

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 21st day of February, 2019.

Present: Lemons, C.J., Goodwyn, McClanahan, Powell, Kelsey, McCullough, JJ. and Lacy, S.J.

RC VA Lands, LLC, Appellant,

against Record No. 180175
 Circuit Court No. CL17-230

James C. Smith, Jr., Administrator C.T.A.
Estate of Charles M. Carrithers, Deceased, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Gloucester County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that the circuit court did not abuse its discretion in imposing sanctions against RC VA Lands, LLC. However, the circuit court erred in the amount of sanctions imposed. The amount of attorney's fees actually incurred by the Administrator is \$12,480. Accordingly, we will modify the monetary award in the final order to reflect the correct amount and enter final judgment for the Administrator.

I. BACKGROUND

The underlying matter is a lengthy, contentious family dispute over the estate of Charles M. Carrithers who died on February 7, 2009. A photocopy of a document purporting to be decedent's will was discovered after his death and, in 2009, was refused probate by the Circuit Court Clerk in Gloucester County. Thereafter, the intestate estate was distributed to the decedent's three sons, his heirs under Code § 64.2-200(A)(2). Decedent's grandchildren filed an action in 2011 to establish decedent's "lost" will. (Circuit Court No. CL11-560.) The circuit court sustained pleas in bar based on the statute of limitations and dismissed the matter by order in 2013 (this order is also referred to as "Judge McGinty's Order"), where it additionally noted that the photocopy of the will did not meet the requirements for entry under Code § 64.2-403.

This Court refused a petition for appeal challenging the circuit court's judgment. (Record No. 140375.)

The original of the decedent's will was located in 2014 and was admitted to probate by the circuit court in 2017. (Circuit Court No. CL14-234.) The terms of the will established a trust that distributed the entire estate to decedent's children and grandchildren in equal shares. The intestate distributions previously made to the decedent's sons had to be returned to the estate in order for the estate to be redistributed under the terms of the will. The decedent's sons appealed the circuit court's probate of the will to this Court. (Record No. 170859.) In that appeal, they argued that admission of the original will to probate was in error because the 2013 order entered in case #CL11-560, finding that the grandchildren's suit was time barred and noting that the photocopy of the will did not meet the requirements for entry under Code § 64.2-403, barred the later admission of the original will to probate. The decedent's sons also argued that the original will was not valid because it was not properly signed.

While the appeal to this Court was pending in Record No. 170859, RC VA Lands filed a "PETITION FOR APPEAL FROM THE ORDER OF THE DEPUTY CLERK PURSUANT TO CODE OF VIRGINIA § 64.2-445." The Petition appealed from an order entered by the circuit court's deputy clerk on May 30, 2017, which included the statement that it was entered "pursuant to Court Order entered by this Court on April 5, 2017." RC VA Lands argued that the May 30, 2017 order was a clerk's order, within the meaning of Code § 64.2-444 ("Clerks may probate wills"), that probated the original will and appointed the Administrator. In summary, RC VA Lands argued that the circuit court's 2013 order in case #CL11-560 controlled and that the clerk erred in admitting the original will to probate. RC VA Lands asked the circuit court to find that the circuit court's 2013 order was a judgment *in rem* and argued that the circuit court lacked subject matter jurisdiction to enter the 2017 court order in case #CL14-234 that admitted the original will to probate. The Petition included the following specific assertions:

22. Judge McGinty's Order constitutes a judgment *in rem* that held the Decedent died without a valid will and intestate, and such judgment binds all persons, including Smith in any capacity even though he was not a party in [the] #11-560 case, and binds all courts, including this court.

. . . .

26. By filing the barred Complaint to establish, Smith sought to collaterally attack Judge McGinty's Order by a means not authorized by Virginia's probate statutes.
27. Smith did not have any right to file his Complaint and, by extension, this [c]ourt lacked subject matter jurisdiction to decide the merits of [the] #14-234 proceeding.
28. All orders entered by the Gloucester Circuit Court in #14-234 are nullities, void *ab initio*, and subject to collateral attack since the [c]ourt lacked subject matter jurisdiction.
29. Because the Deputy Clerk's Order probated the Will that Judge McGinty's Order held invalid in its execution and inadmissible to probate, the Deputy Clerk lacked jurisdiction to probate the Will.
30. Because of Judge McGinty's Order and the [Code] § 64.2-448(G) statutory bar, the Deputy Clerk lacked jurisdiction to probate the Will and, by extension, lacked jurisdiction to appoint an administrator c.t.a.

