

Circuit Court for Montgomery County
Case No. 427983-V

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

Nos. 1037 and 3041

September Term, 2018

CONSOLIDATED CASES

GARY PISNER

v.

ROBERT M. McCARTHY

Berger,
Wells,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: March 18, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After the death of Marion Pisner in 2009, her children, appellant Gary Pisner and Marla Pisner Rubinstein, succeeded her as co-trustees of a revocable trust she had created in 2008. When “continuing stalemates” affecting the administration of the trust arose between Pisner and Rubinstein, the Circuit Court for Montgomery County, over Pisner’s objection, assumed jurisdiction over the trust, removed Pisner and Rubinstein as trustees, and appointed appellee Robert McCarthy as substitute trustee to administer the trust under court supervision.¹

Pisner requested that the circuit court remove McCarthy as trustee, but the court declined to do so and approved final distribution from the trust. Pisner, *pro se*, filed two notices of appeal of that decision, docketed in this Court as No. 3041, September Term, 2018. In addition, the circuit court held Pisner in contempt for failing to provide trust-related documents to McCarthy as part of McCarthy’s court-ordered accounting. Pisner also filed a timely appeal of that decision, docketed in this Court as No. 1037, September Term, 2018. We consolidated the cases for briefing.

For brevity and clarity, we rephrase the issues Pisner asks us to address as follows:²

1. Whether the circuit court erred in assuming jurisdiction over the trust, appointing a substitute trustee, ordering an accounting, declining to remove the substitute trustee, and approving distribution of the remaining trust assets?

¹ Rubinstein agreed with the circuit court’s rulings and is not a party to this appeal.

² We set forth the issues, as presented in Pisner’s briefs, in an appendix to this opinion.

2. Whether the circuit court erred in holding Pisner in contempt for failing to provide McCarthy with pertinent trust-related documents, as ordered by the court?

Perceiving no reversible error, we affirm the judgment of the circuit court.

BACKGROUND

On December 12, 2008, Marion Pisner created a revocable trust agreement, appointing herself as the trustee and primary beneficiary. Upon her death in January 2009, her children, Pisner and Rubinstein, succeeded her as the co-trustees and beneficiaries.

By 2016, significant disagreements had arisen between the siblings, and Pisner petitioned the circuit court for a declaration of rights because, in his view, the trust had “ceased to function,” and “this dysfunction” required the court to provide guidance as to how the trust should interpret the trust document. Rubinstein responded by asking the court to order an independent audit of the trust by a third-party accountant, alleging that Pisner had refused to assist with the accounting, failed to provide records Rubinstein had requested, and used the trust funds for his personal expenses, thereby violating his fiduciary duty.

At a hearing on August 24, 2017, Rubinstein acknowledged that she and Pisner had “lost the ability to work together as co-trustees.”³ Due to the nature of the disputes between the pair, the fact that they were both trustees and income beneficiaries of the trust, and that Pisner was serving as the trust’s counsel, the circuit court considered whether it should, on

³ Pisner and Rubinstein represented themselves throughout the pendency of this matter.

its own motion, remove both Pisner and Rubinstein as trustees and appoint an independent trustee. Rubinstein agreed that the appointment of an independent trustee and an audit would be appropriate; Pisner objected.

Following the hearing, the circuit court issued an order requiring Pisner and Rubinstein to show cause within 30 days why the court should not assume judicial administration of the trust, remove Pisner and Rubinstein as trustees in favor of an independent third-party trustee, and order an independent third-party accounting of the trust. In response to the circuit court's order, Rubinstein again agreed that the court should assume judicial administration of the trust due to "ongoing animosity" between the trustees. Pisner continued to disagree that removal of the trustees and an accounting were necessary.

The circuit court heard argument on the matter on September 28, 2017. At the close of the hearing, the court found, as a matter of fact, that Pisner and Rubinstein, as co-trustees and beneficiaries of the trust, had "broad disputes," including their construction of the trust document itself, the appropriate disposition of the trust assets, and the need for an accounting. In the circuit court's view, Pisner and Rubinstein were unable to work together to manage the trust, and without the court's administration of the trust, "these issues [would] not get resolved." The circuit court found that the appropriate remedy would be removal of the trustees and the appointment of a substitute trustee.

Because neither Pisner nor Rubinstein had identified a potential substitute trustee, despite being given the opportunity by the court to do so, the circuit court appointed McCarthy, an attorney who had "broad experience in matters such as these." The circuit

court, in finding that some accounting would be appropriate, explained it would direct McCarthy to retain an accountant and report as to the appropriate breadth of an accounting, after conducting a review.

