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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-618

Filed 05 July 2023

New Hanover County, No. 16E1551

IN THE MATTER OF THE ESTATE OF:

DAVID SCOTT CORBETT, Deceased.

Appeal by executrix from order entered 31 March 2022 by Judge J. Stanley Carmical in New Hanover County Superior Court. Heard in the Court of Appeals 25 April 2023.

Moore & Van Allen PLLC, by Elena F. Mitchell, Thomas D. Myrick, and Caitlin N. Horne, for executrix-appellant.

Essex Richards, PA, by Jonathan E. Buchan, for propounders-appellees, no brief.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by James C. Adams, II, Daniel L. Colston, and Thomas G. Varnum, for caveator-appellee.

GORE, Judge.

Executrix Shannon Corbett Maus appeals the trial court's Order on motions for award of fees and costs entered 31 March 2022. Executrix argues the trial court: (i) lacked subject-matter jurisdiction to enter the fee Order; (ii) erred in granting caveator Diana G. Corbett's fee petition; and (iii) erred in denying in part executrix's

motion for award of attorneys' fees and costs as estate expenses. Upon review, we affirm in part and dismiss in part.

I.

On 12 September 2017, caveator Diana G. Corbett filed a caveat to the 12 September 2016 will of her deceased husband, testator David Scott Corbett. Caveator alleged testator lacked testamentary capacity or was unduly influenced in executing a new will while in the hospital one month prior to his death from cancer. On 14 December 2017, executrix Shannon Corbett Maus filed a response.

Caveator was represented by James C. Adams, II, Thomas Varnum, and Ryan Fairchild of Brooks, Pierce, McLendon, Humphrey, & Leonard, LLP ("Brooks Pierce"). Executrix was represented by Thomas D. Myrick, Caitlyn N. Horne, Elena F. Mitchell, and Catherine R. Prater of Moore Van Allen, PLLC, ("MVA") of Charlotte.

Executrix filed multiple petitions for payment of MVA's fees throughout the litigation. Caveator opposed each petition on grounds that MVA's fees were excessive, and payment was not consistent with executrix's statutory and fiduciary duty to preserve estate assets. The New Hanover County Clerk of Court issued orders awarding 100% of the invoiced fees and costs billed by MVA. The estate had paid MVA a total of \$634,843.53 in fees and costs from the initiation of the caveat through 30 June 2020. However, ruling on future payments to MVA was deferred pending resolution of caveat proceeding.

From 12 July 2021 to 30 July 2021, this matter was tried before a jury in New

Hanover County Superior Court. On 27 July 2021 executrix filed for a motion for directed verdict at the close of caveator’s evidence, which was denied. On 28 July 2021, executrix made an oral motion for directed verdict at the close of all evidence, which was also denied.

On 30 July 2021, the jury returned a unanimous verdict in favor of caveator on all issues. On 9 August 2021, the trial court rendered judgment for caveator based on the jury’s verdicts, entered 16 August 2021. Following trial, executrix filed a motion for judgment notwithstanding the verdict, or in the alternative, a new trial (“JNOV” motion), which the trial court denied.

Following trial and denial of her JNOV motion, executrix sought to have the estate pay MVA an additional \$984,261.69 in attorneys’ fees and costs for the period of June 2020 to September 2021, for a total of \$1,619,105.22 in fees and costs since the initiation of the caveat. In contrast, the total amount of legal expenses sought by caveator since the initiation of the caveat was \$935,492.01.

On 16 September 2021, caveator filed a petition for payment of attorneys’ fees and costs. On 19 October 2021, executrix filed a motion seeking entry of an order directing the estate to pay the attorney’s fees and costs incurred by executrix’s counsel from 30 June 2020 through 30 September 2021. On 22 October 2021, propounders Melissa A. Corbett and Rebecca Corbett McGowan—executrix’s sisters—filed a motion seeking an order directing the estate to pay the attorneys’ fees and costs they incurred related to the caveat.

In support of their respective fee petitions and motions, the parties submitted affidavits on the reasonableness of the attorneys' fees sought. Executrix submitted the affidavits of attorneys attesting that MVA's fees were "comparable to those charged by comparably skilled and experienced practitioners at similar firms in North Carolina for similar work in similar matters," but did not mention the locality of New Hanover County. Caveator's affidavits attested that the rates for Brooks Pierce were "well within the range of reasonableness" for complex civil superior court cases in the Wilmington, North Carolina area, but that rates over \$500 per hour for partners or \$350 per hour for associates "would be outside the range of reasonableness" for Wilmington and New Hanover County.