Based on this pleading, RC VA Lands requested *inter alia* that the court:

- (c) affirm and declare that Judge McGinty's Order, as a judgment *in rem*, binds all courts, including this [c]ourt;
 - (d) find that Code of Virginia § 64.2-448(G) barred James C. Smith, Jr., Trustee, from filing his Complaint to establish, and therefore, #14-234 is a null and void proceeding;
- . . .
- (g) declare that, because of Judge McGinty's Order and Code of Virginia § 64.2-228(G), this [c]ourt lacked subject matter jurisdiction in #14-234 to adjudicate the cause;
 - (h) vacate and set aside all orders rendered in #14-234 for lack of subject matter jurisdiction. . . .

The Administrator filed a plea in bar attacking RC VA Lands' characterization of the clerk's order. The Administrator argued that the circuit court entered the final order that admitted the will to probate and appointed the Administrator, therefore, the subsequent order entered by the deputy clerk was ministerial in nature. The Administrator argued that the Petition was an attempt by RC VA Lands to relitigate issues already litigated. The Administrator noted

that a petition for appeal challenging the circuit court's final order was already pending in this Court.¹ The Administrator also filed a motion for sanctions, which is the subject of this appeal. The motion requested an award of attorney's fees and an award of sanctions under Code § 8.01-271.1.

Prior to granting a voluntary nonsuit requested by RC VA Lands pursuant to Code § 8.01-380, the circuit court held a hearing on the motion for sanctions. The circuit court heard testimony from George Somerville, an attorney offered by RC VA Lands as an expert in appellate advocacy.² Mr. Somerville testified that he believed the deputy clerk's order constituted a new proceeding. He testified that he advised Ms. Garber, RC VA Lands' counsel, that he "believed that if the deputy clerk's order became final six months after it was entered and unappealable, it would then be a . . . res judicata bar to the appeal to the Supreme Court. The Supreme Court would have no choice but to dismiss that appeal."

At the close of the evidence, the Administrator made the following arguments. The Administrator argued that the petition for appeal was frivolous, improper, and not well grounded in fact. The Administrator challenged RC VA Lands' characterization of the order as a clerk's order, maintained that the final order was the court's order, and argued that RC VA Lands' requested relief, to declare the circuit court's action probating the will null and void, was already on appeal to this Court. The Administrator produced an attorney's fees affidavit reflecting \$12,480 for services rendered to the Administrator in the underlying proceeding.

RC VA Lands made the following arguments in support of its contention that it filed the Petition to avoid mootng the pending appeal in this Court. RC VA Lands argued that it filed its Petition based on Somerville's opinion that, "[i]f the clerk's probate order is not appealed, then such order is a judgment *in rem* establishing due execution." RC VA Lands also argued that the will was not valid due to a missing witness signature. RC VA Lands refuted the Administrator's argument that the clerk's order was ministerial in nature. RC VA Lands argued that the clerk entered the order as authorized by Code § 64.2-444 and did not need the circuit court to order her

¹ The petition for appeal was refused on October 31, 2017.

² The circuit court did not rule on the plea in bar due to RC VA Lands' motion for a nonsuit filed on October 25, 2017.

to admit a will for her to do so. RC VA Lands claimed that the clerk's order spoke for itself and could be appealed as a matter of right under Code § 64.2-445. RC VA Lands also argued that the prior order rejecting probate of the photocopied will was a judgment *in rem* and divested the circuit court of subject matter jurisdiction. Therefore, the probated will was not valid and the estate should be distributed as intestate.

In summary, counsel for RC VA Lands argued that she was required to file the Petition to preclude the clerk's order from becoming final and moot the pending appeal of case #CL14-234. With regard to the breadth of the Petition, counsel asserted that in order to effectively present the case, she needed to establish the background facts. Specifically, with regard to the good faith basis for filing the pleading, counsel for RC VA Lands argued that she did not file the Petition for any improper purpose and that she thoroughly researched the issue and consulted with knowledgeable attorneys prior to filing. On brief, counsel for RC VA Lands asserted that the arguments were based on an interpretation of existing law.

In addressing counsel for RC VA Lands' position regarding why she felt it necessary to file the Petition and the content of what was filed, including the requests for relief, the circuit court observed:

But the complaint's a lot more than just that one point. . . . But you go back – you dig up Judge McGinty's stuff from 20[1]3, so even if . . . I would accept this, that there would be some nugget of good faith in that . . . you've got A through L of what you're seeking and asking the [c]ourt to find, none of which -- only one or two items have anything to do with [Code § 64.2-445].

In awarding sanctions, the circuit court held:

I find that the document, the Petition for Appeal, that formed the basis of Case 17-230 was not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

I think, even if the idea that you somehow had to appeal the clerk's order, that that has some nugget of – kernel of good faith in that, nothing – or very little of this Petition for Appeal even relates or references that.

