Circuit Court for Montgomery County
Case No. 141193FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 360

September Term, 2017

IN RE MARGO SELBY

Arthur,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: February 8, 2019

Hebrew Home, Inc. ("Hebrew Home") appeals an order of the Circuit Court for Montgomery County directing it to pay the attorney's fees of Nina Helwig, Esq., appellee. Ms. Helwig was court-appointed counsel in a guardianship proceeding for Margo Selby, a disabled nursing home resident. After representing Ms. Selby, Ms. Helwig filed a petition for attorney's fees to be paid by Hebrew Home. Hebrew Home opposed the petition, arguing that the State of Maryland is the sole source of payments of attorney's fees incurred by an indigent disabled person for court-appointed counsel. The circuit court ordered Hebrew Home to pay $525 in attorney's fees to Ms. Helwig. On appeal, Hebrew Home presents two questions, which we have consolidated and rephrased as follows:

Did the trial court err in ordering Hebrew Home to pay the attorney's fees?

For the reasons that follow, we vacate the judgment of the circuit court and remand for further proceedings in accordance with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Ms. Selby, who suffers from dementia, moved to Hebrew Home, a long-term assisted care facility in Rockville, Maryland, on January 14, 2013. Assisted by her son and attorney-in-fact George Selby, she qualified for Medicaid benefits on March 1, 2013. Following the death of her son in December 2015, those benefits terminated on March 31, 2016 for failure to complete the recertification process. A nephew helped her submit

[1] Following briefing, this Court informed the Attorney General that the State may have an interest in the case pursuant to Article V, Section 6 of the Maryland Constitution. The Department of Human Services filed a motion for leave to file a brief as *amicus curiae*, which was granted by this Court.

a redetermination request, but she was found ineligible because her assets exceeded the maximum allowable amount by less than $600. When no other family members were willing or able to assist Ms. Selby, Hebrew Home filed a Petition for Appointment of a Guardian of the Property for Margo Selby ("Petition for Guardianship") in the circuit court on December 12, 2016. The petition requested a guardian to "properly manage and disburse the nominal income and assets [Ms. Selby] may have in order to pay Hebrew Home's bills and to apply for and re-obtain eligib[ility] for Medicaid benefits." At the time of that filing, Hebrew Home believed that Ms. Selby, a private-pay resident, received $1206.04 per month in retirement benefits. For the period of time she was without Medicaid benefits, she owed Hebrew Home approximately $100,000.

On December 12, 2016, the circuit court appointed Ms. Helwig "counsel to represent [Ms. Selby]." The appointment order provided that "[t]he fee of the appointed attorney shall be fixed by the court and shall be paid out of the fiduciary estate or as the court shall direct. In appropriate circumstances, the fee of an attorney . . . may be paid by the State." On December 15, 2016, the court appointed Philip Karasik, Esq. Temporary Guardian of the Property of Ms. Selby "for the limited purpose of managing any of Ms. Selby's identifiable income and assets and for applying for . . . Medicaid benefits to pay for her care."

After meeting and consulting with Ms. Selby, Ms. Helwig filed a response to the Petition for Guardianship, agreeing with Hebrew Home on the need for guardianship. She stated that Ms. Selby expressed her consent to the appointment of a guardian of her

property and waived her right to be present at hearings. After a hearing on the Petition for Guardianship on February 16, 2017, the circuit court appointed Mr. Karasik as the permanent guardian of Ms. Selby's property.

Ms. Helwig filed a Petition for Attorney's Fees, on February 24, 2017, requesting $525 for services performed representing Ms. Selby in the guardianship case. She stated that Ms. Selby was indigent and could not pay the fees. Anticipating that Hebrew Home would ask the court to order the State to pay the fees, Ms. Helwig asked the court to order Hebrew Home to pay the fees because the rate paid by the State was $75 per hour, which is $175 less than her hourly rate, and Hebrew Home will now be reimbursed for services it provides to Ms. Selby through Medicaid and Social Security because a guardian of property had been appointed. Hebrew Home opposed the petition, asserting that Maryland Rule 10-106(a) required the State to pay attorney's fees in a guardianship proceeding when the disabled person is indigent.

