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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Zambia Player

v.

J.C., a minor, by and through her guardian ad litem,  
and the Estate of Jabari Player, deceased

Appeal from Etowah Circuit Court  
(CV-17-900499)

MENDHEIM, Justice.

Zambia Player appeals from two orders of the Etowah Circuit Court issued in regard to her administration of the

1180606

estate of her brother, Jabari Player. We affirm one of the orders of the circuit court.

### I. Facts

Jabari died intestate on August 17, 2013, leaving as his sole heir at law his 14-year-old daughter J.C. On December 5, 2013, Zambia filed a "Petition for Letters of Administration" in the Etowah Probate Court, and, after posting a bond, she was appointed administratrix of Jabari's estate. On March 12, 2014, Zambia filed an "Inventory of the Estate of Jabari Player," which showed the value of Jabari's estate to be \$20,862. J.C. protested this inventory through counsel. At some point the attorney who filed this protest on J.C.'s behalf ceased to represent her, but it is unclear from the record precisely when counsel withdrew his representation. For reasons that are not clear, a guardian ad litem was not appointed on J.C.'s behalf until June 8, 2017.

For several years Zambia did nothing to close the estate or to surrender the property in the estate to J.C. On June 26, 2017, J.C., through her guardian ad litem, filed a petition to remove the estate to the Etowah Circuit Court. Following the removal of the estate, J.C., on June 27, 2017,

1180606

filed in the circuit court a "Motion to Compel Final Accounting." The same day, the circuit court entered an order requiring Zambia to file a final accounting and a petition for discharge within 30 days of the date of the order.

Zambia failed to comply with the June 27, 2017, order, and, on August 24, 2017, J.C. filed a motion to remove Zambia as personal representative of the estate. On October 20, 2017, Zambia filed a "Petition for Final Settlement" of the estate. On October 23, 2017, J.C. filed an objection to that petition on the ground that it did not give an actual accounting of the estate. On the same date, the circuit court ordered Zambia to provide "a formal accounting" within 21 days of the date of the order. On November 17, 2017, Zambia filed an "Amended Accounting." J.C. also objected to that submission.

On February 26, 2018, the circuit court held a hearing on J.C.'s motion to remove Zambia as personal representative of the estate. In that hearing, Zambia appeared pro se and testified concerning her administration of the estate. Zambia essentially testified that she had relied upon her former attorney for all of her actions and that she did not mean to

1180606

mismanage the estate, but Zambia essentially admitted that she had commingled estate funds and property with her personal accounts and property. The following day, February 27, 2018, the circuit court entered an order that, among other things, removed Zambia as personal representative of the estate, and it denied Zambia's petition for approval of her final accounting. The order specifically stated that "the removal [of Zambia as personal representative] does not and shall not constitute a release or discharge of [Zambia] or [Zambia's] sureties from any malfeasance or breach of duty in management of the Estate during her tenure as such." On February 28, 2018, the circuit court entered an order appointing J.C.'s mother, Stephanie Calloway, as the personal representative of Jabari's estate.

On September 11, 2018, Zambia, through new counsel, filed a second petition for final accounting of the estate and requested a hearing for examination of that petition. On September 18, 2018, J.C. filed an "Objection to and Motion to Strike/Dismiss Petition for Final Settlement." J.C. argued that the second petition for final settlement was a regurgitation of Zambia's original petition, which the circuit

1180606

court had rejected. On October 9, 2018, the circuit court entered an order granting J.C.'s motion to strike/dismiss Zambia's second petition for final settlement and denying Zambia's request for a hearing on that petition. In that order, the circuit court noted that it had held a hearing on February 26, 2018, "to specifically address the removal of former Administratrix Zambia Player, in addition to the Court addressing the issues to approve the Former Representative's Final Accounting and Petition for Final Discharge."

On October 23, 2018, Zambia filed a motion to reconsider the October 9, 2018, order. The circuit court held a hearing on that motion on December 10, 2018. In that hearing, the circuit court explained that any further hearing with respect to Zambia's second petition for final settlement was unnecessary because of the extensive testimony concerning Zambia's administration of the estate that was heard in the February 26, 2018, hearing. Also in the December 10, 2018, hearing, the parties agreed that a motion alleging breach of fiduciary duty, along with supporting documentary evidence, would be filed against Zambia, that Zambia would then be allowed to file a response to that motion along with any

1180606

supporting evidence, and that the circuit court would enter an order based on the parties' evidentiary submissions as well as Zambia's previous testimony from the February 26, 2018, hearing.

