Circuit Court for Garrett County
Case No. 11-C-15-14102

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2126

September Term, 2016

JOSEPH KACZOROWSKI

v.

HAROLD LIVINGSTON,
GUARDIAN OF THE PROPERTY OF
BERNARD KACZOROWSKI

Woodward, C.J.,
Beachley,
Fader,

JJ.

Opinion by Beachley, J.

Filed: December 13, 2017

Joseph Kaczorowski, appellant, appeals a decision from the Circuit Court for Garrett County which awarded attorney's fees in a guardianship case for services rendered prior to the appointment of a guardian. Appellant timely appealed and raises three issues for our review, which we have rephrased as follows:[1]

1. Did the trial court err by denying appellant's Motion to Strike [Appellee's] Petition for Reimbursement of Attorney Fees for failure to note appellant's attorney of record on the certificate of service?

2. Did the trial court err by awarding attorney's fees incurred by the guardian's attorney-in-fact after the filing of the guardianship but prior to the appointment of guardian?

3. Did the trial court err:

   A. by admitting into evidence a photocopy of the power of attorney, and

[1] We reprint appellant's three questions verbatim:

I. Did the trial court err when it denied the Defendant's Motion to Strike Plaintiff's Petition for Reimbursement of Attorney Fees when Counsel for Plaintiff failed to note the attorney of record for the Defendant, Arnold Phillips, on the certificate of service for Plaintiff's Petition for Reimbursement of Attorney Fees?

II. Did the trial court err when it awarded attorney fees to Plaintiff when the attorney fees were not incurred on behalf of the guardian, but billed on behalf of the guardian's spouse, prior to the guardianship, and therefore not incurred on behalf of, or as a result of the guardianship?

III. Did the trial court err by admitting into evidence, and finding valid a power of attorney naming Bernadette Livingston attorney [sic] Bernard Kaczorowski, where Appellants [sic] attorney was not permitted to inquire into the witnesses [sic] knowledge of the incompetence of Bernard Kaczorowski at the time of the execution of the document?

B. by limiting appellant's cross-examination of the guardian concerning his knowledge of Bernard Kaczorowski's competence to execute the power of attorney?

Appellee Harold Livingston, appellant's brother-in-law and former guardian of the property for Bernard Kaczorowski ("Bernard"), moves to dismiss the appeal, arguing that appellant lacks the authority to appeal. We deny appellee's motion to dismiss, but affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a competition between family members to become the guardian of Bernard, who, prior to his passing, had been diagnosed with senile dementia. Appellant, Bernard's son, filed a Petition for Guardianship of the Property of Bernard F. Kaczorowski in the Circuit Court for Garrett County on January 12, 2015.[2] In the petition, appellant alleged that he felt compelled to apply for the guardianship because his sister, Bernadette Livingston ("Bernadette"), was using an allegedly invalid power of attorney to gain control of Bernard's property.

On April 6, 2015, Bernadette filed a response to appellant's petition. In her response, Bernadette denied that she had taken any improper actions regarding Bernard's property, and instead claimed appellant had been taking advantage of their father.

[2] The case has a somewhat convoluted procedural history due to a related case filed in the Circuit Court for Baltimore County. We need not recite that history because, in resolving this appeal concerning the attorney's fees awarded in the guardianship, it is sufficient to note that appellant filed his Petition for Guardianship of the Property of Bernard in the Circuit Court for Garrett County on January 12, 2015.

Bernadette accused appellant, as the representative payee for Bernard's social security income and veteran pension income, of using their father's income for his own personal purposes rather than for Bernard's benefit. While Bernadette agreed that Bernard required a guardian, she argued that appellant was not an appropriate choice, and instead requested that the court appoint her guardian of both Bernard's person and property.

