REL: May 28, 2021

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2020-2021

1190405

Cortney Brooks

v.

Chad Svenby

1191037

Cortney Brooks

v.

Chad Svenby

Appeals from Autauga Circuit Court
(CV-19-900338)

MITCHELL, Justice.

These consolidated appeals involve a dispute between Cortney Brooks and her brother Chad Svenby about the administration of the estate of their deceased mother Dorothy Clare. In appeal no. 1190405, Brooks challenges an order of the Autauga Circuit Court removing the original administrator of the estate. After the circuit court appointed Svenby to be the executor of the estate and granted his motion to enter a final settlement, Brooks filed appeal no. 1191037 contesting that settlement. We now reverse the circuit court's orders in both appeals and remand the case for further proceedings consistent with this opinion.

Facts and Procedural History

Clare died in September 2019. She had previously executed a will leaving her property in equal shares to her only two children, Brooks and Svenby; that will also named Svenby as the executor of her estate. Following Clare's death, Svenby petitioned the Autauga Probate Court to probate her will and to appoint him executor of her estate.

Brooks opposed Svenby's petition and asked the probate court to disqualify him from serving as executor. Brooks said that Clare had been removed from Svenby's care about a year before her death following allegations of elder abuse and a Department of Human Resources investigation.[1] Brooks further alleged that Svenby had misappropriated over $400,000 of Clare's funds before her death -- the majority of which he allegedly spent at a casino -- and that he was currently under criminal investigation for his actions. For these reasons, Brooks argued that her brother should be disqualified from serving as executor under § 43-2-22(a), Ala. Code 1975, which provides that "[n]o person must be deemed a fit person to serve as executor ... who, from intemperance, improvidence or want of understanding, is incompetent to discharge the duties of the trust." Brooks further noted that Clare's estate included ownership of an operating beauty salon, and she asked the probate court to appoint a special administrator ad colligendum under § 43-2-47, Ala. Code 1975, to

[1]The circuit court appointed a guardian and conservator for Clare under the Adult Protective Services Act, § 38-9-1 et seq., Ala. Code 1975, following the elder-abuse claim. The guardianship and conservatorship were ongoing at the time of Clare's death.

temporarily manage the estate's assets until a permanent administrator could be appointed.

On November 21, 2019, the probate court entered an order holding that Svenby was disqualified from serving as executor under § 43-2-22(a) "on the grounds of improvidence." But, rather than appointing a special administrator to manage Clare's estate, the probate court issued letters of administration with the will annexed to attorney Louis Colley.[2]

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[2]See § 43-2-22(b), Ala. Code 1975 (explaining that if the named executor is unfit to serve under subsection (a), "letters of administration, with the will annexed, may be granted on the testator's estate, under the provisions of § 43-2-27[, Ala. Code 1975]"); § 43-2-27, Ala. Code 1975 (providing that when the executor named in a will is unfit and neither the residuary or principal legatees timely apply for letters of administration, "such letters may be granted to the same persons and in the same order as letters of administration are granted in cases of intestacy"); § 43-2-42, Ala. Code 1975 (setting forth the order of priority for persons to serve as administrators of an intestate's estate and authorizing the appointment of "[a]ny other person as the judge of probate may appoint" when those persons with higher priority are unwilling to serve or would be unsatisfactory appointments).

In Ex parte Baker, 183 So. 3d 139, 141 n.2 (Ala. 2015), this Court explained that when letters of administration are issued under § 43-2-27, the words of limitation " 'with the will annexed' or its Latin counterpart 'cum testamento annexo' give notice to persons dealing with the personal representative that the administration of the estate is guided by the provisions of a will rather than by the many statutory provisions that

On December 13, 2019, Svenby filed a "verified petition for removal" in the circuit court. In this petition, Svenby argued that he was qualified to serve as executor of Clare's estate and that the probate court's appointment of Colley was void. He further stated:

> "It is believed that because of the complex and equitable issues that will arise in the prosecution of [Clare's] estate, ... such issue[s] should be heard by this court in its appellate capacity ... de novo. The order disallowing the movant from serving as executor for the estate of Dorothy Clare hereby being challenged, disputed, and/or appealed.
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> "It is therefore requested pursuant to § 12-22-21, Ala. Code 1975, [that] this court enter an order removing [Clare's] estate to the circuit court."