On January 10, 2019, Calloway and J.C. filed a "Motion for Damages Against Former Administratrix and Supporting Brief." Along with this motion, Calloway and J.C. filed substantial documentary evidence. On January 29, 2019, Zambia filed a response to the motion in which she argued that "[t]he estate has suffered no damage[] as a result of the failure of [Zambia] to have final settlement after the six (6) month period to file claims had expired." She admitted that "she co-mingled [estate] funds with her own assets but clearly the \$13,191.00<sup>[1]</sup> that Jabari Player had at the time of his death was used for the benefit of his estate and its beneficiary."

On January 30, 2019, the circuit court entered an order on

"a determination of whatever damage[], if any, [was] suffered from the Estate and its sole beneficiary as a consequence of the manner in which the Estate property was handled by the original Administratrix,

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<sup>1</sup>We recognize that this amount differs from the amount that Zambia stated was in the estate in her initial inventory filed in March 2014.

1180606

Zambia Richea Player, whom the Court previously removed from her appointment as Personal Representative for breach of her fiduciary duties."

The circuit court concluded that Zambia's contention that

"her actions were somehow on behalf of the Estate are without merit and are contrary to the evidence; and that [Calloway and J.C.] are entitled to judgment in an amount equal to the value of the Estate as it existed as of March 14, 2014, the last day for filing claims against the Estate. Based upon the evidence presented, the Court finds this amount to be \$27,622.85 .... The Court further finds that [Calloway and J.C.] are entitled to recover interest on the amount of money held in the bank as of March 14, 2014, through at least March 13, 2018."

The circuit court also charged court costs against Zambia.<sup>2</sup>

On February 26, 2019, Zambia filed a postjudgment motion seeking to set aside the circuit court's January 30, 2019, order. On April 3, 2019, the circuit court held a hearing on the postjudgment motion. On the same date, the circuit court denied the postjudgment motion. On May 8, 2019, Zambia filed this appeal.

## II. Standard of Review

"The evidence in this case was presented to the trial judge in a bench

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<sup>2</sup>Zambia asserts in her brief to this Court that the total judgment amount is \$33,622.85, but nothing in the record on appeal, including Zambia's notice of appeal, confirms that amount as the amount in controversy.

trial. "When a judge in a nonjury case hears oral testimony, a judgment based on findings of fact based on that testimony will be presumed correct and will not be disturbed on appeal except for a plain and palpable error.'" Smith v. Muchia, 854 So. 2d 85, 92 (Ala. 2003) (quoting Allstate Ins. Co. v. Skelton, 675 So. 2d 377, 379 (Ala. 1996)); see also First Nat'l Bank of Mobile v. Duckworth, 502 So. 2d 709 (Ala. 1987). ...

"'...'"

"'... However, "that presumption [of correctness] has no application when the trial court is shown to have improperly applied the law to the facts." Ex parte Board of Zoning Adjustment of Mobile, 636 So. 2d 415, 417 (Ala. 1994).'

"Robinson v. Evans, 959 So. 2d 634, 637 (Ala. 2006).

"Questions relating to the good faith and prudence of an executor in carrying out his or her duties in administering an estate are questions of fact clothed with a presumption of correctness when the ore tenus rule is applied, and a probate court's judgment based on such findings will not be disturbed on appeal unless that judgment is clearly erroneous."

Ruttenberg v. Friedman, 97 So. 3d 114, 121 (Ala. 2012).

### III. Analysis

#### A. Jurisdiction of Zambia's Appeal

Zambia purports to appeal from two orders of the circuit court. First, she appeals from the October 9, 2018, order,



1180606

which she says "removed [her] as personal representative of the estate." Second, she appeals from the January 30, 2019, order that assessed damages against her for malfeasance of estate assets during her tenure as personal representative. However, before we address her arguments, we must determine whether this Court has jurisdiction of this appeal even though neither party raises that issue. See, e.g., Nettles v. Rumberger, Kirk & Caldwell, P.C., 276 So. 3d 663, 669 n.1 (Ala. 2018) (observing that "[i]t is the duty of this Court ... to consider its own appellate jurisdiction, and '[w]e therefore are not confined to the arguments of the parties in our subject-matter-jurisdiction analysis.' Riley v. Hughes, 17 So. 3d 643, 648 (Ala. 2009)").

Zambia is incorrect that the circuit court's October 9, 2018, order removed her as personal representative of the estate. The order that actually removed Zambia as personal representative was the circuit court's February 27, 2018, order. The October 9, 2018, order dismissed Zambia's second petition for a final settlement. A probate-court order removing a personal representative from an estate is

1180606

immediately appealable to this Court under § 12-22-21, Ala. Code 1975.