On August 17, 2015, Bernadette filed an Amended Response, in which she withdrew her request to become Bernard's guardian of the property and proposed that other relatives be considered for guardian of the person (with Bernadette as an alternate choice). That same day, a group consisting of three other relatives filed a Request to be Appointed as Guardian of the Property and Person for Bernard F. Kaczorowski. The group consisted of: appellee, Bernadette's husband; Brian Livingston ("Brian"), Bernard's grandson; and Alicia Wofford ("Alicia"), appellant's daughter and Bernard's granddaughter. The group proposed that appellee be the first choice for guardian of the property, with Brian second, and Alicia third. The group proposed the same ranking for guardian of the person, with Bernadette as an alternate choice. All three members of the group agreed that appellant was not fit to serve as Bernard's guardian of the property.[3]

Following a hearing, the Circuit Court for Garrett County issued an order on September 29, 2015, naming appellee as Bernard's temporary guardian of the property, and the Garrett County Area Agency on Aging as Bernard's temporary guardian of the

[3] Appellant only petitioned to become Bernard's guardian of the property.

person. After a subsequent hearing on January 4, 2016, the circuit court issued an order on January 21, 2016, appointing appellee as guardian of the property for Bernard.

Bernard passed away on June 12, 2016. On July 14, 2016, appellee filed a Petition for Reimbursement [of] Attorney's Fees, seeking reimbursement for $31,173.15 in attorney's fees that he and Bernadette had incurred between February 27, 2015, and August 31, 2015 (a period of time after appellant filed his guardianship petition, but before appellee was appointed guardian of the property).[4] On August 12, 2016, appellant filed both a motion to strike the petition for attorney's fees and a response to the petition.

On November 21, 2016, the circuit court held a hearing on appellee's petition for reimbursement of attorney's fees. At the close of the hearing, the court found that Bernadette, as Bernard's attorney-in-fact, reasonably incurred the requested attorney's fees to protect Bernard's assets. The following day, the court issued an order reimbursing appellee attorney's fees in the amount of $31,173.15. Appellant timely appealed and, as stated *supra*, appellee filed a motion to dismiss the appeal.[5]

[4] During all relevant times, appellee and Bernadette were represented by the same attorney.

[5] At oral argument, appellant's counsel stated that appellant was also challenging two earlier orders for attorney's fees, both dated June 24, 2016, in the respective amounts of $5,000.00 and $2,500.00. Because appellant failed to sufficiently articulate in his brief any challenges to those two orders, we decline to consider them on appeal. *See* Md. Rule 8-504(a)(6); *Anne Arundel Cty. v. Harwood Civic Ass'n*, 442 Md. 595, 614 (2015).

DISCUSSION

We first address appellee's motion to dismiss. In his motion, appellee notes that on appellant's civil appeal information report, appellant identified himself as the personal representative of Bernard's estate.[6] Appellee also notes that on September 26, 2016, Bernadette filed a Petition to Caveat Will with the Orphans' Court, which reduced appellant's powers and duties from those of a personal representative to those of a special administrator, pursuant to Md. Code (1974, 2011 Repl. Vol.), § 6-307 of the Estates and Trusts Article ("ET"). Appellee contends that once Bernadette filed her caveat petition, appellant lost the authority to bring the instant appeal because a special administrator does not have the power to pursue litigation on behalf of the estate. *See* ET § 6-403.

We are not persuaded. A party is not bound by statements made in an information report. "Information contained in an information report . . . shall not (1) be treated as admissions, (2) limit the disclosing party in presenting or arguing that party's case, or (3) be referred to except at a scheduling conference." Md. Rule 8-205(f); *Williams v. Hofmann Balancing Techniques, Ltd.*, 139 Md. App. 339, 357 (2001).

[6] In the circuit court, appellant identified himself as both an interested person and as the personal representative of Bernard's estate. Appellee argues that, in this Court, appellant has identified himself in the information report and other filings as the personal representative of Bernard's estate. To the extent, if any, that appellee's observation is relevant, we note that this practice was not uniform. Appellant filed his notice of appeal simply as "Joseph Kaczorowski," and the caption on his appellate brief and record extract reflect the same.