On March 27, 2017, the circuit court, without reference to rule or statute, entered an order that Hebrew Home pay Ms. Helwig $525 in attorney's fees.[2] Hebrew Home noted this timely appeal.

[2] We express no opinion of the reasonableness of the requested fees.

DISCUSSION

Standard of Review

We review a trial court's interpretation of court rules and statutes *de novo*. *See, e.g.*, *State v. Graves*, 447 Md. 230, 240 (2016) (applying a de novo standard in addressing circuit court's compliance with Md. Rule 4-215(e)); *Lowery v. State*, 430 Md. 477, 487 (2013) ("[w]e review a trial court's interpretation of a statute through a non-deferential prism."). Ordinarily, we review a trial court's grant of attorney's fees for an abuse of discretion and will disturb an award only when it is "arbitrary" or "clearly wrong." *Ochse v. Henry*, 216 Md. App. 439 (2014).

Contentions

Hebrew Home contends that, because Ms. Selby is indigent, the circuit court erred by ordering it, rather than the State, to pay Ms. Helwig's attorney's fees. Hebrew Home bases that contention on Maryland Rule 10-106(a), which requires a circuit court to "promptly appoint an attorney" for an allegedly disabled person who has not retained his or her own counsel in a guardianship proceeding, and if the individual is indigent, provides that "the State *shall* pay a reasonable attorney's fee." (Emphasis added.) It argues that the use of "shall" in the rule imposes a mandatory obligation on the State to pay an indigent disabled person's attorney's fees. In its view, Rule 10-106(a) applies to both guardian of the property and guardian of the person proceedings.

Ms. Helwig, reading the plain text of Rule 10-106(a) "conjunctively instead of disjunctively,"[3] responds that it allows for attorney's fees to be paid from the estate of the disabled person or in a manner directed by the trial court. In other words, the State is required to pay attorney's fees only if ordered to do so by the trial court. In her view, the statutory scheme authorizes the court to use its discretion to ensure a proper party pays the disabled person's attorney's fees. She argues that Hebrew Home is the proper party because Ms. Selby needed to qualify for Medicaid benefits and had insufficient funds to pay for her nursing care. Once she qualified and had contributed all of her otherwise available income, those benefits will go to Hebrew Home to pay for her care. And, because Hebrew Home is the ultimate beneficiary of the guardianship proceedings, ordering Hebrew Home to pay attorney's fees is no different than ordering Ms. Selby or the guardian of her property to pay the fees.[4]

The Department of Human Services (the "Department"), as *amicus curiae*, contends that the circuit court was correct in not ordering the State to pay Ms. Helwig's

[3] Ms. Helwig appears to urge us to apply the provision in the applicable iteration of Rule 10-106(a), which we will refer to, in whole, as the 2017 Rule and which, in subsection (1), states that "[t]he fee of the appointed attorney shall be fixed by the court and shall be paid out of the fiduciary estate *or as the court shall direct*" (emphasis added), to Rule 10-106(a)(2). This interpretation ignores the distinction in the 2017 Rule, which we will discuss *infra*, between subsection (1) dealing with guardianship of a "minor" and subsection (2) dealing with that of a "disabled person."

[4] Ms. Helwig also asserts that nothing in the record establishes that Ms. Selby is an indigent person. She makes this argument notwithstanding having stated a contrary position in her Petition for Attorney's Fees: "the ward in this matter is indigent." We will assume for the purpose of this opinion that Ms. Selby is indigent.

attorney's fees. The Department takes no position on the question of whether the circuit court erred or abused its discretion when it ordered Hebrew Home to pay the fees.

The Department argues that Rule 10-106(a), to be consistent with the statutory scheme, only requires that the Department pay attorney's fees in guardianship of the person cases. In those cases, legal representation for an indigent allegedly disabled adult is managed by the Maryland Legal Services Program ("MLSP"). See COMAR 07.01.13.01. The State, in turn, can "assess the attorney's fees against the local department [Department of Human Services] as a party to the case." COMAR 07.01.13.05.[5] But, in guardianship of the property cases, the General Assembly has not appropriated the necessary funds to pay counsel, and the MLSP has no obligation to pay. The Department acknowledges that, however, "in recent years, the MLSP has voluntarily paid up to $500 to court-appointed attorneys in guardianship of property cases when the attorney is unable to procure the funds from elsewhere."