In fact, Svenby's petition conflated two separate issues: (1) the circuit court's authority under § 12-22-21, Ala. Code 1975, to review the probate court's finding that he was disqualified from serving as executor and (2) the circuit court's authority under § 12-11-41, Ala. Code 1975, to remove the administration of Clare's estate from the probate court. Without addressing this jumbling of the issues, the circuit court granted Svenby's petition and ordered the probate court to transfer the case, which it did.

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govern an intestate estate."

Seizing on Svenby's request that the circuit court consider this case in "its appellate capacity," and the language in his petition invoking § 12-22-21, Brooks asked the circuit court to dismiss Svenby's "appeal" as untimely. Specifically, Brooks noted that, under § 12-22-21(2), an appeal to a circuit court of a probate court's order deeming a party unfit to serve as the executor of a will "by reason of improvidence" must be taken "within seven days from the denial of the application." Thus, Brooks argued, Svenby's attempted December 13 appeal of the probate court's November 21 order denying his application to serve as executor was untimely because it was filed 22 days after that order was issued. On February 11, 2020, the circuit court entered an order effectively denying Brooks's motion, explaining that "this case is a removed case."[3] The circuit court also removed Colley as administrator with the will annexed and appointed Svenby as executor to replace him. On February 17, 2020,

[3]Although the circuit court did not cite § 12-11-41, Ala. Code 1975, in its order, that statute provides that "[t]he administration of any estate may be removed from the probate court to the circuit court at any time before a final settlement thereof ...."

Brooks filed an appeal with this Court, docketed as appeal no. 1190405, challenging the circuit court's removal of Colley.[4]

Svenby continued to administer Clare's estate while appeal no. 1190405 was pending in this Court. On June 3, 2020, Svenby moved the circuit court to enter a final settlement of Clare's estate. Less than 24 hours later, the circuit court granted his motion and issued an order of final settlement. On June 11, 2020, Brooks moved the circuit court to vacate that order, arguing that final settlement was improper because Svenby had not filed a verified statement of account as required by § 43-2-502, Ala. Code 1975, and because the notice and hearing requirements of § 43-2-505, Ala. Code 1975, had been ignored.

In contrast to the speed with which it had granted Svenby's motion for final settlement, the circuit court did not hold a hearing on Brooks's

[4]Section 12-22-21(3), Ala. Code 1975, authorizes the appeal of "any decree, judgment or order removing an executor or administrator." See also Ray v. Huett, 225 So. 3d 30, 36 n.3 (Ala. 2016) (explaining that, while § 12-22-21 expressly authorizes appeals from a judgment entered by a probate court deciding certain issues, this Court has traditionally allowed appeals from a judgment entered by a circuit court if it decides one of those same issues).

motion for over two months. That hearing was eventually held on August 13, 2020, but, even then, the circuit court failed to enter a ruling, and Brooks's motion was ultimately denied by operation of law under Rule 59.1, Ala. R. Civ. P. Brooks then appealed the order of final settlement, and that appeal, docketed as appeal no. 1191037, was consolidated with appeal no. 1190405 for our consideration.

Standard of Review

The facts underlying these appeals are undisputed. We are asked to consider only whether the circuit court complied with statutory requirements governing the removal and appointment of administrators and the settlement of an estate. We review a circuit court's conclusions of law and application of law to undisputed facts de novo. Mitchell v. Brooks, 281 So. 3d 1236, 1243 (Ala. 2019).

Appeal no. 1190405

Brooks argues that the circuit court never obtained subject-matter jurisdiction over Clare's estate because, she says, Svenby's petition challenging the probate court's denial of his application to serve as executor was in substance nothing more than an untimely appeal. See

Flannigan v. Jordan, 871 So. 2d 767, 770 (Ala. 2003) (holding that a petition seeking review of a probate court's decision that was filed after the seven-day limitations period in § 12-22-21 was untimely and that the circuit court therefore "lack[ed] subject-matter jurisdiction to review the case"). To the extent Svenby's petition sought to appeal the denial of his application to serve as executor, Brooks is correct. Section 12-22-21(2) clearly states that a party whose application to serve as executor is denied "by reason of improvidence" must file an appeal to the circuit court within seven days. Svenby's petition was filed 22 days after the entry of the probate court's order and was therefore untimely.

