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ARKANSAS COURT OF APPEALS

DIVISION III

No. CV-20-251

LARRY HAMILTON

APPELLANT

V.

BANK OF THE OZARKS, ELLEN B.
BRANTLEY, AND SUSAN COSSEY

APPELLEES

Opinion Delivered May 25, 2022

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
FIFTEENTH DIVISION

[NO. 60PR-16-651]

HONORABLE RICHARD MOORE,
JUDGE

AFFIRMED

RITA W. GRUBER, Judge

Larry Hamilton filed this pro se appeal from the Pulaski County Circuit Court's award of attorney's fees and costs in this trust-administration case, which has returned to us after we ordered supplementation of the record and rebriefing. *See Hamilton v. Bank of the Ozarks*, 2021 Ark. App. 437. The case is collateral to *In re Hamilton Living Trust*, 2019 Ark. App. 76, 571 S.W.3d 53 (*Hamilton II*), in which we affirmed the circuit court's denial of Mr. Hamilton's challenges to a summons and complaint in a lawsuit involving the trust and Mr. Hamilton. The case was brought by the trustee for a declaration of rights and injunctive relief regarding real property owned by the trust. The relevant facts of the underlying case are set forth therein. *See id.* Here, Mr. Hamilton appeals the circuit court's award of the attorney's fees and costs expended in litigating the case. He argues that the circuit court was not authorized to hear the trustee's request for attorney's fees (1) on appeal because this

authority rests with the appellate court and is barred by “law of the case” and “issue preclusion” established at the appellate level; (2) for defense of Mr. Hamilton’s petition for writ of certiorari because such authority rests with the appellate court; (3) for defense of Mr. Hamilton’s complaint to the Arkansas Bank Department because it was not a “judicial proceeding” pursuant to Ark. Code Ann. § 28-73-1004; and (4) for fees requested in the supplemental petition because they were not timely requested pursuant to Rule 54(e)(2) of the Arkansas Rules of Civil Procedure and were not requested by the first trustee, which incurred the fees, but by the subsequent trustee. We reject Mr. Hamilton’s arguments and affirm the circuit court’s order awarding fees.

Mr. Hamilton and his sister, Susan Cossey, are qualified beneficiaries of the Hamilton Living Trust (the “Trust”), which was created by their parents. The underlying lawsuit was filed by the trustee on March 31, 2016, for a declaration of rights, specifically with respect to real estate owned by the Trust. The circuit court entered an order on May 4, 2017, granting the trustee relief, which we affirmed. *See Hamilton II*.

On May 18, 2017, two weeks after the circuit court had entered its order, the trustee filed a petition to recover its attorney’s fees and costs incurred in prosecuting the case as well as attorney’s fees and costs for general trust administration. The trustee asked the court for attorney’s fees for general trust administration in the amount of \$3,693.50 to be paid by the Trust and attorney’s fees in the amount of \$25,808 plus expenses of \$724.12 to be paid by, and charged against, Mr. Hamilton’s share of the Trust. The trustee filed a supplemental petition for attorney’s fees and costs on August 15, 2017, incorporating by reference its previous petition and alleging that it had incurred additional attorney’s fees and expenses of \$2,191.78 in connection with the case, which it asked the circuit court to charge against

Mr. Hamilton's share of the Trust. The trustee alleged it had also incurred additional attorney's fees and expenses in the amount of \$9,119.28 in connection with the general trust administration, which it asked the court to order the Trust to pay. Finally, on September 12, 2019, the successor trustee¹ filed a second supplemental petition for attorney's fees and costs, incorporating the earlier petitions by reference and requesting additional attorney's fees and costs incurred from the time the last petition was filed. The second supplemental petition alleged that the trustee had incurred additional fees and expenses in the amount of \$21,274.72 in connection with the case against Mr. Hamilton, including for the appeal, and asked the court to add that amount to the fees to be paid by, and charged against, Mr. Hamilton's share of the Trust for a total of \$47,806.84. The trustee also requested an additional \$13,462.25 in attorney's fees and costs for general trust administration, including fees incurred in connection with selling personal and real property of the Trust. The trustee asked that these fees be added to the fees requested in the previous petitions, for a total of \$26,275.03 to be paid by the Trust.

The circuit court held a hearing on the petitions on December 2, 2019, and entered an order on December 19 granting the petitions. The court awarded \$26,275.03 in attorney's fees and expenses to be paid by the Trust and \$47,806.84 in attorney's fees and expenses to be paid by, and charged to, Mr. Hamilton's share of the Trust. Mr. Hamilton filed a timely appeal of the order and challenges only those fees charged against his share of the Trust and only those that were incurred in litigation after the circuit court entered its

¹By order entered March 7, 2018, the circuit court accepted the resignation of the trustee, Bank OZK, and appointed a successor trustee, Ellen B. Brantley. Mr. Hamilton filed a petition for certiorari of the order with the supreme court, which it denied.

order, in the appeal of the case, in defending Mr. Hamilton's petition for certiorari of the order appointing the successor trustee, and for trust management regarding a complaint filed by Mr. Hamilton against the Trust with the Arkansas Bank Department.

