Rel: March 6, 2020

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180999

Nina Judkins Harvison

v.

Jennifer Lynn and Pamela E. Nail

Appeal from Cullman Circuit Court
(CV-15-900357)

THOMPSON, Presiding Judge.

This appeal arises from a judgment of the Cullman Circuit Court ("the trial court") ordering Nina Judkins Harvison to pay a total of $47,861 in attorney fees to attorneys involved with the conservatorship and guardianship of Mary Emily

McSwain. McSwain is incapacitated and is the ward of her granddaughter, Jennifer Lynn, and attorney Pamela E. Nail (hereinafter sometimes referred to as "the co-guardians"). Nail also serves as the conservator of McSwain's estate. The attorney fees at issue were awarded pursuant to the Alabama Litigation Accountability Act ("the ALAA"), § 12-19-270 et seq., Ala. Code 1975.

This matter began when Lynn filed a petition for emergency letters of conservatorship and guardianship over McSwain in the Cullman Probate Court ("the probate court") on February 11, 2015. A letter of January 22, 2015, from Dr. Christopher D. Coccia of Cullman Primary Care, which is contained in the record, indicates that McSwain suffers from "fairly profound dementia." Dr. Coccia wrote that, in his opinion, McSwain was not competent to drive or make decisions for herself regarding her health or her finances.

On February 17, 2015, Trent Judkins, McSwain's grandson, filed a verified objection to Lynn's petition and filed a competing petition for emergency letters of guardianship. The probate court appointed attorney Michael Burleson as McSwain's guardian ad litem. Burleson met with McSwain on

February 20, 2015, at the Falkville Nursing Home ("Falkville") and subsequently filed a report with the probate court. In the report Burleson said that McSwain had told him she was aware of the competing petitions for guardianship. The report also indicated that McSwain had explained to Burleson that she had two daughters, Joan and Harvison, that Lynn is Joan's daughter, and that Judkins is Harvison's son. McSwain informed Burleson that she loved both grandchildren but that her daughters did not "get along." She told Burleson that she owns approximately 20 acres of land and that both daughters wanted her house and the land.

Burleson also spoke to both Lynn and Judkins. He reported that Lynn had told him that McSwain would not eat for two weeks because she believed she was being poisoned. McSwain was then admitted to The Sanctuary at The Woodlands ("The Sanctuary") in Cullman, which provides inpatient psychiatric care for geriatric patients. Lynn told Burleson that McSwain had been admitted to The Sanctuary so that her medications could be regulated and that McSwain also suffered from "panic attacks" and inner ear problems.

In his report, Burleson stated that Judkins had told him that McSwain had "short-term memory problems, evidenced by 'double paying' her bills." However, Judkins told Burleson that McSwain could bathe and cook for herself. Burleson reported that Judkins had indicated that, if he were the guardian and conservator for McSwain, he would "provide assistan[ce]" for her during the day and allow her to stay by herself at night. When Burleson asked, Judkins told him that he believed that it was in McSwain's best interest to stay at Falkville at least until the emergency letters of guardianship and conservatorship were issued.

Burleson then reported:

> "Despite Mr. Judkins having been told the undersigned's believe [sic] that Ms. McSwain's needs were being met at [Falkville], on the very next day, February 25, 2015, the undersigned received numerous telephone calls and emails from staff at the nursing home and the attorney for Falkville ... regarding Mr. Judkins and his mother, [Harvison], attempting to check Ms. McSwain out of Falkville.... The two succeeded in checking Ms. McSwain out of the nursing home."

A relative of McSwain's who lives across the street from her told Burleson that she thought it would be in McSwain's best interest if Lynn were granted the letters of guardianship and conservatorship. Burleson opined that, based on his

observations, McSwain was "physically and mentally incapable of handling her affairs." He stated that McSwain needed a guardian and conservator "at least on an emergency basis" to take care of her business and personal affairs and to safeguard her assets. In his opinion, Burleson said, Lynn would be the proper person to be granted the letters of guardianship and conservatorship.

