FIRST DIVISION
June 19, 2017

No. 1-16-0479
2017 IL App (1st) 160479-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| In re Estate of<br><br>RUTHANNE B. SAVAGE,<br>_____<br>JAMES B. SAVAGE, as heir and residuary beneficiary of the Ruthanne B. Savage Revocable Trust of 1999 dated July 29, 1999,<br><br>Petitioner-Appellant,<br><br>v.<br><br>PAUL S. FRANCISZKOWICZ, as Special Administrator of the Estate of Ruthanne B. Savage, Deceased, and ELIZABETH SAVAGE, as former executor of Estate of Ruthanne B. Savage, Deceased, heir, and residuary beneficiary of the Ruthanne B. Savage Revocable Trust of 1999 dated July 29, 1999,<br><br>Respondents-Appellees. | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 99 P 9408<br><br>Honorable Susan M. Coleman, Judge Presiding. |

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

**ORDER**

¶ 1 *Held:* This court lacked jurisdiction to review the circuit court's order denying movant's petition to adjudicate attorney fees when the order appealed from was immediately appealable under Rule 304(b) and entered five years prior to the filing of the instant notice of appeal; the trial court properly closed the estate where all claims were resolved and any alleged remaining claim was against one

of the estate's heirs in her individual capacity, rather than against the estate; dismissed in part and affirmed in part.

¶ 2 Petitioner, James B. Savage, appeals from two orders of the circuit court. The first order, entered on October 1, 2010 (2010 order), denied James's petition to adjudicate an attorney's lien and petition to award attorney fees and costs related to the removal of Elizabeth Savage as independent representative. The second order, entered on January 14, 2016 (2016 order), closed the estate of James's mother, Ruthanne B. Savage, and discharged the estate's special administrator, Paul S. Franciszkowicz. James argues that the trial court erred when it failed to resolve his petition to adjudicate fees before closing the estate. Respondents, special administrator Franciszkowicz, and James's sister and co-heir, Elizabeth Savage[1] contend that we lack jurisdiction to review the 2010 order because it was entered over five years prior the filing of James's notice of appeal in the instant matter. Additionally, respondents argue that the court below did not err in closing the estate, because the statement in the final report that there were no outstanding claims against the estate was true as James's alleged claim for attorney's fees was against Elizabeth individually, not the estate. We find that we lack jurisdiction to review the circuit court's 2010 order and so we dismiss that portion of James's appeal. We affirm the circuit court's 2016 order that closed the estate.

¶ 3 BACKGROUND

¶ 4 Due to the lengthy and extensive history of this case, coupled with the limited issues on appeal, we set forth only those facts that are necessary to our resolution of this matter. This case involves the estate of Ruthanne B. Savage, who died on September 29, 1999. Ruthanne had two children: James and Elizabeth. Ruthanne's will was admitted to probate on October 20, 1999,

[1] On May 10, 2017, this court granted Elizabeth's motion to join brief and argument of Franciskowicz. Thus, we collectively refer to Elizabeth and Franciskowicz as "respondents," because their positions in this appeal are the same.

and Elizabeth was appointed the executor of Ruthanne's estate. According to the last will and testament of Ruthanne, dated July 29, 1999, the sole residuary legatee of the estate was the Ruthanne B. Savage Revocable Trust of 1999 dated July 29, 1999 (trust). James and Elizabeth were each entitled to an equal share of the residuary trust estate as they were declared Ruthanne's only two heirs. Additionally, the trust instrument provided that upon Ruthanne's death, Elizabeth would act as successor trustee. James and Elizabeth were unable to come to an agreement regarding distribution of the trust assets, and thus continuous litigation ensued. This is the fourth appeal in this case, which was ongoing for nearly 17 years prior to being closed in the circuit court's 2016 order.