But, even then, I don't think anybody could consider that a simple one-page redundant clerk's order would moot an entire litigated trial with a court order from a judge and an appeal to the

Supreme Court. I just . . . find that incredulous. So I'll award sanctions against the plaintiff in the amount of \$20,000.

When counsel questioned the circuit court on the amount, the circuit court responded, “[t]he statute and the case law says it doesn't have to be limited to actual attorney's fees.” The final order awarded the Administrator “\$20,000 which sum has been incurred by the Estate in attorney's fees for the defense of this action” and specified that “Plaintiff RC VA Lands, LLC is ordered to pay” that award, rather than its counsel. *See* Code § 8.01-271.1 (stating that “[i]f a pleading, motion, or other paper is signed or made in violation of this rule, the court . . . shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee”).

II. ANALYSIS

“On appellate review of the imposition of sanctions imposed under Code § 8.01-271.1, we apply an abuse of discretion standard.” *Westlake Legal Group v. Flynn*, 293 Va. 344, 349 (2017).

In applying that standard, we use an objective standard of reasonableness in determining whether a litigant and his attorney, after reasonable inquiry, could have formed a reasonable belief that the pleading was well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for an improper purpose.

Flippo v. CSC Assocs. III, L.L.C., 262 Va. 48, 65–66 (2001).

Code § 8.01-271.1 authorizes a circuit court to award “an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, *including a reasonable attorney's fee.*” (Emphasis added.) “This Court has recognized that one purpose of Code § 8.01–271.1 is to ‘reduc[e] the volume of *unnecessary litigation.*’” *Kambis v. Considine*, 290 Va. 460, 467 (2015) (quoting *Oxenham v. Johnson*, 241 Va. 281, 286 (1991) (emphasis added)). “Additionally, ‘[t]he possibility of a sanction can protect litigants from the mental anguish and expense of frivolous assertions of unfounded factual and legal claims and

against the assertions of valid claims for improper purposes.”” *Id.* (quoting *Oxenham*, 241 Va. at 286). “[S]anctions can be used to protect courts against those who would abuse the judicial process. Yet the threat of a sanction should not be used to stifle counsel in advancing novel legal theories or asserting a client’s rights in a doubtful case.” *Oxenham*, 241 Va. at 286. We have held that “a court’s imposition of a sanction will not be reversed on appeal unless the court abused its discretion in 1) its decision to sanction the litigant, or 2) in the court’s choice of the particular sanction employed.” *Switzer v. Switzer*, 273 Va. 326, 331 (2007).

The circuit court held that the petition filed by RC VA Lands was “not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” The circuit court went on to state that “I think, even if the idea that you somehow had to appeal the clerk’s order, that that has some nugget of – kernel of good faith in that, nothing – or very little of this Petition for Appeal even relates or references that.” RC VA Lands disputes this interpretation.

We, as was the circuit court, are well aware of the lengthy and contentious history regarding the decedent’s estate. We cannot conclude that the circuit court abused its discretion in finding the Petition sanctionable and in awarding attorney’s fees as a sanction against RC VA Lands. The circuit court took issue with the underlying premise of RC VA Land’s argument that the order was a clerk’s order under Code § 64.2-444. Specifically, the circuit court found the argument spurious that “anybody could consider that a simple one-page redundant clerk’s order would moot an entire litigated trial with a court order from a judge and an appeal to the Supreme Court. I just . . . find that incredulous.”

Even assuming that RC VA Lands was correct on the factual point that the relevant document was a “clerk’s order” under Code § 64.2-444, as opposed to a ministerial action effectuating the judge’s order, the circuit court found, and we agree, that the petition filed by RC VA Lands went far beyond the potentially good faith basis advocated by Mr. Somerville, which was to appeal the “clerk’s order” under Code § 64.2-445. The Petition attempted to relitigate the entire case that had just been litigated to finality in the circuit court and was pending on appeal before this Court instead of focusing on an argument solely related to an appeal under Code § 64.2-445. While counsel for RC VA Lands correctly admitted to the Court that a proper appeal of a clerk’s order would place the issues of “due execution and testamentary intent before the court,” the circuit court noted that she went further than that and argued that the clerk’s order

“was entered in violation of the old case [to] vacate the deputy clerk’s order for lack of jurisdiction because it was entered in violation of Judge McGinty’s order.”