On March 6, 2015, the probate court entered an order granting emergency letters of conservatorship and guardianship to attorney Pamela E. Nail. A hearing was scheduled for April 2, 2015, to consider the permanency of the letters. Over Judkins's objection, the probate court extended the expiration of the temporary letters so that they would remain effective until the permanent letters could be granted. Ultimately, the hearing to consider permanent letters was held on May 22, 2015. The day before that hearing, Burleson filed a second report regarding McSwain. Burleson said that he had visited with McSwain on May 19, 2015, at Morningside Assisted Living of Cullman ("Morningside"), where she resided at that time. McSwain informed Burleson that she liked living there but that it was not home and she would rather be at her house.

Burleson reported that McSwain's apartment at Morningside was neat and clean and that it appeared that McSwain's needs were "well provided."

Burleson said that McSwain had told him that she recognized him but that she did not remember his name or where she had met him. When he told her that information, Burleson said, McSwain remembered the meeting. At the May 19, 2015, meeting, Burleson said, McSwain could not tell him the date. She thought it was April, and she did not know the year. Burleson said that, based on his observations during the May 19, 2015, meeting, his opinion remained that McSwain was physically and mentally incapable of handling her affairs and needed a guardian and conservator.

After the May 22, 2015, hearing, the probate court entered an order finding that Nail and Lynn were the fit and proper parties to serve as guardians for McSwain. Letters of co-guardianship were issued to them. Nail was also appointed as conservator of McSwain's estate. Burleson was awarded a guardian ad litem fee of $2,670, to be paid from McSwain's funds.

The record indicates that Nail performed her duties as co-guardian and conservator without issue until September 25, 2015, when McSwain's niece Kathy Welch, sent a letter to the probate court repeatedly claiming that Nail had spoken "rudely, loudly, and disparagingly" to Welch, Welch's family, and McSwain. In the letter, Welch also requested an appointment with the probate court to discuss elder abuse. Welch also filed a complaint against Nail with the Alabama Bar Association ("the State Bar"), which Nail was required to address. A copy of that complaint appears in the record. On September 28, 2015, Nail submitted a motion to retain counsel and to pay that counsel from McSwain's funds to defend herself against Welch's accusations. The probate court granted the motion on September 28, 2015. Attorney Kay Cason entered an appearance on behalf of Nail.[1]

On September 30, 2015, Harvison, as McSwain's daughter and next friend, filed a petition in the trial court pursuant to § 26-2-2, Ala. Code 1975, seeking to have the matter

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[1]The probate court approved the hiring of Cason to represent Nail regarding Welch's allegations of elder abuse, including defending Nail against the complaint filed with the State Bar. However, as discussed infra, the actual scope of Cason's representation appears to have been broader.

removed from the probate court. In the petition, Harvison asserted that there had been "no final settlement of [the] guardianship and conservatorship estate" of McSwain and that no proceedings had been held in the probate court "preparatory to a final settlement of said estate." Harvison stated that the guardianship and conservatorship could be better administered by the trial court. The trial court granted Harvison's petition on October 6, 2015, and the matter was transferred to the trial court.

On January 19, 2016, Harvison moved for an order under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") for the "purpose of challenging the continuing guardianship or conservatorship arrangements" for McSwain. Despite an objection filed by Cason, on January 27, 2016, the trial court entered an order ("the HIPAA order") that, among other things, authorized Harvison to take or accompany McSwain for medical and/or mental evaluations to ascertain McSwain's current physical and mental conditions.

On February 3, 2016, Cason filed a motion to alter, amend, or vacate the HIPAA order. In the motion, which was supported by Nail's affidavit, Cason alleged that, on the

morning of February 3, 2016, Harvison had taken McSwain from Morningside without first notifying the co-guardians and without taking with her any of the medication McSwain needed for the day. Such conduct endangered McSwain, the motion alleged. Additionally, the motion alleged that Harvison's attorney had demanded a list of McSwain's medications and records from Morningside. In the motion, it was argued that, although the parties were entitled to such information pursuant to the HIPAA order, it had to be acquired in accordance with the Alabama Rules of Civil Procedure. The trial court entered an order setting aside the HIPAA order on February 4, 2016.

On April 13, 2016, Burleson and Cason filed an application for a temporary restraining order and an injunction against Harvison, her husband, Billy, and McSwain's grandson Clay Judkins (hereinafter collectively referred to as "the Harvisons"), seeking to have them barred from Morningside. The application stated that the Harvisons had caused a disruption at the facility earlier and that Billy had been arrested and removed. The executive director of Morningside said that, because of Billy Harvison's conduct,

the staff had concerns about their safety and the safety of the residents, and that, if the Harvisons were not prohibited from coming onto Morningside's premises, McSwain was in danger of being asked to move out of the facility.