¶ 5 On September 11, 2007, James filed a petition to remove Elizabeth as executor and trustee, arguing that Elizabeth had breached her fiduciary duty to the trust and that her legal fees were improperly paid out of the trust. James sought, *inter alia*, to require Elizabeth to reimburse the estate for the cost of the litigation and to reimburse him for the cost of his attorney fees in seeking her removal. Following a hearing on May 26 and 27, 2009, the trial court granted James's petition, revoked Elizabeth's letters of office, and appointed Franciszkowicz as special administrator for the estate. According to the transcript of the May 27, 2009, proceedings, the court also made the following determination with regard to James's requests: "I'm [] denying the request to have Elizabeth reimburse the estate for the cost of the litigation. *** I will, however, grant the – James' request to have Elizabeth pay the attorney's fees of James with regards to this removal action." The court's oral order requiring Elizabeth to pay James's fees was not included in the written order entered that day.

¶ 6 Nearly one year later, on April 1, 2010, James filed a petition to adjudicate an attorney's lien and petition to award attorney fees and costs related to the removal of Elizabeth Savage as

independent representative. The petition stated that although at the conclusion of the hearing on May 27, 2009, the court ordered Elizabeth to pay James's attorney fees associated with her removal, James's former attorneys, Baker & Daniels, did not ensure that the court's oral ruling was included in the written order. Also, James's petition stated that "Baker & Daniels did file a motion to modify the court's written order to include a provision for the payment of James' attorney[] fees from Elizabeth, but the law firm did not pursue it." The petition asserted that the total amount billed to James by Baker & Daniels for work related to the removal of Elizabeth totaled $143,193.50. James's petition stated that he believed the fees to be inflated, unreasonable, and inappropriate, and sought to have the court adjudicate these fees and determine their reasonableness. On October 1, 2010, the court entered an order denying James's petition "for the reasons stated in open court." The record on appeal does not contain a report of proceedings, bystander's report, or agreed statement of facts for the October 1, 2010, court date. James did not file a motion to reconsider or a notice of appeal within the 30 days following the petition's denial.

¶ 7 On November 10, 2015, Franciszkowicz presented the court with his final forensic account, covering the time period of July 1, 2007, through July 31, 2015, and his final report for approval and closure of the estate. According to the final forensic account, there was only approximately $29,000 remaining in the estate as of July 31, 2015. The court granted the parties 21 days to file objections to the final report, and set the matter for hearing on December 10, 2015. On December 1, 2015, James filed his objection to the final report, stating that "not all claims have been resolved" and that "a motion to amend to add additional claims was filed and is unresolved." At the hearing on December 10, 2015, James's attorney represented to the court that there was an unresolved fee petition, but did not have a copy of it with him. As a result, the

court entered an order approving the final forensic accounting (no objection having been filed), approving the special administrator's fee petition (no objections having been filed), and continuing the proceedings regarding the final report to January 14, 2016. On January 6, 2016, James filed a supplement to his objection to the final report. The supplement stated that James's allegedly unresolved claim was related to the attorney fees that James incurred in removing Elizabeth as executor and trustee.

¶ 8 At the January 14, 2016, court date, James's attorney presented a copy of his fee petition filed on April 1, 2010, and stated to the court that "[t]here hasn't been a resolution on it for whatever reason." Prior to court, Franciszkowicz attempted to find the order that he believed disposed of James's petition. Franciszkowicz told the court that he had observed a clerk's entry on the docket dated October 1, 2010, that stated that a petition for attorney fees had been denied. Franciszkowicz stated that James's petition was the only one on-file during that time period, thus he believed that the 2010 order was for James's petition. Eventually, someone from the clerk's office brought to the courtroom a copy of the 2010 order. The 2010 order was drafted by an attorney who acted as co-counsel with the law firm that represented James at the January 14, 2016, court date and continues to represent him in this appeal. The 2010 order stated:

> "This cause coming to be heard on James B. Savage's petition to adjudicate attorneys' lien and petition to award attorneys' fees and costs related to removal of Elizabeth Savage as independent representative, due notice having been given and the Court being fully advised in the premises, it is hereby ordered the petition is denied for the reasons stated in open court."

After reviewing the 2010 order, the court closed the estate. Franciszkowicz then stated:

> "And, Judge, I'm not going to file anything further. But to file objections alleging that there's this outstanding motion that was ready to go to hearing and we find out, in fact, that there's an order of denial, that it's with co-counsel. I mean, James signed these pleadings alleging that there's open claims. That is false. And you know, at this point, I just want the case closed. But I'm just putting warning on everyone, your Honor, that continuing to press this matter after it's already been denied five years ago -- enough is enough."

