts in this case. Specifically, Appellee asserts that Harold Livingston was an interested party and this Court reimbursed him for attorneys' fees that he incurred for services rendered on behalf of the estate. As such, Appellee should be entitled to attorneys' fees.

Finally, Appellee contends that "Appellant failed to properly notify ... Appellee of the pending appeal with a certificate of service" and that "[t]he attorney for Appellant has established a willful course of conduct of ignoring the service requirement in order to prejudice the opposing side." [App'e Br. 7]. Appellee asserts that three successive petitions

for attorneys’ fees were made without Appellee being served. Specifically, Appellee maintains that “this appeal was not served on ... Appellee and the certificate of service only noted the current special administrator.” Appellee contends that he learned about the appeal by seeking out court filed pleadings. Moreover, Appellee argues that “Appellant failed to note the attorney of record for Appellee, Arnold Phillips, Esq., on the certificate of service for Appellant’s appeal to reverse an award of attorney[s’] fees.” Appellee further argues that Appellant’s attorney has shown a willful disregard for Md. Rule 1-323, which has resulted in clear prejudice against Appellee. As such, Appellee asserts that this Court “should not allow an appeal to be heard when Appellant willfully fails to properly serve ... Appellee.”

B. Analysis

i. Orphans’ Court Awarding Attorneys’ Fees to Appellee as Special Administrator

Appellant maintains that the “Orphans’ Court erroneously awarded attorney[s’] fees to Appellee.” Specifically, Appellant contends that Appellee was special administrator of the estate and as such, Appellee did not have the power to engage in litigation. Thus, Appellant argues that Appellee had no authority to file a “Petition to Approve Attorney[s’] Fees relat[ed] to... *Kaczorowski v. Livingston*” because Appellee’s role was reduced to special administrator on September 26, 2016.

On June 27, 2016, Appellee filed a petition for probate and was appointed as personal representative for the Estate of Bernard Kaczorowski. On September 26, 2016, Appellant filed a Petition to Caveat the Last Will and Testament of Bernard Kaczorowski.

A filing of a Petition to Caveat a will reduces the personal representative of the estate to the role a special administrator. Md. Code Ann. Est. & Trust § 5-207 (b) and § 6-307 (b) prescribes as follows:

Effect of petition

(b) If the petition to caveat is filed before the filing of a petition for probate, or after administrative probate, it has the effect of a request for judicial probate. If filed after judicial probate the matter shall be reopened and a new proceeding held as if only administrative probate had previously been determined. In either case the provisions of Subtitle 4 of this title apply.

Md. Code Ann. Est. & Trust § 5-207 (b).

Interim powers of representative

(b) Subject to an order in the proceeding for judicial probate, a personal representative appointed previously has the powers and duties of a special administrator until the appointment of a personal representative in the judicial probate proceeding.

Md. Code Ann. Est. & Trust § 6-307 (b).

It follows that Appellee's role as personal representative was reduced to special administrator for the Estate of Bernard Kaczorowski on September 26, 2016.

Md. Code Ann. Est. & Trust § 6-403 sets forth the powers and duties of a special administrator as follows:

A special administrator shall collect, manage, and preserve property and account to the personal representative upon his appointment. A special administrator shall assume all duties unperformed by a personal representative imposed under Title 7, Subtitles 2, 3, and 5 of this article, and has all powers necessary to collect, manage, and preserve property. In addition, a special administrator has the other powers designated from time to time by court order.

As noted above, the code states that a special administrator assumes the duties of the

personal representative as noted in Title 7, Subtitles 2, 3, and 5 of the code and “has all powers necessary to collect, manage, and preserve property.” However, a special administrator does not have the powers pursuant to Md. Code Ann. Est. & Trust § 7-401-7-404. Specifically, a special administrator does not have the power to engage in litigation. Md. Code Ann. Est. & Trust § 7-401(y).

As noted above, Appellee’s role was reduced to special administrator on September 26, 2016. Appellee’s Petition to Approve Attorneys’ Fees relates to *Kaczorowski v. Livingston*, 2017 WL 6371666 (2017), from the period of March 22, 2017 through December 4, 2017. During this period, Appellee was the special administrator for the Estate of Bernard Kaczorowaski. It follows that the Orphans’ Court abused its discretion when it awarded Appellee attorneys’ fees as special administrator for the Estate of Bernard Kaczorowaski because special administrators are not allowed to engage in litigation nor did Appellee seek authorization to engage in litigation from the Orphans’ Court.

ii. Approval of Attorneys’ Fees

Appellant contends that the Orphans’ Court erred when it granted Appellee’s Petition for Attorneys’ Fees. Specifically, Appellant contends that Appellee’s petition stems from *Kaczorowski v. Livingston*, No. 2126, in which Appellee litigated the matter in his individual capacity and not as special administrator for the Estate of Bernard Kaczorowski.

On November 22, 2016, the Circuit Court for Garrett County awarded Harold Livingston, Appellant’s husband, attorneys’ fees in the Bernard Kaczorowaski guardianship matter. Appellee in his individual capacity appealed this decision. In

Kaczorowski v. Livingston, No. 2126, this Court in an unreported opinion identified Appellee as a party in his individual capacity and not as a special administrator for the estate. The record shows that Appellee's Petition for Attorneys' Fees was for the guardianship matter. Appellee filed his Petition for Attorneys' Fees on behalf of the Estate of Bernard Kaczorowski and not in his individual capacity. Appellee was required to request to substitute parties pursuant to Maryland Rule 8-401 to have the Estate of Bernard Kaczorowski serve as the appellant in *Kaczorowski v. Livingston*, No. 2126. Appellee failed to do so.