On April 15, 2016, the trial court granted a temporary restraining order and an injunction prohibiting the Harvisons from visiting McSwain or entering the premises of Morningside. On April 25, 2016, the day before a hearing on the injunction was scheduled, Harvison again sought a HIPAA order, saying that she wanted McSwain reevaluated and possibly removed from Morningside. After the April 25, 2016, hearing, the trial court entered an order enjoining Harvison and her husband from entering Morningside. The trial court specified that Harvison would be allowed to visit with McSwain away from Morningside provided that reasonable notice was given to the co-guardians. The trial court also provided that Harvison could arrange to have McSwain reevaluated if she gave proper notice to the co-guardians, the guardian ad litem, and their respective counsel, who were to receive copies of any reports obtained as a result of the reevaluation.

Nail continued her work as the conservator for McSwain's estate. On June 10, 2016, Burleson filed a report in which he noted that there seemed "to be a great division between the family in regards to Ms. McSwain." At the time that report was made, McSwain had returned to The Sanctuary for treatment. Dr. G. Grayson, a physician at The Sanctuary, had written a letter, which was attached as an exhibit to Burleson's report, stating that McSwain "shows severe decline in mental skills which are not reversible," adding that McSwain "may very well have to be housed in a facility with a dementia lock-down unit.

In the report, Burleson also stated that he had observed Nail with McSwain on numerous occasions and had never seen Nail be abusive to McSwain. He added that McSwain had denied to him that Nail had ever been abusive.

In addition to his report, Burleson filed a motion to withdraw from his role as guardian ad litem based on a conflict that had arisen. He sought a guardian ad litem fee in the amount of $3,840. The trial court granted both the motion to withdraw and the fee request. Sara Baker was appointed to replace Burleson as McSwain's guardian ad litem.

On June 18, 2016, the co-guardians filed an amended application for a temporary restraining order and an injunction asking that the injunction entered in April 2016 be amended to cover facilities other than Morningside. In the amended application, the co-guardians stated that McSwain had returned to The Sanctuary on May 13, 2016, for treatment because of a "severe mental episode." At the time the amended application was filed, McSwain was ready to be discharged to a dementia lock-down facility or a facility with 24-hour awake care because of the severe decline in her mental state. Morningside refused to allow McSwain to return because she no longer met the qualifications for an assisted-living facility. The co-guardians asserted that they had attempted to find a new, appropriate facility for McSwain and only one nursing-home group, which operated the Falkville facility where McSwain had previously resided, was willing to take her. However, that nursing-home group would not permit McSwain admission to Falkville unless an injunction similar to the April 2016 injunction against the Harvisons was entered in the group's favor. In the amended application, the co-guardians stated that, if McSwain returned to her home and 24-hour awake

care was provided to her there, the cost would be $11,648 each month compared to $5,800 each month at a nursing home.

On June 18, 2016, the trial court entered a temporary restraining order as requested. On July 18, 2016, the parties, the guardian ad litem, the Department of Human Resources, the nursing-home group that operated Falkville, and their respective attorneys appeared before the trial court and announced that an agreement had been reached regarding the terms of an injunction. On July 19, 2016, the trial court entered an order generally continuing the injunction. However Harvison was to be permitted to visit McSwain at Falkville one day each week if she were unaccompanied. She was ordered not to engage in any disruptive actions. The trial court also directed Baker, McSwain's guardian ad litem, to work with Harvison and her attorney to arrange for a second mental/medical evaluation. The co-guardians were directed to report any changes in McSwain's condition to their attorney, who was to notify Harvison's attorney and Baker.

In July 2016, Cason filed a petition on behalf of Nail for the sale of perishable property in McSwain's estate. Baker filed a motion seeking an early hearing date for

consideration of the petition so that the sale could begin as soon as possible so that McSwain's ongoing needs could be met. Harvison opposed the petition, saying that the property was in a house protected from waste and that there was "no documentation or allegations that [McSwain] will not recover from her infirmaries [sic] or that she will never return home." Harvison proposed to have McSwain return home and be cared for by caregivers until the end of her life. Harvison also asked the trial court for an opportunity to inspect the property at issue.