On January 14, 2016, the court ultimately entered an order closing the estate and discharging Franciszkowicz as special administrator.

¶ 9 On February 16, 2016, James filed his notice of appeal, seeking to appeal the 2010 order and the 2016 order. On June 8, 2016, Franciszkowicz filed a motion to dismiss James's appeal and for sanctions pursuant to Illinois Supreme Court Rule 375 (eff. Feb. 1, 1994). The motion argued that the appeal should be dismissed because this court lacks jurisdiction where the order being appealed from was immediately appealable and entered over five years ago. Additionally, the motion argued that sanctions should be imposed because James and his counsel misrepresented to the circuit court that James's petition was still pending and unresolved, which was untrue given the 2010 order denying his petition. James filed his response to the motion to dismiss on June 13, 2016, asserting that this court has jurisdiction because the 2010 order was not final and appealable, and could not have been appealed until the estate was closed. Also, James stated that sanctions were improper where he brought the appeal in good faith and respondents[2] failed to cite any cases that would allow this court to sanction James or his attorney

[2] Although the motion to dismiss and for Rule 375 sanctions was filed only on behalf of Franciszkowicz, we nonetheless use the term "respondents" in reference to the motion's arguments because Franciszkowicz raised the same arguments in his appellate response brief, which was joined and adopted by Elizabeth.

for their conduct in circuit court. The motion to dismiss and for Rule 375 sanctions was taken with the case.

¶ 10 ANALYSIS

¶ 11 Before addressing the substantive issues in this appeal, we first address respondents' motion to dismiss James's appeal. Respondents contend that this court lacks jurisdiction to review James's appeal because James's appeal from the 2010 order is untimely. Respondents assert that the 2010 order was final and appealable pursuant to Rule 304(b)(1), which allows the appeal of judgments and orders entered in the administration of an estate that finally determine a right or status of a party without the finding required in section (a) of Rule 304. Ill. S. Ct. R. 304(b)(1) (eff. Mar. 8, 2016). James responds that the motion lacks any citation to authority, and as a result, the arguments therein are waived. He also asserts that respondents failed to show how the 2010 order could have been final and appealable when it did not reverse, modify, or vacate the May 27, 2009, oral ruling that ordered Elizabeth to pay James's attorney fees related to her removal. James's appellate brief's jurisdictional statement reflects that his appeal is brought pursuant to Rule 301, and his notice of appeal states that James's appeal is brought "pursuant to Illinois Supreme Court Rules 301[] and 303."

¶ 12 Rule 301 states that, "[e]very final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional. An appeal is a continuation of the proceeding." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Rule 303 requires that the notice of appeal in a civil case be filed within 30 days after the entry of the final judgment or within 30 days after the entry of the order disposing of the last pending posttrial motion, if such motions are filed. Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015).

¶ 13 Also relevant here is Rule 304(b)(1), which was cited by respondents but not by James. Rule 304(b)(1) states in relevant part that "[a] judgment or order entered in the administration of an estate *** which finally determines a right or status of a party" is appealable without the finding required under Rule 304(a). Ill. S. Ct. R. 304(b)(1) (eff. Mar. 8, 2016). The reasoning behind this rule was explained in *In re Estate of Kime*, 95 Ill. App. 3d 262, 268 (1981), when the court stated:

> "A central reason behind making the time for appeal of such orders mandatory, and not optional, is that certainty as to some issues is a necessity during the lengthy procedure of estate administration. Little imagination is needed to conjure up the intolerable consequences of permitting a party, at his option, to wait until an estate administration is concluded before appealing an order, entered perhaps several years previously, which denied a motion to remove an executor or allowed a claim against the estate. In such circumstances, were an appellant successful, then the entire administration might have to be begun again. Thus, in the interest of efficiency and the sound and practical administration of estates, orders in estate proceedings must be appealed within 30 days from entry when they finally determine the right or status of a party, even though they are preliminary to a final settlement of estate proceedings."