Attorney's fees are generally not recoverable unless expressly provided for by statute. *In re Hamilton Living Tr.*, 2015 Ark. 367, at 7, 471 S.W.3d 203, 208. This case, however, involves attorney's fees and costs awarded to a trustee for both general administration of the Trust and litigation. Several statutes in the Arkansas Trust Code authorize such fees to be requested and reimbursed. Arkansas Code Annotated section 28-73-709 (Repl. 2012) provides that a trustee "is entitled to be reimbursed out of the trust property, with interest as appropriate, for [] expenses that were properly incurred in the administration of the trust." The comments to the section states that it includes "expenses incurred in the hiring of agents" and that reimbursement under the section "may include attorney's fees and expenses incurred by the trustee in defending an action." Ark. Code Ann. § 28-73-709 editor's notes, unif. law cmt. (West current through March 15, 2022). Further, Arkansas Code Annotated section 28-73-1004 (Repl. 2012) provides the following:

In a judicial proceeding involving the administration of a trust, a court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

We generally review a circuit court's decision to award attorney's fees and the amount of the award for an abuse of discretion. *In re Hamilton Living Tr.*, 2015 Ark. 367, at 8, 471 S.W.3d at 209. Because the issue before us requires us to interpret Ark. Code Ann. § 28-73-1004 and other sections of the Arkansas Trust Code, our review of the circuit court's award of attorney's fees and costs involves statutory interpretation. *Combs Revocable*

Tr. v. City of Russellville, 2011 Ark. 186. We review issues of statutory interpretation de novo because it is for this court to decide what a statute means. *Id.* While we are not bound by the circuit court’s interpretation, in the absence of a showing that the circuit court erred, we will accept its interpretation as correct on appeal. *Giles v. Ozark Mountain Reg’l Pub. Water Auth. of the State of Ark.*, 2014 Ark. 171, at 3.

The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Miss. River Transmission Corp. v. Weiss*, 347 Ark. 543, 550, 65 S.W.3d 867, 872–73 (2002). The basic rule of statutory construction is to give effect to the intent of the General Assembly. *Thomas v. Hall*, 2012 Ark. 66, at 5, 399 S.W.3d 387, 390. Moreover, statutes relating to the same subject should be read in a harmonious manner if possible. *Thomas v. State*, 349 Ark. 447, 454, 79 S.W.3d 347, 351 (2002). In construing any statute, we place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *Garrett v. Progressive Eldercare Servs. - Saline, Inc.*, 2019 Ark. App. 201, at 4, 575 S.W.3d 426, 429.

I. *Appeal and Writ of Certiorari*

Because Hamilton makes the same argument to challenge the trustee’s legal fees incurred in defending the appeal and its legal fees incurred in defending against the petition for a writ of certiorari filed by Hamilton with the supreme court, we address them together. Hamilton argues that the circuit court has no authority or jurisdiction to award fees “outside of a mandate ordering the award.” Basically, he contends that only the appellate court has jurisdiction to award attorney’s fees incurred on appeal and that the circuit court is only

vested with jurisdiction “conferred by the appellate court’s opinion and mandate,” citing *City of Dover v. Burton*, 342 Ark. 521, 525, 29 S.W.3d 698, 700 (2000).

We reject Hamilton’s arguments. The fees incurred by the trustee in defending this case on appeal and against Hamilton’s petition for a writ of certiorari were granted pursuant to Ark. Code Ann. § 28-73-1004, which provides in pertinent part that “[i]n a judicial proceeding involving the administration of a trust, a court, as justice and equity may require, may award . . . reasonable attorney’s fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.” (Emphasis added.) By their very nature, trust-administration cases may involve a variety of costs and expenses, including attorney’s fees, in a variety of courts, including appellate courts. The trustee is a representative and incurred fees on appeal, not for its own interest, but “to protect the interests of the beneficiaries, to manage the trust property, and to carry out the terms and purposes of the trust.” *Hamilton II*, 2019 Ark. App. 76, at 10, 571 S.W.3d at 59. The law allows the trustee to recoup these expenses from the trust. Moreover, the Trust itself provides: “Our successor trustee shall serve with reasonable compensation. . . . Additionally, all expenses of any type incurred by our successor trustee in carrying out duties under this trust shall be paid for from the trust.”

City of Dover, cited by Hamilton, is simply not pertinent to the issues in this case and involves neither a trust nor attorney’s fees. The reference to the mandate in *City of Dover* is simply recognizing the requirement for a lower court to follow an appellate court’s direction on an issue following an appeal of that issue. That principle of law is not relevant to whether a circuit court may award fees incurred by a trustee on appeal pursuant to this statute in the Arkansas Trust Code. We hold that it can, and that the circuit court did not err in

determining that the Trust may recover attorney's fees in defending the claims in the judicial proceeding on appeal.