Nevertheless, Svenby's petition, while hardly a model of clarity, also contained a request that the circuit court remove the administration of Clare's estate from the probate court. Indeed, the petition was styled as a "verified petition for removal," and, while it contained no express reference to § 12-11-41, Ala. Code 1975, it stated that, "because of the complex and equitable issues that will arise in the prosecution of [Clare's] estate, ... such issue[s] should be heard by [the circuit] court." This language appears to reference § 12-11-41, which authorizes a circuit court

to order the removal of an estate from the probate court at any time before final settlement when an heir petitions it to do so because, "in the opinion of the petitioner, such estate can be better administered in the circuit court than in the probate court."

Thus, the circuit court was effectively presented with a petition that (1) sought an untimely appeal of the probate court's order denying Svenby's application to serve as executor of Clare's estate and (2) asked the circuit court to remove Clare's estate from the probate court. For the reasons already discussed, the circuit court had no jurisdiction to consider the untimely appeal. But under § 12-11-41, the circuit court could order the removal of Clare's estate "at any time before a final settlement." The circuit court's order removing the estate was therefore authorized by law, and the circuit court could properly exercise subject-matter jurisdiction over the administration of the estate once it was removed.

Brooks alternatively argues that, even if the circuit court had subject-matter jurisdiction over the administration of Clare's estate, its order removing Colley as administrator had no legal basis. We agree. Section 43-2-290, Ala. Code 1975, provides that, once an administrator has

been appointed, he or she may be removed only for one of the following reasons:

> "(1) Imbecility of mind; intemperance; continued sickness, rendering him incapable of the discharge of his duties; or when from his conduct or character there is reason to believe that he is not a suitable person to have the charge and control of the estate.
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> "(2) Failure to make and return inventories or accounts of sale; failure to make settlements as required by law; or the failure to do any act as such executor or administrator, when lawfully required by the judge of probate.
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> "(3) The wasting, embezzlement or any other maladministration of the estate.
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> "(4) The using of any of the funds of the estate for his own benefit.
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> "(5) A sentence of imprisonment in the penitentiary, county jail or for hard labor for the county for a term of 12 months or more."

See also Ex parte Holladay, 466 So. 2d 956, 959-60 (Ala. 1985) ("Alabama law provides for the removal of an administrator only upon proof of one or more of those grounds for removal stated in § 43-2-290."). Colley's appointment was not challenged on any of these grounds. Rather, Svenby

simply argued to the circuit court that he should replace Colley as personal representative because Clare's will nominated him as executor.

On appeal, Svenby does not argue that Colley's removal was justified under § 43-2-290. He instead argues, essentially, that only probate courts are bound by § 43-2-290. He states that a circuit court can properly exercise jurisdiction over any aspect of an estate once the estate has been properly removed, see generally Allen v. Estate of Juddine, 60 So. 3d 852, 854-55 (Ala. 2010) (stating that, "once a circuit court has properly taken jurisdiction of the administration of an estate under § 12-11-41, its jurisdiction over the estate is exclusive"), and argues that the circuit court therefore acted within its general jurisdictional powers when it removed Colley as administrator with the will annexed.

Svenby is mistaken. A circuit court properly exercising jurisdiction over the administration of an estate is empowered "to do all things necessary for the settlement of such estate, including the appointment and removal of administrators." Ala. Const. 1901 (Off. Recomp.), art. VI, § 144. But Svenby cites no authority stating that a circuit court's power to remove an administrator exceeds the power a probate court has to take

that same action. And caselaw seems to refute his position that § 43-2-290 does not apply in a circuit-court proceeding. See Thompson v. Case, 843 So. 2d 197, 200 (Ala. Civ. App. 2002) (recognizing that the appellants were entitled to make their argument that the administrator should be removed for waste under § 43-2-290 to the circuit court, which had previously removed the case).

Svenby did not allege, much less establish, that Colley should be removed as administrator of Clare's estate for a reason set forth in § 43-2-290. Therefore, the circuit court erred by removing Colley from that position. Because Svenby did not appeal the probate court's order denying his application to serve as executor and appointing Colley as administrator with the will annexed within the seven-day period provided by § 12-22-21(2), the circuit court could, after the expiration of that seven-day period, remove Colley as administrator only as allowed by § 43-2-290.