[5] COMAR 07.01.13.05 provides:

> C. The Court-Appointed Attorneys Program applies to the following cases:
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> * * *
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> (2) Adult guardianships or protective services under Estates and Trusts Article, §13-705 or 13-709, Annotated Code of Maryland, or any case under Family Law Article, §14-404, Annotated Code of Maryland, in which either the Department of Human Services or the Department of Aging is involved.
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> D. In any court-assigned case, the Department of Human Services shall pay the attorney's expenses as approved by the:
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> * * *
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> (2) Director of the Maryland Legal Services Program in adult guardianship or protective services.

According to the Department, not ordering the State to pay attorney's fees in this case "avoids the difficult constitutional questions that would arise under the separation of powers doctrine if the rule were interpreted to impose a mandatory obligation on the executive branch to make these payments without any statutory authority or budgetary appropriation."

Analysis

In *Green v. State*, 456 Md. 97, 125 (2017), the Court of Appeals explained:

> A court interprets a Maryland Rule by using the same canons of construction that the court uses to interpret a statute. First, the court considers the Rule's plain language in light of: (1) the scheme to which the Rule belongs; (2) the purpose, aim, or policy of this Court in adopting the Rule; and (3) the presumption that this Court intends the Rules and this Court's precedent to operate together as a consistent and harmonious body of law. If the Rule's plain language is unambiguous and clearly consistent with the Rule's apparent purpose, the court applies the Rule's plain language. Generally, if the Rule's plain language is ambiguous or not clearly consistent with the Rule's apparent purpose, the court searches for rulemaking intent in other indicia, including the history of the Rule or other relevant sources intrinsic and extrinsic to the rulemaking process, in light of: (1) the structure of the Rule; (2) how the Rule relates to other laws; (3) the Rule's general purpose; and (4) the relative rationality and legal effect of various competing constructions.

At the time of the circuit court's decision on March 27, 2017, Maryland Rule 10-106(a) provided, in pertinent part:

> (1) Upon the filing of a petition for guardianship of the person or property **of a minor** who is not represented by an attorney, the court may appoint an attorney for the minor. The fee of the appointed attorney shall be fixed by the court and shall be paid out of the fiduciary estate or as the court shall direct.
>
> (2) Upon the filing of a petition for **guardianship of the person or property of a disabled person** who is not represented by an attorney, the

> court shall promptly appoint an attorney for the disabled person and may require the deposit of an appropriate sum into the court registry or the appointed attorney's escrow account within 30 days after the order of appointment has been entered, subject to further order of the court. **If the person is indigent, the State shall pay a reasonable attorney's fee.** The court may not require the deposit of an appropriate sum into the court registry or the appointed attorney's escrow account under this section if payment for the services of the court-appointed attorney for the alleged disabled person is the responsibility of (A) a government agency paying benefits to the disabled person, (B) a local department of Social Services, or (C) an agency eligible to serve as the guardian of the disabled person under Code, Estates and Trusts Articles, § 13-707.

(amended June 6, 2016; effective July 1, 2016). (Emphasis added.) We will refer to this iteration of the rule as the "2017 Rule."

Here, the plain language of the rule is hardly ambiguous: "If the person is indigent, the State shall pay a reasonable attorney's fee." But, as with a statute, even when the language of a rule is not ambiguous, we are not "precluded from consulting legislative history" in our search for the intent and purpose of the rule. *See In re Demetrius J.*, 321 Md. 468, 474 (1991).