II. *Arkansas Bank Department*

For his third point on appeal, Hamilton contends that the award of fees and costs for “trust management” in response to a complaint filed by him with the Arkansas Bank Department was error because an agency proceeding is not a “judicial proceeding” within the meaning of Ark. Code Ann. § 28-73-1004 nor is an agency proceeding “litigation” for which fees are recoverable under Ark. R. Civ. P. 54(e)(2). First, we can find no mention in the record of a complaint filed with the Arkansas Bank Department, of documents describing such a proceeding, of arguments regarding such a complaint, or of a ruling by the circuit court regarding fees awarded for defense in such a proceeding. Thus, any argument regarding this issue is not preserved. *In re Estate of Deal*, 2018 Ark. App. 619, at 3, 567 S.W.3d 885, 887. To the extent, however, that any of the fees awarded to the trustee concerned its defense of such a complaint, the court did not abuse its discretion in awarding these fees, as they would fall within the ambit of Ark. Code Ann. § 28-73-709 as expenses that were properly incurred in the administration of the Trust.

III. *Arkansas Rule of Civil Procedure 54(e)(2)*

Finally, Hamilton contends that the circuit court lacked jurisdiction to award the fees requested in the supplemental petition filed on August 15, 2017, because the petition was filed more than fourteen days after the judgment was entered on May 4, 2017. He also alleges that the petition did not identify the party entitled to the award because the trustee who incurred the fees and filed the petition (Bank OZK) was replaced by a substitute trustee

(Ellen B. Brantley). He claims that the substitute trustee was therefore not the moving party and not entitled to the fees.

Rule 54(e)(2) provides,

Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute or rule entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which the claim is made.

Ark. R. Civ. P. 54(e)(2) (2021).

First, the court did not lack jurisdiction to award attorney's fees for litigation that occurred in its court. Noncompliance with this rule of civil procedure is not jurisdictional, and Hamilton has cited no authority to otherwise support his argument. We will not consider arguments that are not supported by legal authority. *Garcia v. Garcia*, 2018 Ark. App. 146, at 6, 544 S.W.3d 96, 100. Moreover, the trustee filed its original petition for fees on May 18, exactly fourteen days after the order was entered on May 4. The trustee then continued to supplement its request as allowed by Ark. R. Civ. P. 15(d), which provides that a party "may at any time without leave of court file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Ark. R. Civ. P. 15(d) (2021). Finally, Rule 54(e)(2) specifically begins by stating, "Unless otherwise provided by statute or order of the court," before providing for the fourteen-day timeline. This authorizes a court to extend the timeline, which the circuit court apparently did, indicating this in its order approving the appointment of the successor trustee on March 7, 2018, in which it recognized that the "petition for fees, including any amendments or supplements thereto, remain[ed] pending."

See *Goodson v. Bennett*, 2018 Ark. App. 444, at 20, 562 S.W.3d 847, 861 (recognizing court’s authority pursuant to Ark. R. Civ. P. 54(e)(2) to set an alternate timetable, including extending it).

We turn to Hamilton’s argument that the petition did not properly identify the party who was entitled to the award because the trustee who incurred the fees and filed the petition (Bank OZK) was replaced by a substitute trustee (Ellen B. Brantley). We disagree. As we stated in *Hamilton II*, neither Bank OZK nor Ellen B. Brantley is or was a “party.” Each was the acting trustee at the time fees were incurred on behalf of the Trust and filed petitions.

A trustee is a representative and does not file a lawsuit to redress a wrong or protect a right for its own interest. A trustee acts to protect the interests of the beneficiaries, to manage the trust property, and to carry out the terms and purposes of the trust. See *Restatement (Third) of Trusts* § 70 (2007). Moreover, the trustee may be replaced by another person or entity, as occurred here. A trustee, as a representative, is entitled to seek instructions whenever he or she has reasonable doubt regarding any matter relating to administration of the trust. *Taylor v. Woods*, 102 Ark. App. 92, 106, 282 S.W.3d 285, 295 (2008) (citing *Ark. Baptist State Convention v. Bd. of Trs.*, 209 Ark. 236, 189 S.W.2d 913 (1945)).

Hamilton II, 2019 Ark. App. 76, at 10, 571 S.W.3d at 59. The trustee incurred the fees, and the trustee was the moving party, not Bank OZK or Ellen B. Brantley individually.

Affirmed.

WHITEAKER and HIXSON, JJ., agree.

Larry Hamilton, pro se appellant.

Rose Law Firm, a Professional Association, by: *Amanda K. Wofford* and *Joseph Hall*, for separate appellee *Ellen B. Brantley*.