In her objection to the sale of perishable property, Harvison also stated that there was no documentation to show that McSwain's estate was in need of additional funds and suggested that McSwain's

> "assets be spent on attempting to find a treatment for her conditions in an effort eventually allowed [sic] to return home, where Mrs. McSwain has always wanted to be, with supervision and proper care, instead of sticking her in a nursing home, keeping her away from family, and preparing for her to die."

In August 2016, Cason filed a petition on behalf of Nail to approve the prepayment of funeral expenses. In the petition, Nail explained that the purpose of the request was

to prepay the funeral services that will be needed for McSwain before all of McSwain's assets were expended.

Ultimately, the trial court entered an order permitting Harvison to schedule a time with Nail when she could inspect the perishable property at issue and present a list of the items she wanted reserved for McSwain's future use. Harvison was also authorized to obtain a medical evaluation of McSwain at Harvison's expense. The parties reached an agreement regarding the purchase of a prepaid funeral plan and subsequently reached an agreement regarding the disposition of McSwain's personal property. Harvison was awarded possession of specific items, including family Christmas ornaments and decorations, and each of McSwain's daughters was to have copies of family photographs and writings of McSwain. Nail was to have copies of the latter items made for McSwain's daughters. Nail was directed to sell the remaining personal property.

In addition to the various filings Harvison's attorneys submitted to the trial court,[2] Harvison herself wrote a number of letters to the trial judge complaining of the co-guardians'

[2]The record indicates that several attorneys representing Harvison withdrew during the course of this matter.

conduct, asserting that McSwain did not need to be in a nursing home, and claiming that her civil rights, as well as those of her family, had been denied, that the court's rulings were based on lies, that the alleged abuse of McSwain had not been properly investigated, and that McSwain and Harvison were being "railroaded" by the court system, among other things. Harvison also enlisted scores of friends and family members to sign petitions and to send letters to the trial court. At least some of the letters are included in the record on appeal.

On May 2, 2017, Harvison filed a motion to place McSwain in the least restrictive environment, which, in Harvison's opinion, was McSwain's home. Various evaluations of McSwain's mental condition, conducted by licensed psychologists and physicians, continued to indicate that McSwain's mental condition was deteriorating. For example, in an evaluation conducted at Norwood Clinic on February 2, 2017, Dr. James Mark Adams concluded that he considered McSwain to have dementia, specifically Alzheimer's Disease. He stated that he expected that McSwain would need 24-hour care for safety, to ensure that her medications were monitored, and to ensure that

her activities of daily living were being provided. As mentioned, Dr. Coccia had previously examined McSwain and reported that she had "fairly profound dementia." Harvison argued that, although the evaluations indicated that McSwain "need[ed] assistance with her health and finances, none of the reports or opinions state that Mrs. McSwain requires nursing home care." Harvison said it was also McSwain's wish that she not be "confined" to a nursing home.

On May 17, 2017, Cason, on behalf of the co-guardians, filed a response to Harvison's motion to place McSwain in the least restrictive environment. In the response, the co-guardians argued that McSwain was in the least restrictive environment necessary for her care. They pointed out that Dr. Mark Prohaska, who Harvison had chosen to evaluate McSwain, said that McSwain had significant cognitive impairment and that she required a high level of supervision to ensure her safety. Dr. Grayson, a physician at The Sanctuary, stated in February 2016 that McSwain "is not able to live at home and requires assistance." The co-guardians also stated that returning McSwain to her residence and hiring 24-hour awake care would cost twice as much each month as allowing McSwain

to stay at Falkville. The co-guardians stated: "Due in large part to [Harvison's] continual court filings and unruly behavior, [McSwain] does not have the necessary funds to pay for such private care."

Additionally, the co-guardians included writings from McSwain, saying that, before she became incapacitated, "she made it clear that she did not trust the Petitioner, Nina Judkins Harvison, and penned in her own words that she felt that the Petitioner was solely after her money and property." The co-guardians also stated that Harvison had "exhibited such hostility and vitriol toward her sister, Joan Lynn, and niece, Jennifer Lynn, that to place [McSwain] under the care of the Petitioner, Nina Judkins Harvison, would effectively deny them and their family access to [McSwain]." That arrangement would not be in McSwain's best interest, the co-guardians asserted.