¶ 14 Illinois courts have differed on the issue of whether an order denying a petition for attorney fees falls within the scope of Rule 304(b)(1). In the case of *In re Trusts of Strange ex rel. Whitney*, 324 Ill. App. 3d 37, 42 (2001), the court determined that the trial court's denial of a petition for attorney fees was within the purview of Rule 304(b)(1) where the fee request was directly related to the trial court's supervision of the administration of the trusts. Conversely, in *People ex rel. A.M. v. Herlinda M.*, 221 Ill. App. 3d 957, 964-65 (1991), the court held that a

guardian *ad litem*'s petition to recover fees in a child abuse case did not fall within the context of Rule 304(b)(1) because the request for fees was collateral or incidental to the principal action.

¶ 15 Here, we find that the 2010 order was directly related to the administration of the estate where the basis for James's claim for attorney fees stemmed from Elizabeth's removal as executor of the estate. As a result, Rule 304(b)(1) rendered the 2010 order appealable within the 30 days following its entry on October 1, 2010. James, however, did not file a motion to reconsider or a notice of appeal within 30 days after the 2010 order was entered. Thus, the timeframe in which to timely appeal from the 2010 order passed, and James's current appeal of that order is unreviewable due to our lack of jurisdiction. We have jurisdiction, however, to consider the merits of James's appeal from the 2016 order because his notice of appeal was filed within 30 days of January 14, 2016, and is timely.

¶ 16 Prior to addressing the 2016 order, we find it pertinent to note that even if we had jurisdiction over James's appeal of the 2010 order, we would affirm the court's decision regarding that portion of his appeal pursuant to *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984). In *Foutch*, our supreme court recognized that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Id.* at 391-92. Further, "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392.

¶ 17 Here, the 2010 order reads:

> "This cause coming to be heard on James B. Savage's petition to adjudicate attorneys' lien and petition to award attorneys' fees and costs related to removal of Elizabeth Savage as independent representative, due notice having been given and the

> Court being fully advised in the premises, it is hereby ordered the petition is denied for the reasons stated in open court."

The record on appeal does not contain a report of proceedings, bystander's report, or agreed statement of facts for the October 1, 2010, court date. Any of these would have been allowable under Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). Neither party sets forth an explanation of what "the reasons stated in open court" were, thus we are completely uninformed as to what transpired in court on that date. The parties agree that our review is under the manifest weight of the evidence standard. See *Estate of Vail v. First America Trust Co.*, 309 Ill. App. 3d 435, 438 (1999) ("In reviewing a probate court's determination, all reasonable presumptions are made in favor of the trial court, the appellant has the burden to affirmatively show the errors alleged, and the judgment will not be reversed unless the findings are clearly and palpably contrary to the manifest weight of the evidence.") Thus, it would be impossible for us to conduct the necessary review of the court's 2010 order when we are unaware of the basis upon which it was entered. We also are unaware what, if any, evidence the court considered in reaching its decision. Any review of the 2010 order would be riddled with speculation and doubt. Thus, even if jurisdiction were present, which it is not, we would affirm the court's 2010 order as a result of James's failure to provide a complete record.

¶ 18 Turning to the merits of James's appeal of the 2016 order, we find the trial court properly entered the order closing the estate and discharging the special administrator. Section 28-11(b) of the Probate Act requires an independent representative seeking discharge and closure of a decedent's estate to file with the court a final report making several required representations. 755 ILCS 5/28-11(b) (West 2012). Relevant here is the representation "[t]hat each claim has been allowed, disallowed, compromised, dismissed or is barred and that all claims allowed have

been paid in full, or, if the estate was not sufficient to pay all the claims in full, that the claims have been paid according to their respective priorities." 755 ILCS 5/28-11(b)(5) (West 2012).

¶ 19 James argues that the final report's statement that all claims were resolved was false, because "the attorneys' fee claim against Elizabeth was not resolved." Respondents assert, and we agree, this is not accurate. Although the petition may not have been resolved in James's favor, it was nonetheless resolved on October 1, 2010, when it was denied, or "disallowed." See 755 ILCS 5/28-11(b)(5). James opted not to bring a motion to reconsider or an appeal, so James's petition was resolved upon entry of the 2010 order. James argues that "the probate judge should have granted appellant's petition to adjudicate fees before closing the estate." It is perplexing how a court could grant a petition to adjudicate fees that was not pending. James further argues that there was no reason for denying his request to award attorney fees. However, such an argument is misplaced here where we lack jurisdiction to review the court's decision to deny his petition. We believe James's arguments regarding the 2016 order are implausible. On the one hand, he argues the petition was unresolved and the estate should not have been closed. On the other, he contends that it was an abuse of the court's discretion to award him "zero fees." Both arguments fail. It is clear from the record that James's petition was resolved when it was denied on October 1, 2010. Further, we need not determine whether it was an abuse of the court's discretion to deny James any fees because we lack jurisdiction to review the 2010 order, which was the basis for his argument that he should not have been awarded "zero fees."