Furthermore, the Court of Appeals has noted that "one who has sufficient interest may appeal even though he is not a party of record." *Kreatchman v. Ramsburg*, 224 Md. 209, 216 (1961) (citing *Hall v. Jack*, 32 Md. 253 (1870)). Here, due to his status as a beneficiary of Bernard's will, appellant has a direct financial interest in whether attorney's fees are paid from the estate's assets. Even if appellant were not a party of record in the circuit court, he could still appeal the court's order awarding attorney's fees as an interested person. We therefore deny appellee's motion to dismiss, and proceed to address the arguments raised in appellant's brief.

I. Service of the Petition for Attorney's Fees

Appellant first argues that appellee violated Md. Rule 1-323 by failing to serve the third Petition for Reimbursement [of] Attorney's Fees on appellant or appellant'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 appellant 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.[7] *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

[7] Because the Petition for Reimbursement [of] Attorney's Fees contained a certificate of service verifying service to parties other than appellant, the clerk correctly accepted the pleading for filing.

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, appellant is correct that he was, as a party, entitled to be served with appellee's petition for attorney's fees.

That appellant 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, appellant learned of the petition, timely responded, and participated in the hearing. Under these circumstances, we fail to see how appellant was harmed or otherwise prejudiced by appellee'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.

II. Appropriateness of Attorney's Fees

Prior to the appointment of appellee as guardian of the property, Bernadette was Bernard's attorney-in-fact.[8] On appeal, appellant argues that the circuit court erred by

[8] Appellee correctly points out that Bernadette held a durable power of attorney, which did not terminate upon the appointment of a guardian. *See* ET § 17-112. Rather, after the appointment of appellee as guardian of the property, Bernadette had to account to appellee rather than to Bernard. ET § 17-105(e)(1).

awarding attorney's fees to appellee because the fees at issue were incurred by Bernadette rather than by appellee, and also because the fees were incurred before the guardianship existed. According to appellant, Bernadette was a third party at the time she incurred the attorney's fees, and therefore the legal fees she incurred cannot be reimbursed through the guardianship.

"An award of attorney's fees will not be disturbed unless the court 'exercised [its] discretion arbitrarily or [its] judgment was clearly wrong.'" *Ochse v. Henry*, 216 Md. App. 439, 456 (2014) (quoting *Danziger v. Danziger*, 208 Md. 469, 475 (1955)).

Under ET § 15-102(o), a fiduciary:

> may employ for reasonable compensation agents, attorneys, auditors, investment advisors or other persons with special skills, to advise or assist the fiduciary in the performance of his administrative duties, but no attorney's fee in an amount exceeding $50 shall be paid in a fiduciary estate administered under court jurisdiction unless the amount of the fee has been first approved by order of court.

This provision is applicable to both Bernadette as Bernard's attorney-in-fact, and to appellee as guardian of the property. ET § 15-102(a)(3)(i); ET § 13-213. "Statutory construction begins with the plain language of the statute, and ordinary, popular understanding of the English language dictates interpretation of its terminology." *Kortobi v. Kass*, 410 Md. 168, 177 (2009) (citation and quotation marks omitted). Here, the plain language of ET § 15-102(o) provides that a fiduciary may employ an attorney and request payment of concomitant fees as long as the services were incurred "to advise or assist the fiduciary in the performance of his [or her] administrative duties."

Despite being decided under a different title of the Estates and Trusts Article, the Court of Appeals' opinion in *Clark v. Rolfe*, 279 Md. 301 (1977) is instructive. There, the Court affirmed the orphans' court's decision to award attorney's fees to a law firm that interested parties had retained to challenge certain fees and commissions that the personal representative of an estate proposed to pay:

> We have no hesitancy in concluding that under the same statutory provision, *in the rare case where the assets of an estate are increased in value or protected from dissipation as the result of an action brought by someone other than the personal representative for the benefit of the estate as a whole, the orphans' court, in the exercise of its discretion, may allow the payment of a counsel fee from the assets of the estate*. To reach any other conclusion would be to seriously hamper a successful attempt to bring a recalcitrant personal representative to account or to remove one for breach of his fiduciary duty.