Counsel for RC VA Lands argued that she was making a good faith argument based on existing law and that she needed to set the stage for her argument by reciting the relevant, albeit belabored, facts, but the Petition did much more than recite facts. The Petition included a prayer for relief that consisted of eleven requests, all but one of which sought affirmative relief, in a case not before the court, that amounted to a relitigation of the just concluded case, with the underlying goal of setting aside the original will that the circuit court admitted to probate and reinstating intestate distribution of the estate. RC VA Lands repeatedly asked the circuit court to “vacate and set aside all orders rendered in [case] #14-234 for lack of subject matter jurisdiction.” This action was filed almost exactly two months after the final order in case #CL14-234 was entered, RC VA Lands was not a party to case #CL14-234, and that case was pending on appeal to this Court. *See Rule 1:1.* There was no good faith basis for seeking relief in case #CL14-234 in the Petition.

While counsel for RC VA Lands may have been allowed to lay a factual background in the Petition, counsel clearly exceeded merely laying a background by her numerous attacks against the subject matter jurisdiction of the circuit court. Those arguments, which comprised the bulk of the Petition, had nothing to do with whether RC VA Lands needed to appeal the “clerk’s order” to avoid mooting the then-pending appeal in Record No. 170859. Further, the attack on the subject matter jurisdiction of the circuit court was not well founded. The subject matter jurisdiction of the circuit court in probate proceedings is established by statute. Code § 64.2-443 provides that “[t]he circuit courts shall have jurisdiction of the probate of wills.” RC VA Lands specifically argued that Code § 64.2-448(G) deprived the circuit court of subject matter jurisdiction to adjudicate the matter in case #CL14-234 because of the order previously entered in case #CL11-560. By enacting Code § 64.2-448(G), the General Assembly has in no way barred circuit courts from exercising jurisdiction to consider an *original will* offered for probate under circumstances such as here where a copy has failed for insufficient proof. Our probate statutes and their limitations do not “state or mean that a lost will may not be established in a court of equity under its general equity jurisdiction.” *Hawkins v. Tampa*, 197 Va. 22, 26 (1955). The fact that decedent’s estate was distributed intestate also does not bar probate of a subsequently discovered original will. *See Kristine C. Karnezis, Annotation, Right to Probate*

Subsequently Discovered Will as Affected by Completed Prior Proceedings in Intestate Administration, 2 A.L.R.4th 1315, § 2[a] (1980) (“Despite the completion of proceedings administering a decedent’s estate as an intestate estate, it has been held that this is not a bar to the probate of a subsequently discovered will.”).

Counsel for RC VA Lands may have had a good faith basis for asking that the “clerk’s order” be stayed or set aside to avoid mooting the pending appeal, however, the requests for relief far exceeded that when counsel launched a frontal assault on the entire process. Counsel for RC VA Lands engaged in unnecessary litigation when she essentially relitigated each case that had already been tried, and made frivolous assertions lacking an objectively reasonable legal basis when she requested affirmative relief including, *inter alia*, that the circuit court vacate an order that was not before it and indeed was pending on appeal to this Court. To the extent that the relief sought applied squarely to case #CL14-234, it clearly went beyond a request to set aside the “clerk’s order” and, as the circuit court correctly found, demonstrated a clear disconnect between the advice she sought and the face of the Petition. Counsel’s actions were exacerbated by the fact that RC VA Lands is wholly owned by one of the decedent’s sons who was a party to all of the previous cases. He has been an active participant throughout the proceedings relating to the decedent’s estate. He was well aware of the rulings made by the circuit court, yet he persisted in a repetitive pattern of conduct targeted at retaining one-third of the decedent’s substantial estate. That pattern of conduct permeated every aspect of the Petition. As such, it supported the circuit court’s decision regarding sanctions, as well as its decision, apparent from the language used in the order awarding sanctions, that “Plaintiff RC VA Lands, LLC is ordered to pay . . . the amount of \$20,000.” Accordingly, in making those determinations, the circuit court did not abuse its discretion.

The circuit court’s written order awarded \$20,000 “which sum has been incurred by the Estate in *attorney’s fees* for the defense of this action.” (Emphasis added.). Unlike the circuit court’s pronouncement from the bench, the order does not include language referencing additional sanctions. The record includes an attorney’s fees affidavit reflecting \$12,480 in fees for services rendered in the underlying proceeding. Accordingly, we will modify the \$20,000 to reflect the actual amount of attorney’s fees, \$12,480, incurred by the Administrator.

For these reasons, we will uphold the award of sanctions but modify the monetary award and enter final judgment for the Administrator in the amount of \$12,480 which reflects the

amount of attorney's fees incurred by the Administrator. We will affirm the judgment of the circuit court in all other respects.

This order shall be certified to the Circuit Court of Gloucester County.

A Copy,

Teste:

A handwritten signature consisting of the letters "DBN" in a cursive, flowing script.

Clerk