¶ 20 Respondents further argue, and we agree, that even if James had a pending or active claim for attorney fees, which he does not, such a claim would be against Elizabeth individually, not the estate. At the hearing on May 27, 2009, the court stated that it would "grant the – James' request to have Elizabeth pay the attorney's fees of James with regards to this removal action."

It is clear to this court that the court below was specifically ordering Elizabeth, individually, to pay James's attorney fees that resulted from the removal proceedings. When the court intended to involve the estate, it made clear in its ruling that the estate was affected. For example, the court stated, "I'm also denying the request to have Elizabeth reimburse the estate for the cost of the litigation." However, when the court determined that Elizabeth should pay for James's attorney fees expended in the removal proceedings, it neither mentioned the estate, nor implicated it in any way. Thus, any claim James may have had was against Elizabeth and not the estate. As a result, we find the statement in the final report that all claims were resolved was accurate, and the circuit court properly ordered the estate closed and special administrator discharged on January 14, 2016.

¶ 21 As a final matter, we turn to respondents' motion for Rule 375 sanctions, which was filed within the motion to dismiss the appeal and taken with the case. Respondents argue that we should impose sanctions against James and his attorney because they misrepresented in bad faith to the circuit court that his petition for attorney fees was not yet ruled on and still pending. Additionally, respondents point to Franciszkowicz's assertion at the end of the January 14, 2016, court date wherein he stated that he was "putting warning on everyone *** that continuing to press this matter after it's already been denied five years ago – enough is enough," and argue that in spite of this warning, James still chose to file the instant, bad faith appeal.

¶ 22 James responds that Franciszkowicz has failed to cite any cases that support this court having jurisdiction to impose sanctions on James for his alleged bad faith in the circuit court proceedings. Additionally, James argues that he acted in good faith where it is clear from the transcript in the record dated May 27, 2009, that the court did, in fact, order Elizabeth to pay his

attorney fees related to her removal, and the 2010 order did not expressly foreclose his attempt to prove-up his fees.

¶ 23 Rule 375 allows sanctions for appeals that are frivolous or not taken in good faith. Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). "A reviewing court applies an objective standard to determine whether an appeal is frivolous; 'the appeal is considered frivolous if it would not have been brought in good faith by a reasonable, prudent attorney.' " *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 87 (quoting *Dreisilker Electric Motors, Inc. v. Rainbow Electric Co.*, 203 Ill. App. 3d 304, 312 (1990)). Also, an appeal is considered frivolous if it is "not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law." Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994).

¶ 24 We find that although James's appeal is unsuccessful, a reasonable, prudent attorney could have filed this appeal in good faith, and thus we deny the motion for Rule 375 sanctions. James's previous appeals in this case do not involve the issues addressed in this appeal; therefore, a reasonable attorney may have believed the issues in this appeal were meritorious. Also, we believe it is possible that James's counsel was unaware of the entry of the 2010 order denying his client's petition until it was produced by the clerk of court at the January 14, 2016, court date. Thus, it is unclear whether his representation to the circuit court that the petition was unresolved was made in bad faith or merely out of ignorance. Further, we find that James's contention that he acted in good faith because the court did, in fact, order Elizabeth to pay his attorney fees is reasonably well-grounded in fact based on the transcript of the May 27, 2009, hearing. Ultimately, the conduct at issue here does not merit Rule 375 sanctions, and the motion for the same is denied.

¶ 25 CONCLUSION

¶ 26 Based on the foregoing, we dismiss James's appeal as it relates to the trial court's October 1, 2010, order, and affirm the trial court's January 14, 2016, order that closed the estate.

¶ 27 Dismissed in part and affirmed in part.