Appeal no. 1191037

We thus turn to appeal no. 1191037, in which Brooks challenges the order of final settlement closing Clare's estate. Brooks argues that the final settlement was improper because (1) Svenby's request for that

settlement did not contain a verified statement of account and other information required by § 43-2-502 and (2) the notice and hearing requirements of § 43-2-505 were ignored by the circuit court. As in appeal no. 1190405, Svenby's argument in response amounts to a bare assertion that a circuit court exercising jurisdiction over the administration of an estate can exercise that jurisdiction without regard to statutes that he appears to believe constrain only probate courts. Svenby is wrong, and his position is unsupported by any authority. See, e.g., Hall v. Hall, 903 So. 2d 78, 81 (Ala. 2004) (reviewing a judgment approving a final settlement entered by a circuit court and noting that the administrator was required to file a statement containing the information set forth in § 43-2-502).

In contrast, Brooks argues that the circuit court erred by entering an order of final settlement without complying with the statutory requirements. Her view is well supported. First, as discussed above, the appointment of Svenby as executor was void because Colley was improperly removed as administrator. Svenby therefore had no capacity to initiate settlement proceedings. See § 43-2-502 (explaining the steps

an "executor or administrator" must take when "making settlements of an administration" (emphasis added)).

Second, even if Svenby's appointment as executor had been proper, he failed to take the steps required by § 43-2-502. In McCormick v. Langford, 516 So. 2d 643, 646 (Ala. 1987), a party contesting a final settlement stated that the probate court had erred in entering an order approving that settlement because the statement of account filed by the administrator was not supported by documentary evidence. The contesting party specifically argued that he was entitled to see and examine the documents supporting the statement of account so that he could confirm the accuracy of the final settlement. Id. This Court agreed and ruled in his favor, explaining that the administrator "was required under [§ 43-2-502] to file with the probate court those documents supporting his statement of account ... or to provide a sufficient explanation for his failure to do so" and that the failure to comply with § 43-2-502 required the reversal of the order approving the final settlement. Id. If the failure of the administrator in McCormick to support his statement of account with documentary evidence was a sufficient basis to

reverse the final-settlement order entered in that case, Svenby's failure to submit a statement of account at all certainly merits the same result -- even if he had been properly appointed the personal representative of Clare's estate.

The circuit court's entry of an order of final settlement less than 24 hours after Svenby (who, again, had no legal status to do so) requested it -- without complying with the notice requirements of § 43-2-505 and leaving Brooks without opportunity to be heard -- is likewise problematic and an additional reason to reverse the circuit court's order. See Lett v. Weaver, 79 So. 3d 625, 628-29 (Ala. Civ. App. 2010) (explaining that "the notification requirements for a final-settlement hearing are expressly stated in § 43-2-505" and that, "[b]ecause the probate court failed to properly notify the contestants of the [final-settlement] hearing, that court's judgment of final settlement is void").

Conclusion

Brooks has established that the circuit court erred (1) by removing Colley as the administrator of Clare's estate and (2) by entering an order

approving a final settlement of Clare's estate.[5] Accordingly, the circuit court is directed on remand to vacate those orders and to reinstall Colley as the duly appointed administrator with the will annexed of Clare's estate, which remains open. Care should be taken so that future proceedings contemplating a final settlement of the estate are conducted in accordance with the terms of the applicable statutes discussed above, which apply to the administration of all deceaseds' estates, whether in the probate court or in the circuit court.

1190405 -- REVERSED AND REMANDED.

1191037 -- REVERSED AND REMANDED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, and Stewart, JJ., concur.

Sellers, J., concurs in the result.

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[5]Svenby argues that any error committed by the circuit court was harmless and, under Rule 45, Ala. R. App. P., does not require the reversal of the circuit court's orders because, in any event, Clare's will unambiguously provides that Brooks and Svenby are to receive equal shares of her estate. He fails to recognize, however, that the probate court has already found from its review of the evidence that Svenby's "probable lack of care and foresight in the management of the estate ... would endanger its safety" if he were to be appointed executor.