On May 17, 2017, Cason, on behalf of the co-guardians, filed a motion for attorney fees and costs pursuant to the ALAA. The co-guardians alleged that Harvison had, without substantial or lawful justification, filed numerous pleadings and motions attempting to have McSwain removed from care facilities and returned to her house. They asserted that

Harvison's efforts were based on her hostility to Joan Lynn and Jennifer Lynn and were intended to harass and intimidate the co-guardians. They outlined the actions Harvison and her "cohorts" had taken against the co-guardians, including making false complaints to the probate court, filing unfounded complaints with the Department of Human Resources, filing unfounded complaints with the State Bar, posting slanderous filings against Joan Lynn, Jennifer Lynn, and Nail on the social-media Web site Facebook, sending numerous ex parte letters to the trial judge, and engaging in disruptive behavior at a nursing facility resulting in the arrest of Harvison's husband and an injunction being entered against the Harvisons.

In defending against Harvison's "frivolous and harassing actions," the co-guardians said, McSwain's estate had incurred attorney fees, conservator fees, and guardian ad litem fees in the amount of $33,869.56, which, they said, had substantially reduced the money available to care for McSwain. The co-guardians stated that, of the total $33,869.56, $18,932.96 had been incurred for attorney fees, $8,825 had been incurred for guardian ad litem fees, and $6,111.60 had been incurred for

conservator fees and expenses. Therefore, the co-guardians asserted, McSwain's estate was entitled to recover that amount, plus court costs and expenses.

On July 18, 2017, Harvison, represented by her fourth attorney in this matter, filed an objection to the motion for attorney fees, arguing that the requested fees were not in any way associated with her actions. She requested a jury trial to hear the issue of attorney fees, to which the co-guardians objected. Harvison filed a motion asking the trial court to acknowledge her request for a jury trial, which the trial court denied, and another motion to acknowledge the date of the hearing on the motion for attorney fees.

Harvison propounded discovery requests and a deposition notice on Cason, the attorney for Lynn and Nail. Cason moved to quash the subpoena for her deposition and to quash the request for written discovery. Harvison filed several other motions related to the ALAA claim, including a request that she be allowed "full discovery concerning damages." She also sought to have Baker's and Nail's May 17, 2017, guardian ad litem and conservator filings sealed because, she said, they exposed confidential medical reports regarding McSwain. We

note that the reports at issue were the evaluations that had been included as exhibits to a number of previous filings, including Harvison's motion to place McSwain in the least restrictive environment. On December 20, 2018, Harvison filed a motion seeking to take McSwain out of Falkville for Christmas Eve or Christmas Day. Cason, as attorney for the co-guardians, filed a response saying that Harvison could visit McSwain at Falkville when the facility permitted visitors but that Harvison had not been permitted to take McSwain from Falkville out of "safety concerns" for McSwain. Attached to the objection was a letter from Falkville personnel describing McSwain's condition and saying it took two staff members to tend to her hygienic needs and to help her ambulate. The trial court did not enter an order on Harvison's motion until December 26, 2018, at which time it found that the motion was moot.

Harvison, through the fifth attorney she had retained in this matter, filed two motions seeking the trial judge's recusal on the ground that, because of a number of cases involving the judge or her family and Harvison's fifth attorney, who had also filed a complaint against the trial

judge with the Judicial Inquiry Commission ("the JIC"), the trial judge had a personal bias or prejudice against Harvison. The trial judge told Harvison's attorney that she had contacted the JIC and was told that the fact that the attorney had filed a complaint against her did not necessitate her recusal. Harvison's recusal motions were denied. On May 15, 2019, Harvison filed a motion for a complete inventory and itemization, stating that, in the last inventory filed by Nail, Nail had failed to state what moneys from the estate had been spent for guardian/conservator fees and attorney fees paid to Cason.

Throughout this matter, Nail continued to conduct such inventories and accountings as well as filing the requisite reports with the trial court. When Nail submitted her properly documented fee requests to the trial court, Harvison objected, claiming they were erroneous and excessive and asking that the trial court deny any of Nail's claims upon the estate for payment.