By written order entered October 11, 2017, the circuit court assumed jurisdiction of the trust, appointed McCarthy as substitute trustee, and required McCarthy to file an inventory of assets of the trust and undertake an accounting for the time period of January 1, 2015 through September 30, 2017.⁴ McCarthy filed an inventory on November 30, 2017. On January 18, 2018, the circuit court entered a modification order denying, among other things, Pisner’s request for reconsideration of the court’s October 11, 2017 order and deferring McCarthy’s task to engage an accountant to conduct an accounting.⁵

On February 1, 2018, McCarthy filed a suggestion of contempt, contending that Pisner had “failed to turn over documents and information related to the Trust” in violation of the court’s order, despite repeated requests. By order dated February 9, 2018, the court ordered Pisner to show cause why he should not be held in contempt. Following a hearing on April 4, 2018, the circuit court denied McCarthy’s suggestion of contempt but ordered

⁴ Pisner noted an interlocutory appeal of the circuit court’s order on November 13, 2017. That appeal was docketed as No. 1800, September Term, 2017. We dismissed that appeal as premature by order dated February 21, 2018.

⁵ Pisner noted an interlocutory appeal of the court’s order on January 24, 2018. That appeal was docketed as No. 2300, September Term, 2017. We dismissed that appeal as premature by order dated April 2, 2018.

Pisner and Rubinstein to produce enumerated trust documents to McCarthy by April 27, 2018.⁶

On April 24, 2018, Pisner moved to remove McCarthy as substitute trustee “for his breach of trust.” McCarthy responded that Pisner had not established any valid reason for his removal and suggested that Pisner seemed “desperate to prevent [McCarthy] from conducting the Court-ordered audit.” The circuit court denied Pisner’s motion to remove McCarthy as substitute trustee by order entered on May 21, 2018. Pisner filed a notice of appeal of that ruling on December 19, 2018; that appeal was docketed as No. 3041, September Term, 2018 in this Court.

On April 30, 2018, McCarthy filed a petition for a finding of contempt with incarceration against Pisner, who, McCarthy averred, continued to refuse to turn over all the financial documents specified by the court’s April 5, 2018 order. The circuit court issued an order to Pisner on May 7, 2018, requiring him to show cause why he should not be held in contempt and incarcerated.

On May 22, 2018, McCarthy advised the court that of the approximately 944 pages of documents Pisner had provided him, very few complied with the court’s order; instead,

⁶ The court ordered Pisner to produce the following specific documents: (1) all fiduciary tax returns, including all supporting documents, for the “relevant period” (defined as January 1, 2009 through October 2, 2017); (2) settlement statement related to the sale of any trust property during the relevant period; (3) all bank statements for trust accounts during the relevant period; (4) canceled checks from all trust bank accounts, including source material supporting the purpose for which each check was written during the relevant period; (5) all documents related to sales of trust stocks during the relevant period; and (6) all trust ledgers maintained during the relevant period.

they consisted mostly of “copies of tax returns without the required supporting documentation and ledgers created by Gary Pisner, again, without supporting documentation.” Pisner had failed to provide any other documents as ordered by the court, and McCarthy was therefore unable to complete the court-ordered audit.

Following a contempt hearing on June 7, 2018, the circuit court found that Pisner’s testimony was “not entirely candid or truthful” and that Pisner had willfully refused to supply trust-related documents to McCarthy. The court therefore granted McCarthy’s petition for a finding of contempt and ordered Pisner to be incarcerated for 60 days, unless he provided the required documents to McCarthy on or before July 20, 2018. Pisner did not provide McCarthy with the required documentation. The court continued to find him in contempt but vacated the sentence of jail time.

On July 13, 2018, Pisner filed a notice of appeal of the finding of contempt. That appeal was docketed as No. 1037, September Term, 2018 in this Court.

On February 14, 2019, McCarthy filed a motion for approval of trust distribution. Because Pisner had received distributions from the trust that totaled approximately \$594,000 more than distributions received by Rubinstein, McCarthy recommended that the remaining available cash in the trust—approximately \$490,000, less \$50,000 to be distributed to Pisner if and when he executed a release in favor of the trust and McCarthy—be distributed to Rubinstein. The circuit court granted the motion following a hearing on April 9, 2019 and entered its order on April 12, 2019.⁷ On April 29, 2019, Pisner filed a

⁷ Pisner did not attend the hearing.

motion for reconsideration of the court’s distribution order. The circuit court denied his motion by order entered on May 28, 2019.