Id. at 307 (emphasis added). Under *Clark*, the court may, in its determination whether to allow attorney's fees, ascertain whether the legal actions are reasonably calculated to increase the value of the estate or protect its assets from dissipation.[9]

Here, there is ample support for the circuit court's conclusion that Bernadette's attorney's fees were satisfactorily tied to the guardianship proceeding and incurred to protect (and potentially increase) Bernard's assets. The circuit court heard testimony that

[9] Appellant cites *Sollers v. Mercantile-Safe Deposit & Tr. Co.*, 262 Md. 606 (1971) for the proposition that Bernadette's attorney's fees may not be paid through the guardianship proceeding. In *Sollers,* descendants of a testator appealed from the circuit court's construction of the will, and requested that their attorney's fees be paid from the assets of the trust estate. *Id.* at 610. *Sollers* is distinguishable from *Clark* and the instant case because the attorneys retained by the beneficiaries in *Sollers* sought only to represent the individual claims of their clients; their legal efforts were not directed at preserving, protecting, or increasing the estate. *Id.* at 609-10.

after appellant filed his guardianship petition on January 12, 2015, Bernadette and appellee hired an attorney to investigate appellant's potentially improper use of Bernard's income in an effort to preserve Bernard's assets. Bernadette and appellee, with the assistance of counsel, presented evidence that appellant had not been paying Bernard's assisted living center bills, and that appellant had misappropriated almost $200,000 of Bernard's income. Based on the attorney's investigation, the Garrett County State's Attorney filed five charges of embezzlement and theft against appellant.[10] In addition, appellant was removed from his position as the representative payee for Bernard's veteran pension income, and an independent fiduciary was appointed to receive the income and use it to pay Bernard's assisted living center bills.

While not convinced that appellant had engaged in any fraudulent activity with regard to Bernard's assets, the circuit court nevertheless concluded that it was reasonable for Bernadette to engage the services of an attorney to investigate potential wrongdoing. Indeed, the court noted that the State's Attorney for Garrett County had filed criminal charges against appellant, thereby supporting appellee's contention that Bernadette acted reasonably in seeking the assistance of an attorney. The court therefore found that the attorney's fees were valid expenses of the guardianship as they were incurred to prevent Bernard's assets from being wasted.

[10] The criminal charges against appellant were eventually placed on the stet docket.

Accordingly, we hold that the circuit court did not abuse its discretion in granting attorney's fees through the guardianship proceedings. The attorney's fees at issue were incurred after appellant initiated guardianship proceedings on January 12, 2015, and the trial court did not abuse its discretion in finding that they were reasonably incurred for the purpose of protecting and preserving Bernard's assets.

III. Validity of Bernadette's Power of Attorney

Lastly, appellant argues that the circuit court erred when it admitted a photocopy of Bernadette's power of attorney into evidence. In appellant's view, a photocopied power of attorney is not the same as an original document, and is not self-authenticating or automatically admissible. Appellant further argues that even though Bernadette's power of attorney contained two witness signatures and an apparent maker signature, those facts do not make the document immune to challenges of authentication, fraud, attestation, or competence of the maker at the time of signing. Finally, appellant argues that the circuit court erred when it prevented him from cross-examining appellee on the issue of Bernard's competency at the time the power of attorney was signed.

A.

We address the first part of appellant's argument by referring to the relevant evidentiary rules on the admissibility of photocopies. While Maryland Rule 5-1002 generally requires the admission of an original document, Rule 5-1003 states that "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to

admit the duplicate in lieu of the original." Regarding what constitutes a "genuine" challenge to the authenticity of a document, we have held that this is a matter for the trial court to decide. *Old Frederick Rd., LLC v. Wiseman*, 213 Md. App. 513, 529 (2013). In *Old Frederick Rd.*, we held that the circuit court did not abuse its discretion in admitting a copy of a contract that the court concluded was genuine even though the defendant introduced evidence to the contrary, including a handwriting expert whose testimony challenged the authenticity of the signatures on the document. *Id.* Here, appellant objected to the admission of the photocopied power of attorney only on the basis that it was a copy, without identifying any "genuine question" as to authenticity.