In 1988, when the Rules Committee first considered what would become Rule 10-106, the proposed Reporter's Note explained, "This Rule was drafted based on the statutory provisions of [ET] §§ 13-211(b) and 13-705(d), both of which mandate counsel to be appointed by the court to represent an alleged disabled person in a guardianship case." The proposed rule, after referral to a subcommittee, was not adopted. In 1996, the Rules Committee submitted a proposed rule to the Court of Appeals. As adopted, Rule 10-106(a) read:

> Upon the filing of a petition for guardianship of the person or property of a disabled person or minor who is not represented by an attorney, the court **shall** promptly appoint an attorney for the disabled person and **may** appoint an attorney for the minor. The fee of an appointed attorney shall be fixed by the court and shall be paid out of the fiduciary estate or as the court shall direct. **To the extent the estate is insufficient, the fee of an attorney appointed for a disabled person shall be paid by the State.**

(adopted June 5, 1996; effective January 1, 1997). (Emphasis added.) The Reporter's Note explained, "in [Section (a)], consistent with the statute, appointment of counsel is mandatory for an alleged disabled person; it is discretionary for a minor. The third sentence makes clear that State payment is only required in the former situation. The General Assembly may wish to consider making the appointment of counsel provisions the same for minors and disabled persons."

The 2016 amendment that created the 2017 Rule fashioned subsection (1) for petitions for guardianship of a "minor" and subsection (2) for those of a "disabled person," and provided different payment structures for attorney's fees for each. According to its Reporter's Note, "Chapter 400, Laws of 2015 (HB 109) amended [ET] § 13-705 to add a provision . . . [regarding the] require[ment] to deposit money into the court registry or into the attorney's escrow account," and "[t]he Rules Committee recommends amending 10-106(a) to conform to the amended statute." The Floor Report of House Bill 109 states that "the bill specifies . . . circumstances under which a court may or may not require the deposit of funds into the court registry or appointed attorney's escrow account."

This iteration of the rule had a short life. Rule 10-106 was amended again to provide, as follows:

> (1) Upon the filing of a petition for guardianship of the person, the property, or both, of a minor who is not represented by an attorney, the court may appoint an attorney for the minor.
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> (2) Upon the filing of a petition for guardianship of the person, the property, or both, of an alleged disabled person who is not represented by an attorney of the alleged disabled person's own choice, the court shall promptly appoint an attorney for the alleged disabled person.
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> * * *
>
> (c)(1) The court shall order payment of reasonable and necessary fees of an appointed attorney. Fees may be paid from the estate of the alleged disabled person or as the court otherwise directs. **To the extent the estate is insufficient, the fee of an attorney for an alleged disabled person shall be paid by the State.**

(amended October 10, 2017; effective January 1, 2018). (Emphasis added.) The provision regarding who should pay attorney's fees when the estate is insufficient reverted to the Rule's pre-2017 language. Appellant makes no reference to the amended rule, and Ms. Helwig and *amicus curiae* concur that the amendment does not change their respective positions in this case.

Because Rule 10-106 was originally drafted in light of the existing statutory requirements of Title 13 of the Estates and Trusts Article ("ET"), we turn now to the statute. Title 13, Subtitle 7 relates to guardianship of the person, and Title 13, Subtitle 2 relates to guardianship of the property.

In a guardianship of the person case, the court determines whether the allegedly disabled adult "lacks sufficient understanding or capacity to make or communicate

responsible decisions **concerning his person**, including provisions for health care, food, clothing, or shelter." Md. Code Ann., ET § 13-705(b) (emphasis added). If so, ET § 13-705, in pertinent part, provides:

> (a) On petition and after any notice or hearing prescribed by law or the Maryland Rules, a court **may appoint a guardian of the person of a disabled person**.
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> * * *
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> (d)(1)(i) Subject to paragraph (2) of this subsection, unless the alleged disabled person has counsel of the person's own choice, **the court shall appoint an attorney** to represent the person in the proceeding and may require the deposit of an appropriate sum into the court registry or the appointed attorney's escrow account within 30 days after the order of appointment has been entered, subject to further order of the court.
> (ii) **If the person is indigent, the State shall pay a reasonable attorney's fee**.

(Emphasis added.) ET § 13-705(d)(2) also provides that "[i]n any action in which payment for the services of a court-appointed attorney for the alleged disabled person is the responsibility of the local department of social services . . . the court shall [a]ppoint an attorney who has contracted with the Department of Human Services to provide those services."