On May 13, 2019, Pisner filed a second notice of appeal in No. 3041, September Term, 2018. It was substantially similar to his December 19, 2018 notice of appeal, with an additional claim of error directed toward the circuit court’s April 12, 2019 order approving final distribution from the trust.

DISCUSSION

In his consolidated appeals, Pisner argues that the circuit court erred in: (1) assuming jurisdiction over the trust, removing him and Rubinstein as co-trustees, appointing McCarthy as substitute trustee, declining to remove McCarthy as substitute trustee, ordering an accounting, and approving the final distribution from the trust, all of which denied him due process; and (2) holding him in contempt for failing to provide McCarthy with documents, when McCarthy had not provided the court with clear and convincing evidence of contempt, because Pisner had provided all the documents he had and the testimony of McCarthy’s witnesses at the contempt hearing was “pervasively false.”

I. Appeal No. 3041, September Term, 2018—The Court’s Jurisdiction Over the Trust

As a preliminary matter, we point out that Pisner’s initial notice of appeal in No. 3041, September Term, 2018, filed on December 19, 2018, was both premature and untimely.

This Court has jurisdiction over an appeal “when the appeal is taken from a final

judgment or is otherwise permitted by law, and a timely notice of appeal was filed.” *Doe v. Sovereign Grace Ministries, Inc.*, 217 Md. App. 650, 661 (2014). Pisner’s initial appeal related to the circuit court’s rulings that it would assume jurisdiction over the administration of the trust, remove Pisner and Rubinstein as trustees, appoint McCarthy as successor trustee, and decline to remove McCarthy as trustee. Those rulings did not dispose of all claims against all parties or conclude the case, which continued at least until the court approved the final distribution from the trust in April 2019. Therefore, the circuit court’s orders from which Pisner initially appealed were interlocutory, as they failed to comprise a final appealable judgment. *See Miller & Smith at Quercus, LLC v. Casey PMN, LLC*, 412 Md. 230, 241 (2010) (A “final judgment” is a judgment that “disposes of all claims against all parties and concludes the case.”). *See also* Maryland Rule 2-602(a). Notices of appeal filed prematurely, before the entry of a final judgment, “are generally of no force and effect.” *Sovereign Grace Ministries*, 217 Md. App. at 662 (quoting *Jenkins v. Jenkins*, 112 Md. App. 390, 408 (1996)).⁸

In addition, even if there were some pertinent exception to the final judgment requirement, Pisner filed his first notice of appeal in No. 3041, September Term, 2018, on December 19, 2018, but the circuit court’s rulings from which he purported to appeal were entered between October 11, 2017 and June 27, 2018. Md. Rule 8-202(a) provides that a

⁸ There are exceptions to the requirement that an appeal may be taken only from a final judgment, but none that apply here.

notice of appeal “shall be filed within 30 days after entry of the judgment or order from which the appeal is taken.” Although the thirty-day time limitation in the Maryland Rules is no longer considered “jurisdictional,” “Maryland Rule 8-202(a) remains a binding rule on appellants, and this Court will continue to enforce the Rule.” *Rosales v. State*, 463 Md. 552, 568 (2019). It is plain that Pisner’s first notice of appeal was more than a year late as it pertained to the first circuit court judgment, and more than four months late as it pertained to the second. Finding these notices to be belated in the extreme, and noting no exceptional circumstance justifying this Court’s review, we hold that Pisner forfeited his right to appeal in either instance.

Pisner, however, filed a second notice of appeal in No. 3041, September Term, 2018, after the circuit court approved the final distribution from the trust. The second appeal was taken from the final judgment, so we will consider the issues Pisner raises therein.⁹

Pisner argues that the circuit court erred or abused its discretion in assuming jurisdiction over the trust, removing him and Rubinstein as co-trustees, appointing McCarthy as substitute trustee, ordering an accounting, declining to remove McCarthy as trustee, and approving the final distribution from the trust. We disagree.

⁹ The court’s order approving final distribution from the trust was entered on April 12, 2019, and Pisner filed his second notice of appeal on May 13, 2019, 31 days later. Because May 12, 2019 fell on a Sunday, however, the notice of appeal filed the next business day was timely. *See* Rule 1-203(a)(1).

Pursuant to Md. Code (1974, 2017 Repl. Vol.), §14.5-201 of the Estates & Trusts Article (“ET”), “[o]n the invocation of the court’s jurisdiction by an interested person, on the court’s own motion, or as otherwise provided by law, the court may intervene actively in the administration of a trust, fashioning and implementing remedies as the public interests of the beneficiaries may require.” In addition, ET §14.5-706(2) provides: “The court may remove a trustee if. . .[t]he trustee has committed a serious breach of trust[, *l*]ack of cooperation among cotrustees substantially impairs the administration of the trust[, or b]ecause of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries[.]” (Emphasis added).