"Appeal from the order, judgment or decree of the probate court may be taken by the party aggrieved to the circuit court or Supreme Court in the cases hereinafter specified. Appeals to the Supreme Court shall be governed by the Alabama Rules of Appellate Procedure, including the time for taking an appeal. Appeal to the circuit court in such cases shall be within the time hereinafter specified:

"....

"(3) Upon any decree, judgment or order removing an executor or administrator, in which case the appeal must be taken within seven days after such decree, judgment or order ...."

§ 12-22-21, Ala. Code 1975. Section 12-22-21 "does not specifically provide a right to appeal from a similar order of the circuit court. However, this Court has traditionally treated such orders of the circuit court as though they were orders of the probate court." Tate v. Kennedy, 578 So. 2d 1079, 1080 n.2 (Ala. 1991).

"Appeals to the Alabama Supreme Court brought pursuant to § 12-22-21 are governed by the Alabama Rules of Appellate Procedure. § 12-22-21. Rule 4(a)(1), Ala. R. App. P., states that a party must file a notice of appeal 'within 42 days (6 weeks) of the date of the entry of the judgment or order appealed from.'"

1180606

Eustace v. Browning, 30 So. 3d 445, 450 (Ala. Civ. App. 2009).

The first order Zambia seeks to appeal was entered on February 27, 2018; she did not file her appeal until May 10, 2019. Accordingly, Zambia's appeal of that order is untimely.

"A court must dismiss an appeal for lack of jurisdiction if a party does not appeal within the time prescribed by statute."

Flannigan v. Jordan, 871 So. 2d 767, 770 (Ala. 2003).

Therefore, we will not address Zambia's challenge to the circuit court's decision to remove her as personal representative of Jabari's estate.

Zambia also appeals the circuit court's January 30, 2019, order that assessed a \$27,622.85 damages award against her for malfeasance of estate assets during her tenure as personal representative. Section 12-22-21(5), Ala. Code 1975, authorizes an appeal to this Court "[a]fter a final settlement, upon any order, judgment or decree, made on such settlement, or respecting any item or matter thereof, or any previous settlement or item, or matter thereof, within 42 days thereafter." This Court has explained:

"Section 12-22-21(5) does not authorize an appeal from any judgment or order 'respecting a matter of a final settlement' .... Not every order of a probate court involving the funds in a decedent's

1180606

estate is appealable as from a final settlement. On the contrary, a partial settlement is appealable, pursuant to Ala. Code 1975, § 12-22-4 .... [Section] 12-22-21(5) authorizes an appeal to the circuit court only '[a]fter a final settlement.' (Emphasis added.) Thus, the triggering event is the final settlement itself, not ... some order anticipating, or facilitating, an eventual final settlement."

Boyd v. Franklin, 919 So. 2d 1166, 1172 (Ala. 2005).

The order at issue in Boyd, like the order from which Zambia appeals, required the personal representative of an estate to disgorge funds improperly taken from the estate. Thus, the circuit court's January 30, 2019, order concerns a partial settlement of Jabari's estate and is therefore appealable to this Court under § 12-22-4, Ala. Code 1975.<sup>3</sup>

B. Zambia's Arguments Regarding the Circuit Court's January 30, 2019, Order

Zambia's arguments pertaining to the circuit court's January 30, 2019, order are not a model of clarity, and they contain almost no citations to authority or to the record on

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<sup>3</sup>Section 12-22-4 provides:

"From a judgment of the circuit court or probate court on a partial or annual settlement of an estate of a deceased person, an appeal lies to the Supreme Court; but this section shall not be construed as to prevent the presentation of an issue upon appeal taken after a final determination of the case."

1180606

appeal to illuminate them. Regardless, it appears that Zambia essentially presents two arguments as to why she believes the circuit court erred. First, Zambia contends that she should have been permitted to present her second petition for final settlement following her removal as personal representative and that the circuit court erred in failing to hold a hearing on that petition. Second, Zambia argues that the \$27,622.85 judgment against her was erroneous because, she says, the total amount she received from the estate during her tenure as personal representative was \$13,191 and she used those funds for the benefit of the estate and J.C., not for herself. Both arguments lack merit.

With respect to Zambia's first argument, she specifically contends that under § 43-2-550, Ala. Code 1975, she should have been given a hearing on her second petition for a final settlement of the estate following her removal as personal representative. Section 43-2-550 provides:

"When an executor or administrator dies, resigns or is removed, or his letters are revoked, or his authority ceases from any cause, he must within one month after his authority ceases or, in case of his death, his personal representative must or, in case of his removal from the state, his sureties must, within six months after the grant of letters, file his accounts, vouchers and statement of heirs and

1180606

legatees for and must make final settlement of the administration of, such executor or administrator, of which settlement notice must be given in the same manner; and such settlement must be conducted and governed, except as otherwise provided in this article, by the same rules and provisions of law as other final settlements by executors or administrators."