On 8 November 2021, caveator filed an opposition to executrix's motion for payment of attorneys' fees, again arguing that the requested rates for executrix's attorneys were unreasonable for the locality of New Hanover County, and that executrix had neglected her statutorily imposed fiduciary duty to the estate in paying unreasonably high rates. Also on 8 November 2021, executrix filed an opposition to caveator's petition on grounds that the trial court would lose jurisdiction to rule on caveator's fee petition once executrix noticed an appeal of the trial court's denial of her JNOV motion. Executrix also argued that despite a unanimous verdict, the caveat lacked substantial merit and so no fees should be paid to caveator. Later that day, executrix filed notice of appeal to this Court, appealing the trial court's orders denying the directed verdict motions, the judgment, order denying her JNOV motion,

and “all [other] orders contributing to the trial court’s resolution of this action” (“First Appeal”).

After executrix filed the first notice of appeal but before the First Appeal was docketed, the trial court entered its Order on Motions for Award of Fees and Costs on 31 March 2022. The trial court found that all parties had brought good-faith arguments and that counsel had “demonstrated exceptional skill” and conducted themselves “ethically and with laudable collegiality.” The trial court determined that it had jurisdiction to award fees notwithstanding executrix’s First Appeal and found that the caveat had substantial merit based on the triable issues of fact and the evidence presented at trial. The court noted it would still find substantial merit even if the jury had returned a verdict in favor of executrix. Additionally, the trial court found that attorneys’ fees requested by caveator were reasonable within New Hanover County. The trial court also allowed propounder’s motion in full.

The trial court partially granted executrix’s motion, reducing the total amount of attorneys’ fees to be awarded to MVA to \$724,518.90 (reducing the original, requested amount of \$866,122.30 by \$161,603.40). The trial court did so after holding that: (i) all attorneys’ fees awarded to counsel must be “within the range of the customary fee for like work . . . in New Hanover County” rather than North Carolina more generally; and (ii) the affidavits submitted in support of caveator’s petition “show that the attorneys’ fees sought by Executrix . . . [are] not comparable to the rates found in New Hanover County for attorneys of [their] level of experience”, and

are “in excess of those rates customary and reasonable within the New Hanover County geographic area.” The trial court also concluded, however, that MVA’s customary rates “are clearly warranted based on demonstrated skill and expertise as well as what the market for legal services will bear in Mecklenburg and Wake counties.”

On 26 April 2022, executrix filed notice of appeal from the trial court’s fee Order (the “Second Appeal”). The fee Order is a final determination regarding the parties’ rights to attorneys’ fees and costs and, therefore, appeal lies to this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1).

II.

First, executrix argues the trial court lacked subject-matter jurisdiction to enter the fee Order after executrix filed and served the first notice of appeal. We disagree.

“The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, including on appeal.” *McClure v. Cnty. of Jackson*, 185 N.C. App. 462, 469, 648 S.E.2d 546, 550 (2007) (citation omitted). “Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

“When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, . . . but the court below may proceed upon

any other matter included in the action and not affected by the judgment appealed from.” N.C. Gen. Stat. § 1-294 (2022). Under our precedent, “it is *only* when an award of costs is directly dependent upon whether the judgment is sustained on appeal, that, under N.C. Gen. Stat. § 1-294, the trial court lacks jurisdiction to enter an award of costs once notice of appeal has been filed as to the underlying judgment.” *Blanchard v. Blanchard*, 279 N.C. App. 269, 277, 865 S.E.2d 686, 691 (2021) (cleaned up).

In this case, the trial court entered its fee Order pursuant to section 6-21(2). Under this statute, the trial court is authorized to enter a discretionary award in a will caveat proceeding “against either party, or apportioned among the parties . . .” and “shall allow attorneys’ fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.” N.C. Gen. Stat. § 6-21(2) (2022). “The substantial merit requirement does not mean success on the merits; in its sound discretion, the trial court may award attorney’s fees even to unsuccessful caveators.” *In re Estate of Tucci*, 104 N.C. App. 142, 154, 408 S.E.2d 859, 866 (1991).