Pisner and Rubinstein conceded to significant stalemates and acknowledged that they were unable to work together as trustees. Further, the circuit court, aware that the siblings were trustees and income beneficiaries, and that Pisner was acting as the trust’s attorney, questioned whether the removal of Pisner and Rubinstein and related actions were appropriate. Because the court raised the issue, it permitted the siblings 30 days to agree or object to its assertion of jurisdiction.

At the show cause hearing, Rubinstein agreed that the court’s proposed actions were appropriate because of Pisner’s failure to permit a full audit, his refusal to share trust fund documents, his use of trust funds to pay his personal expenses, and the siblings’ lack of agreement on the sale of a major trust asset. Pisner, while objecting generally to his removal as trustee, offered no objection sufficient to overcome the court’s finding that he

and Rubinstein were “unable to work together to manage the trust” and therefore unable to resolve the “number [of] issues that require resolution” to permit the beneficiaries to move forward.

The court found that the remedy that would allow the matter to move forward was “the removal of these trustees for the time being and the appointment of a substitute trustee.” And because neither party had accepted the court’s invitation to identify a potential substitute trustee, the court appointed McCarthy, an attorney who had “broad experience in matters such as these.”

In light of the ongoing animosity and lack of cooperation between Pisner and Rubinstein and the potential for conflict of interest in Pisner’s status as trustee, beneficiary, and attorney of the trust, we perceive no abuse of the circuit court’s discretion in assuming jurisdiction of the trust, removing Pisner and Rubinstein as co-trustees, appointing McCarthy as substitute trustee, and ordering an accounting, on its own motion. Indeed, Pisner, in his brief, does not offer a reason the court abused its discretion in so doing; instead, he merely argues that the court failed to address the issue Pisner raised in his petition for a declaration of rights.

Similarly, we perceive no abuse of discretion in the court’s failure to remove McCarthy as substitute trustee at Pisner’s request. There appears to be no dispute that McCarthy was qualified to act as substitute trustee, and despite Pisner’s claims that McCarthy sought to hold him in contempt even though Pisner was “technically” his client, provided legal services to Rubinstein, offered false testimony at a hearing, “surreptitiously”

transferred trust assets to Rubinstein, and withheld requested documents from him, Pisner presented no credible evidence in support of any of those alleged infractions.

Finally, because we conclude that the court permissibly assumed jurisdiction of the trust and acted in its best interest in removing the co-trustees, appointing an independent substitute trustee, and ordering an inventory and accounting of the trust, we find no error or abuse of discretion in the court’s order of final distribution of the trust funds, after a hearing at which Pisner elected not to appear to offer evidence in contravention of the evidence presented by McCarthy.¹⁰

II. Appeal No. 1037, September Term, 2018—The Court’s Order of Contempt

Pisner also avers that the circuit court erred or abused its discretion in holding him in contempt and threatening 60 days’ incarceration unless he purged the contempt by providing allegedly missing trust documents to McCarthy.¹¹ Pisner contends that the

¹⁰ Moreover, although Pisner challenged the circuit court’s order approving the final distribution of the trust assets in his second notice of appeal in No. 3041, September Term, 2018, he offers no argument or authority in his brief to support his claim of legal error or abuse of discretion on the part of the circuit court. Therefore, he has failed to preserve that issue for our consideration. *See Klauenberg v. State*, 355 Md. 528, 552 (1999) (arguments not presented in a brief or not presented with particularity will not be considered on appeal).

Finally, our determination that the court did not err or abuse its discretion in its rulings applies equally to its denial of Pisner’s related motions to reconsider, to strike, for a more definite statement, and to compel access to trust documents. *See* Pisner’s notice of appeal, filed December 18, 2018.

¹¹ “A contempt proceeding, even though it may grow out of or be associated with another proceeding, is ordinarily regarded as a collateral or separate action from the underlying case and as separately appealable, with appellate review normally limited to the

contempt finding was based on false testimony by Rubinstein and McCarthy’s accountant and that he had provided McCarthy with “all documents that he had[.]” The court’s finding of contempt, he concludes, was therefore improper.