Zambia contends that the circuit court erred by summarily rejecting her second petition for final settlement without a hearing.

The procedural history of this case recounted in our rendition of the facts amply explains why the circuit court did not hold a hearing on Zambia's second petition for a final settlement. Zambia did not comply with multiple orders from the circuit court directing her to file an accounting for the estate. She filed her first petition for final settlement only after J.C. had filed a motion to remove Zambia as personal representative of the estate. Zambia's current counsel concedes that the first petition did not comply with the requirements for a final settlement. Zambia was removed as personal representative of the estate on February 27, 2018, following a hearing held the previous day in which the circuit court heard extensive testimony from Zambia concerning her administration of the estate. That February 27, 2018, order

1180606

also rejected Zambia's first petition for final settlement based on its facial deficiencies and the testimony Zambia had provided in the hearing the day before.

Zambia filed her second petition for final settlement on September 11, 2018. Although this second petition was in better form than was the first petition, it still simply regurgitated the information contained in the first petition, which the circuit court had previously rejected. On October 9, 2018, the circuit court entered an order granting J.C.'s motion to strike Zambia's second petition for final settlement and finding that Zambia's request for a hearing on that petition was moot because of the hearing that had been held on February 26, 2018. Thereafter, the parties agreed in a subsequent hearing held on December 9, 2018, that they would move on to submissions and arguments pertaining to whether Zambia owed anything to the estate.

In short, the circuit court gave Zambia multiple opportunities to properly perform her accounting duties, and she failed to do so. Even assuming § 43-2-550 applied to Zambia's filing of the second petition for final settlement, she did not comply with its terms because she did not file a

1180606

final settlement within one month after being removed as personal representative of the estate. Moreover, the circuit court determined that no hearing was necessary with respect to Zambia's second petition for final settlement because a sufficient hearing had been held on February 26, 2018, and the second petition simply repeated information the circuit court had previously rejected in the submission of the first petition for final settlement. Zambia has not demonstrated how the circuit court's conclusion in this regard was erroneous.

Zambia also argues that the \$27,622.85 judgment against her was erroneous. She contends that when she became personal representative the estate had assets consisting of \$13,191 cash and two automobiles. She asserts that both vehicles still had liens on them and that she used estate assets to pay off that debt, totaling \$10,765.86. Zambia also states that she spent \$10,748.31 to have one of those vehicles repaired and that \$9,67.33 of that amount came from her own funds. Thus, Zambia reasons that "[t]here was no misuse of any assets of the estate, except the failure to deliver the repaired and paid for automobiles to [J.C.] timely. She would have



1180606

delivered them earlier if someone with knowledge had told her to do so." Based on this assessment, Zambia contends that the circuit court's judgment against her was manifestly unjust.<sup>4</sup>

Zambia presents her argument as if merely making the foregoing assertions (without any citations to the record) demonstrates that the circuit court's judgment was erroneous even though the ore tenus rule is applicable to our review of that judgment; the circuit court heard testimony directly from Zambia and based its decision at least in part on that testimony. Zambia herself admits in her appellate brief that "she commingled those funds [of Jabari's estate] with her own assets," but she discounts that fact with the assertion that those funds were "used for the benefit of the estate and its beneficiary." The circuit court concluded that exactly the opposite was the case, finding that Zambia's assertion that "her actions were somehow on behalf of the Estate are without merit and are contrary to the evidence." The evidence indicated, among other things, that Zambia made no effort to

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<sup>4</sup>See, e.g., Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002) (noting that "when a trial court hears ore tenus testimony, its findings on disputed facts are presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust").

1180606

close the estate, that she wasted its assets, that she commingled her funds and the estate's funds, that she titled one of the estate's vehicles in her own name, and that she violated orders not to use the vehicles for her personal benefit. J.C. and Calloway presented evidence documenting Zambia's malfeasance. The fact that Zambia may have received poor legal advice before she retained her current counsel does not obviate her fiduciary duties to the estate and to J.C. Zambia did not fulfill those duties, and the circuit court assessed damages on that basis. Zambia has not demonstrated how the circuit court erred in reaching its judgment.

#### IV. Conclusion

Zambia's appeal of the order removing her as personal representative of Jabari's estate was not timely; therefore that part of Zambia's appeal is not properly before us and we dismiss it. Zambia also has not demonstrated that the circuit court erred in its order assessing damages against her for malfeasance in administering the estate. Therefore, that order is affirmed.

1180606

APPEAL DISMISSED IN PART; AFFIRMED.

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Stewart,  
and Mitchell, JJ., concur.

Shaw, J., concurs in the result.