This Court has “held that a trial court may enter an award of attorneys’ fees following notice of appeal from a prior judgment in a caveat proceeding, section 1-294 notwithstanding.” *In re Will of Baitschora*, 207 N.C. App. 174, 192, 700 S.E.2d 50, 62 (2010) (first citing *In re Will of Dunn*, 129 N.C. App. 321, 329-30, 500 S.E.2d 99, 104-05 (1998); and then citing *McClure*, 185 N.C. App. at 470, 648 S.E.2d at 551). Section 6-21(2) does not contain a “prevailing party” requirement, and thus, the trial court’s decision to award attorneys’ fees is not directly dependent upon the outcome of an

appeal from underlying judgment. Therefore, the trial court retained subject-matter jurisdiction to enter a discretionary fee award pursuant to section 6-21(2).

III.

Next, executrix contends the trial court abused its discretion in granting caveator's petition for attorneys' fees. We lack appellate jurisdiction to reach the merits of this issue.

In this case, the fee Order entered 31 March 2022 incorporated rulings on three separate fee petitions: (i) caveator's 16 September 2021 petition for payment of attorney's fees; (ii) propounder's 22 October 2021 petition for payment of attorneys' fees and costs; and (iii) executrix's 19 October 2021 petition for payment of attorneys' fees and costs. Executrix's notice of appeal, by its express language, only challenges a portion of the trial court's fee Order "reducing the requested attorneys' fees for counsel for [e]xecutrix after [31 May 2020]. Caveator timely objected to executrix's proposed issues on appeal pertaining to caveator's petition for payment of attorneys' fees on grounds that such issues were not preserved for appeal based upon the content of the Notice of Appeal filed 26 April 2022.

Rule 3(d) of the North Carolina Rules of Appellate Procedure provides that notice of appeal "shall designate the judgment or order from which appeal is taken" N.C.R. App. P. 3(d). "Rule 3 is jurisdictional, and if the requirements of the rule are not complied with, the appeal must be dismissed." *Foreman v. Sholl*, 113 N.C. App. 282, 291, 439 S.E.2d 169, 175 (1994) (citations omitted). "Furthermore, an

appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider.” *Id.* (quotation marks and citation omitted). “Rule 3(d) can be treacherous for an appellant whose notice identifies one but not all provisions in the order or judgment from which the appellant seeks relief.” *Gause v. New Hanover Reg’l Med. Ctr.*, 251 N.C. App. 413, 425, 795 S.E.2d 411, 419 (2016).

Despite these principles, we may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction over an apparently unspecified portion of a judgment. First, a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake. Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the *functional equivalent* of the requirement.

Von Ramm v. Von Ramm, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990) (quotation marks and citations omitted).

Executrix’s notice of appeal meets all the technical requirements of Rule 3(d). Therefore, the question is whether executrix’s intent to appeal the entire fee Order can be “fairly inferred” from executrix’s notice of appeal, and caveator was “not misled by the mistake.” *Id.* at 157, 392 S.E.2d at 424 (citation omitted).

Here, the trial court entered a single Order incorporating rulings on multiple petitions. Executrix elected to designate only a portion of that Order in her notice of

appeal. This is not a case where multiple orders appear in the record, and descriptors in the notice may serve to identify the correct order. Executrix identified only a portion of the trial court’s ruling, thereby limiting the scope of our review. As a result, this Court is vested with jurisdiction to review the trial court’s subject-matter jurisdiction (previously discussed) and issues concerning executrix’s petition for attorneys’ fees. We lack appellate jurisdiction to consider portions of the trial court’s Order granting caveator’s petition.

IV.

Executrix argues the trial court abused its discretion in entering the fee Order denying in part executrix’s motion. Executrix raises four arguments. We address each argument in turn.

A.

First, executrix asserts the trial court based its decision to reduce the amount of attorney’s fees paid to MVA on “personal bias and the weighing of irrelevant considerations such as whether executrix personally funded her defense to the caveat or relied on estate resources.” Our review of the record reflects no such bias or prejudice. This argument is without merit.

B.

Next, executrix contends the trial court abused its discretion by finding and concluding that New Hanover County is the relevant locality for this case. *See* N.C. Rev. R. Prof. Cond. Rule 1.5(a)(3) (2021). Executrix argues the appropriate locality

is the State of North Carolina as a whole. We disagree.