Md. Code Ann. Est. & Trust §§ 7-602, 7-603, and 7-604 addresses the awarding of attorneys' fees for estates. Md. Code Ann. Est. & Trust § 7-602 addresses the expenses for estate administration. Here, Appellee's claim was for attorneys' fees, not for the administration of the estate. It follows that Md. Code Ann. Est. & Trust § 7-602 is not applicable. Md. Code Ann. Est. & Trust § 7-603 relates to litigation expenses incurred by the personal representative of the estate. As noted above, Appellee was not the personal representative of the estate during the timeframe where Appellee is contesting reimbursement for attorneys' fees. Md. Code Ann. Est. & Trust § 7-604 relates to payment of attorneys' fees relating to estate administration contested by all interested parties, which does not apply here.

It follows, that the Orphans' Court erred when it awarded attorneys' fees to the Estate of Bernard Kaczorowski because Appellee failed to substitute parties to have the estate serve as a party to the suit. Moreover, Appellee is not entitled to attorneys' fees in his individual capacity as a matter of law. Md. Code Ann. Est. & Trust § 7-603 prescribes:

When a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith and with just cause, he shall be entitled to receive his necessary expenses and disbursements from the estate regardless of the outcome of the proceeding.

In *Kaczorowski v. Livingston*, No. 2126, Appellee represented himself in his individual capacity and any attorneys' fees incurred were not on the behalf of the estate. It follows that the Orphan Court committed an error of law when it awarded the estate attorneys' fees because Appellee represented himself in his individual capacity in *Kaczorowski v. Livingston*, No. 2126.

iii. Service for the Appeal of the Petition for Attorneys' Fees

Appellee contends that “Appellant failed to properly notify ... Appellee of the pending appeal with a certificate of service” and that “[t]he attorney for Appellant has established a willful course of conduct of ignoring service requirement in order to prejudice the opposing side.” Appellee argues that “this appeal was not served on ... Appellee and the certificate of service only noted the current special administrator.” Appellee maintains that Appellant’s attorney has shown a willful disregard for Md. Rule 1-323, which has resulted in clear prejudice against Appellee. As such, Appellee asserts that this Court “should not allow an appeal to be heard when Appellant willfully fails to properly serve ... Appellee.” Appellee further argues that Appellant failed to serve him on three other occasions.

On December 13, 2017, a panel of this Court addressed whether Appellee was served on the three occasions that he alleges Appellant failed to serve him. We stated the following:

[Appellee] first argues that [Appellant] violated Md. Rule 1–323 by failing to serve the third Petition for Reimbursement [of] Attorney’s Fees on [Appellee] or [Appellee’s] counsel. We initially note that Rule 1–323 refers to proof of service, and provides that the clerk of court “shall not accept for filing any pleading or other paper requiring service” without an appropriate certificate of service (or waiver of service). We presume that [Appellee] intended to rely on Rule 1–321, which requires parties to serve “every pleading and other paper filed after the original pleading” upon all other parties to the action. *See Dir. of Fin. of Baltimore City v. Harris*, 90 Md. App. 506, 514 (1992) (distinguishing the failure to serve another party from the failure to provide adequate proof of service). In guardianship proceedings, “[p]arty” means the respondent, petitioner, guardian, conservator, or any other person allowed by the court to participate in a guardianship or protective proceeding.” ET § 13.5–101. As the petitioner before the circuit court, [Appellee] is correct that he was, as a party, entitled to be served with appellee’s petition for attorney’s fees.

That [Appellee] was entitled to, but did not receive, service of the petition pursuant to Rule 1–321 does not automatically mean that the circuit court erred by denying his motion to strike. “Under Rule 1–201, where no consequences are prescribed by the rule for noncompliance with mandated conduct, the court may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule.” *Lovero v. Da Silva*, 200 Md. App. 433, 448 (2011).

Here, despite not being served, [Appellee] learned of the petition, timely responded, and participated in the hearing. Under these circumstances, we fail to see how [Appellee] was harmed or otherwise prejudiced by [Appellant’s] failure to comply with the service requirements of Rule 1–321. We therefore conclude that the circuit court did not err by declining to strike appellee’s petition for attorney’s fees.

See Kaczorowski, 2017 WL 6371666 at *3. As it pertains to Appellant not properly serving Appellee about this current appeal, Appellee’s argument has no merit. Specifically, Appellee resigned as special administrator of the Estate of Bernard Kaczorowski on March 15, 2018, and on May 29, 2018, Nicholas Montelone, Esq. was appointed to be special administrator of the estate. Appellee through his attorney requested attorneys’ fees in his capacity as special administrator for the Estate of Bernard Kaczorowski. On June 11, 2018, Appellant served the successor special administrator, Nicholas Montelone, Esq. As such

Appellant serving the successor special administrator was appropriate because Appellee resigned as special administrator on March 15, 2018 and Montelone was appointed as special administrator on May 29, 2018.

In the alternative, Appellee in his brief stated that that he learned about the appeal by seeking out court filed pleadings. As we stated in *Lovero v. Da Silva*, “[u]nder Rule 1–201, where no consequences are prescribed by the rule for noncompliance with mandated conduct, the court may determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule.” *Da Silva*, 200 Md. App. at 448 (2011). Here despite Appellee not being served in Appellee’s individual capacity, Appellee knew about Appellant filing an appeal through court filed pleadings and he filed a timely response. Under these specific facts, this Court fails to see how Appellee was harmed or prejudiced by Appellant not serving him in his individual capacity.

The judgment of the Orphans’ Court for Garrett County is reversed.

**JUDGMENTS OF THE ORPHANS’ COURT
FOR GARRETT COUNTY REVERSED;
COSTS TO BE PAID BY APPELLEE.**