In a guardianship of the property case, the court determines whether the allegedly disabled adult is "unable to manage his property and affairs effectively because of physical or mental disability . . ." and whether he or she "has or may be entitled to **property or benefits which require proper management**." ET § 13-201(c) (emphasis added). In such cases, the court "may appoint a guardian of the property of . . . a disabled person." ET § 13-201(a). ET § 13-211(b) provides, "Unless the alleged disabled person

has counsel of his own choice, the court shall appoint an attorney to represent him in the proceeding." Unlike Subtitle 7, the Subtitle 2 provision is silent as to attorney's fees.

The 2017 Rule requires the State to pay a reasonable attorney's fee for an indigent disabled adult in a "petition for guardianship of the **person or property** of a disabled person." The statute, however, only requires the State to pay a reasonable attorney's fee for an indigent disabled adult in a guardianship of the person case; there is no similar provision in a guardianship of the property case. In guardian of the property cases, the statutory scheme appears to contemplate the existence of some "property or benefits [of the disabled adult] which require proper management," from which attorney's fees could be paid. *See* ET § 13-201(c).

To be sure, the separation of powers doctrine cautions against reading a rule inconsistently with a statutory scheme. But, in our view, the 2017 Rule is not inconsistent with the statute. The statute, which mandates court appointment of an attorney, simply makes no provision for the payment of attorney's fees in guardianship of the property cases. When the disabled adult's property is insufficient to pay the fees, i.e., the person is indigent[6], the rule fills that potential void by shifting that burden to the State.

[6] The Estates and Trusts Article of the Maryland Code does not define "indigent." ET § 1-101(r) refers to the property of a decedent as "all real and personal property of a decedent." Elsewhere in the Maryland Code, an "indigent individual" is defined as one who qualifies for the services of the Office of the Public Defender. See Md. Code Ann., Criminal Procedure §§ 16-101 and 16-210. Black's Law Dictionary (7th ed. 1999) defines "indigent" as "a poor person" and refers to "pauper," which is defined as "a very poor person, especially one who receives aid from charity or public funds." Black's

And, even when a Maryland Rule is inconsistent with an earlier statute, the rule prevails until a subsequent statute repeals or modifies it. *See Beales v. State*, 329 Md. 263, 273 (1993) (holding that a newer Maryland Rule "prevails" over an earlier Maryland impeachment statute); *see also* Md. Rule 1-201(c) (Maryland Rules do not "supersede common law or statute unless inconsistent with [the] rules"). In *Johnson v. Swann*, 314 Md. 285, 289-90 (1988), the Court of Appeals explained:

> Section 18 of Article IV of the Maryland Constitution expressly grants to this Court the authority to adopt "rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this state," and provides that rules so adopted "shall have the force of law." *See Montgomery County v. McNeece*, 311 Md. 194, 206 (1987); *Hill v. State*, 218 Md. 120, 127 (1958). Under this section, the legislature may rescind, change, or modify a rule promulgated by the Court of Appeals. *Funger v. Mayor of Somerset*, 244 Md. 141, 150 (1966). The Maryland Rules of Procedure generally apply despite a prior statute to the contrary and until a subsequent statute would repeal or modify the rule. *See County Fed. S. & L. Ass'n v. Equitable S. & L. Ass'n*, 261 Md. 246, 253 (1971).

(Cleaned up.)

Our holding should not come as a surprise. The fee provision, in different iterations, has been in effect since 1997. And, as acknowledged by the Department, it has "in recent years" paid fees "up to $500" in guardianship of the property cases. In short, the legislature "may rescind, change, or modify" the rule by statute but until it does, the rule has the "force of law." *See* 314 Md. at 289-90. Whatever discretion the rule permits

defines "estate" as "the amount, degree, nature, and quality of a person's interest in land or other property."

for the payment of attorney's fees, in the case of indigency, which was not contested in the circuit court, the plain language of the 2017 Rule directs payment by the State.

For these reasons, we hold that the circuit court erred as a matter of law and thereby abused its discretion in ordering Hebrew Home to pay attorney's fees in this case.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.