In North Carolina, attorneys’ fees are only recoverable if “such a recovery is expressly authorized by statute.” *Robinson v. Robinson*, 210 N.C. App. 319, 336, 707 S.E.2d 785, 797 (2011) (citation omitted). Section 6-21(2) authorizes the trial court to enter a discretionary award for attorneys’ fees and costs against either party in a will caveat proceeding.

“Whether to allow costs and attorneys’ fees under . . . section [6-21] is a matter within the trial court’s discretion.” *In re Will of Sechrest*, 140 N.C. App. 464, 474, 537 S.E.2d 511, 518 (2000) (citation omitted). “An abuse of discretion occurs only when the trial court’s ruling is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.” *In re Will of McFayden*, 179 N.C. App. 595, 602, 635 S.E.2d 65, 70 (2006) (quotation marks and citation omitted). “A trial court abuses its discretion when it acts under a misapprehension of law.” *Cash v. Cash*, 284 N.C. App. 1, 7, 874 S.E.2d 653, 658 (2022).

“[A] trial court’s award of attorneys’ fees must be supported by proper findings considering ‘the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney.’” *Barrington v. Dyer*, 282 N.C. App. 404, 411, 872 S.E.2d 88, 94 (2022) (alteration in original) (citation omitted). “The reasonableness of attorney’s fees in this state is governed by the factors found in Rule 1.5 of the Revised Rules of Professional Conduct of the North Carolina State Bar.” *Ehrenhaus v. Baker*, 216 N.C. App. 59, 96, 717 S.E.2d 9, 33 (2011).

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

N.C. Rev. R. Prof. Cond. Rule 1.5(a) (2021).

In assessing an award of attorneys' fees in North Carolina, a trial court considers "the fee customarily charged in the locality for similar legal services." Rule 1.5(a)(3). The term "locality" is defined as "[a] definite region; vicinity; neighborhood; community." *Locality*, BLACK'S LAW DICTIONARY (8th ed. 2004).

"[T]his Court has previously recognized the general principle that community

rates in the geographic area of the litigation are relevant to the reasonableness determination.” *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 244, 752 S.E.2d 634, 655 (2013). “The Fourth Circuit has also held that the community where ‘the court sits is the appropriate starting point for selecting the proper rate.’” *Id.* (quoting *Nat’l Wildlife Fed’n v. Hanson*, 859 F.2d 313, 317 (4th Cir. 1988)). “[A]lthough community rates may be the starting point, the trial court must conduct further inquiry when local counsel do not have the expertise to adequately represent a client.” *Id.* (citation omitted). The term “locality” is distinguishable from the term “local counsel.” “Local counsel” means “[o]ne or more lawyers who practice in a particular jurisdiction and are retained by non-resident counsel to help prepare and try a case or to complete a transaction in accordance with that jurisdiction’s law, rules, and customs.” *Local Counsel*, BLACK’S LAW DICTIONARY (8th ed. 2004).

As discussed in *GE Betz*, our case law confirms that “locality” does not include the entire State. In assessing the reasonableness of attorneys’ fees, our trial courts look to the rates customarily charged by local counsel (North Carolina attorneys) within the locality (community) “in which the litigation took place.” *GE Betz*, 231 N.C. App. at 247, 752 S.E.2d at 657. In this case, the trial court made the required findings on this factor, and appropriately determined that New Hanover County is the community in which this case has been litigated and tried.

C.

Executrix raises two additional arguments: (i) the fee Order is contrary to

public policy and, as applied by the trial court, section 6-21 violates the North Carolina Constitution; and (ii) the trial court arbitrarily reduced the hourly rates of three MVA attorneys whose standard hourly rates are reasonable compared to those of attorneys in New Hanover County of similar experience handling like matters. Executrix fails to challenge specific findings or conclusions in the trial court's Order and fails to provide any legal support or basis for these contentions. Accordingly, we deem these arguments abandoned. *See* N.C.R. App. P. 28(b)(6); *see also K2HN Constr. NC, LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 215, 832 S.E.2d 559, 565 (2019) ("[I]t is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein.").

V.

In sum, we affirm and part and dismiss in part: (i) the trial court retained jurisdiction to enter the fee Order; (ii) this Court lacks jurisdiction to review issues pertaining to caveator's fee petition; and (iii) the trial court did not err in conducting its reasonableness determination by concluding that New Hanover County is the appropriate locality for this action.

AFFIRMED IN PART AND DISMISSED IN PART.

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).