The power to hold one in contempt “is vested in the trial court.” *State v. Crawford*, 239 Md. App. 84, 111 (2018). Appellate courts will not disturb a trial court’s finding of contempt “absent an abuse of discretion or a clearly erroneous finding of fact upon which the contempt was imposed.” *Kowalczyk v. Bresler*, 231 Md. App. 203, 209 (2016).

“[A] person whose conduct tends to bring the authority and administration of the law into disrespect or disregard, interferes with or prejudices parties or their witnesses during litigation, or otherwise tends to impede, embarrass, or obstruct the court in the discharge of its duties, has committed a contempt.” *Fisher v. McCrary Crescent City, LLC*, 186 Md. App. 86, 114 (2009) (quoting *Goldsborough v. State*, 12 Md. App. 346, 355 (1971)). If the contempt is civil, *i.e.* intended to coerce compliance with a court order, and the court decides to impose sanctions, the court may issue coercive sanctions, such as imprisonment until the contemnor complies with the court’s order, or remedial sanctions, such as a fine payable to a plaintiff. *Jones v. State*, 351 Md., 264, 278 (1998).

A court must find civil contempt by a preponderance of the evidence. *State v. Roll and Scholl*, 267 Md. 714, 728 (1973). Following a finding of contempt, the court must

contempt order itself.” *Stevens v. Tokuda*, 216 Md. App. 155, 165 (2014) (internal quotation marks and citations omitted).

issue a written order specifying (1) the coercive sanction imposed for the contempt, and (2) how the contempt may be purged. Md. Rule 15–207(d)(2).

Here, McCarthy filed a motion asking the court to hold Pisner in contempt for failing to turn over trust-related documents. Following a hearing, the court declined to do so, but it issued an order specifying all the documents Pisner was required to turn over to McCarthy and the deadline by which he was required to do so.

When Pisner failed to provide the enumerated documents by the deadline, McCarthy filed another motion for contempt, with incarceration. Therein, he explained that, despite being apprised of the specific documents to be produced, Pisner had provided only documents he had created, but virtually none of the requested documents, despite the court’s order. Following a hearing on the contempt motion, which included testimony from Rubinstein and the accountant McCarthy had retained to perform the trust’s accounting, the court found Pisner’s testimony to be lack credibility and found him in contempt with a penalty of 60 days’ incarceration.

Based on Pisner’s conduct, the circuit court found by a preponderance of the evidence that he had willfully failed to comply with its order. We agree. Pisner’s pattern of delay and persistent attempts to avoid producing the trust documents so McCarthy could conduct the court-ordered accounting amounted to a willful failure to comply with the court’s order. The circuit court was not clearly erroneous in its finding of contempt.

**JUDGMENT OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY AFFIRMED; COSTS
ASSESSED TO APPELLANT.**

APPENDIX TO OPINION IN CONSOLIDATED CASES 1037 and 3041,
SEPTEMBER TERM, 2018

The issues, as presented in Pisner’s briefs, are:

In No. 3041, September Term, 2018

1. Under what circumstances can a trustee seek the incarceration of his client the beneficiary of the trust?
2. Is a Beneficiary a client of a Trustee?
3. What is the proper level of procedural due process in trust case?
4. Why in this matter were filing of McCarthy and Rubinstein never rejected because they were not attested to under oath pursuant to MD Rule 2-311(d)?
5. Was withholding the trust file from a Beneficiary a violation of statute and an ethics violation?
6. Does a Declaration of Rights require a Plaintiff and a Defendant?
7. Is an Audit valid if the Beneficiaries are refused access to the Trustee’s file?

In No. 1037, September Term, 2018

1. Under what conditions can a trustee seek the incarceration of the beneficiary of the trust.
2. Under what conditions can a lawyer seek the incarceration of his client.

3. When evidence of incontrovertible pervasive false testimony that was the basis for the contempt finding was submitted to the court, is the trial court legally obliged to reverse its finding of contempt.

4. To what extent does one alleging contempt due to missing documents, be specific about what is missing.

5. If a party believes that documents are missing pursuant to a court order, must he give notice to the party deemed deficient time to cure or explain the alleged deficiency: In this instance there were no communications and the documents were supplied on a Friday and the petition for contempt was filed on the following Monday.

6. If document from more than three years prior to an order were destroyed or deleted and cannot be produced and there is not possibility to produce said documents can a party be found in civil contempt and incarcerated.

7. Under what conditions can a party be incarcerated pursuant to civil contempt, when the cure of the contempt is impossible.

8. Can a court, acting pursuant to a civil contempt hearing, when a jury was requested, switch to a criminal contempt proceeding.

The correction notice(s) for this opinion(s) can be found here:

<https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/1037s18cn.pdf>