We further note that Bernadette's power of attorney was signed by Bernard and two witnesses, and was also notarized. Bernard does not challenge the authenticity of any of these signatures. Pursuant to the rules on self-authenticating documents, extrinsic evidence of authenticity is not required for "[d]ocuments accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments." Md. Rule 5-902(a)(8). Because the photocopy of the power of attorney in this case was admissible to the same extent as the original, and because the original document was self-authenticating, we hold that the circuit court did not abuse its discretion in admitting the photocopy of the power of attorney.[11]

[11] Appellant also contends that the circuit court erred by admitting the power of attorney in part because appellant attached a copy of the power of attorney to his petition for guardianship. We agree that merely attaching a document to a pleading does not make

B.

Finally, appellant argues that he should have been allowed to cross-examine appellee about Bernard's competence when he made Bernadette his attorney-in-fact. We agree that the trial court erred in curtailing appellant's cross-examination of appellee on this issue, but hold that the court's error was harmless.

"It is the established practice in Maryland to permit a lay witness to give an opinion with regard to the mental capacity of a testator[.]" *Ingalls v. Trs. of Mt. Oak Methodist Church Cemetery*, 244 Md. 243, 257 (1966). A proper foundation must be laid before a lay witness may give such an opinion:

> [A] non-expert witness is qualified to express an opinion as to a testator's mental capacity only where the acts and circumstances, of which the witness had personal knowledge, are sufficient to form a basis for the formation of rational opinion. He must state the facts as far as he can and disclose what led to his conclusion.

Masius v. Wilson, 213 Md. 259, 268 (1957) (quoting *Doyle v. Rody*, 180 Md. 471, 481 (1942)).

Here, the circuit court did not provide appellant with an opportunity to establish the requisite factual foundation. Appellant's counsel asked appellee during cross-examination, "At the date of 10/31 of 2012, did you have any knowledge about the competence of Bernard Kaczorowski?" Opposing counsel objected, complaining that this was tantamount to asking for an expert opinion, and the court sustained the objection. In response,

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it admissible. Here, however, the power of attorney was properly admitted under the evidentiary rules discussed *supra*.

appellant's counsel tried to ask appellee, "Did you have any knowledge of any doctors that have met with [Bernard] regarding his competence prior to him signing this document?" After the circuit court sustained another objection, appellant's counsel stated that he had no further questions for appellee.

Because appellee did not have to be qualified as an expert witness in order to testify to his knowledge regarding the circumstances related to Bernard's mental capacity, the circuit court erred by failing to allow the described line of questioning. This error, however, was harmless because it does not undermine the circuit court's ultimate decision to award attorney's fees.

Under ET § 13-203(c)(1), after the appointment of a guardian, "the court has all the powers over the property of the minor or disabled person that the person could exercise if not disabled or a minor." At any time, a guardian or interested party may invoke the jurisdiction of the court to resolve questions concerning the estate or its administration. ET § 13-203(d). While the parties refer us to ET § 15-102(o), that provision only applies to a fiduciary's request for attorney's fees, and does not limit the power of the court to reimburse non-fiduciaries for attorney's fees incurred for the purpose of preserving the estate's assets.

Assuming *arguendo* that the power of attorney was deficient because Bernard was incompetent to execute the document, the court would nevertheless have the authority to award attorney's fees incurred by a non-fiduciary interested party to protect the ward's assets. *Clark*, 279 Md. at 307. Here, the circuit court independently found that the

attorney's fees incurred between February 27, 2015, and August 31, 2015, were valid expenses of the guardianship because they were reasonably incurred to protect Bernard's assets. Because "the court has all the powers over the property of the minor or disabled person that the person could exercise if not disabled or a minor[,]" ET § 13-203(c)(1), the court had the authority to award the reimbursement of attorney's fees in this case regardless of the validity of Bernard's power of attorney in favor of Bernadette. Any error in failing to permit appellant to cross-examine appellee about Bernard's competency was therefore harmless.

APPELLEE'S MOTION TO DISMISS DENIED. JUDGMENT OF THE CIRCUIT COURT FOR GARRETT COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.