The evidentiary hearing on the ALAA claim was held on June 4, 2019. At that hearing, Nail testified regarding the various fees requested in the ALAA claim. Cason conducted

Nail's direct examination. Nail explained that she does not normally hire an attorney to represent her when she is acting as conservator or guardian. However, in this case, Nail said, she had to hire an attorney because of

> "Bar complaints, the complaints made to the district attorney's office trying to have me arrested, complaints made to the [Department of Human Resources], complaints--problems with the family members at The Sanctuary and at Morningside causing problems, having problems at Folsom Center where [McSwain] is at now."

Nail said that she had had to attend seven hearings as a result of various filings Harvison had made and that she had had to file petitions for two injunctions because of the conduct of Harvison and her family or friends. Nail said that, as of the date of the hearing, she had paid Cason $23,849.51 and still owed her $3,701.25, for a total of $27,550.76. Nail said that entire amount was attributable to addressing the situations caused by Harvison.

In addition, Nail testified, the estate had incurred guardian ad litem fees of $2,670 for Burleson and $9,765 for Baker.[3] Of the total amount of fees owed to Baker, Nail said,

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[3]This court recognizes that, in addition to the fee of $2,670, Burleson had subsequently requested a fee in the amount of $3,840. The latter fee was not mentioned at the hearing on the ALAA claim.

$2,070 had not yet been paid. Baker would also generate expenses for appearing at the current hearing, Nail said. As for her own fees, Nail said, $15,483.88 was solely attributable to dealing with the filings by Harvison.

On cross-examination, Harvison questioned Nail's need for an attorney to respond to the various complaints made against her in this matter by Harvison and others, eliciting testimony that in responding to previous complaints against her made to the State Bar, Nail had never had to hire an attorney. Nail also acknowledged that Harvison had not filed the complaint with the State Bar, and she said that she had not spoken with Welch, who had filed the complaint. Harvison also elicited testimony from Nail that, in her opinion, all the pleadings and motions Harvison had filed in this matter in the trial court were frivolous.

On cross-examination, Harvison also elicited testimony regarding entries on Nail's billing sheets that included items such as delivering payments for McSwain's bills, visiting with McSwain, writing checks for McSwain, and balancing McSwain's checkbook. Harvison questioned the time billed for several of those tasks, for example, a billing entry indicating that it

took two hours to balance McSwain's checkbook. Nail testified that "there was probably something else didn't get added in on that," but she conceded that it did not take two hours to balance the checkbook. Nail also went to one of McSwain's rental houses to post an eviction notice. The billing entry indicates a charge of $225 for that task.[4]

Baker testified that, since she had been appointed as McSwain's guardian ad litem, she had had to engage in activities outside her normal duties as a guardian ad litem. For example, Baker said, there were more than the usual number of pleadings and motions filed in this case that she had to review. In addition, Baker said, she was required to accompany Harvison on her visits to McSwain at The Sanctuary because those visits had to be supervised.

Regarding McSwain, Baker testified that her mental condition had deteriorated each of the three years she had been serving as McSwain's guardian ad litem. She also said that, based on her review of McSwain's medical records, her

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[4]During her testimony, Nail said that she was a named defendant "in the suit." She also said that the case she was testifying in was "not the case that was removed from the probate court." She said that Harvison had sued her. In our review of the record, we could find no support for that statement.

own observations, and her conversations with McSwain's care-givers at various facilities, Harvison's caring for McSwain at home was never a viable option, despite Harvison's assertions to the contrary.

Baker said that, at the time of the ALAA hearing, she had billed $9,765 in fees for serving as McSwain's guardian ad litem. She estimated that approximately 60% of the time for which she billed was for activities outside of her normal duties when serving as a guardian ad litem. For example, Baker explained that she had never before had to supervise a visit as a guardian ad litem in a case involving an elderly person. There were also usually very few court hearings for her to attend, Baker said. Baker added that she did not know whether the extended litigation in this case was frivolous, but, she said, it was more expensive than usual. Additionally, Baker said, Harvison had noticed her deposition and she had had to prepare for that, which Baker said she had never done before as a guardian ad litem.

On July 29, 2019, the trial court entered a judgment finding that McSwain was in the least restrictive placement consistent with her safety, care, and medical needs. It also

stated that Nail, as the conservator of McSwain's estate, had satisfied the trial court that "many" of Harvison's actions and pleadings in this matter "were without substantial justification; were interposed in part for delay and harassment; and have resulted in the estate of [McSwain] incurring unnecessary costs and attorney's fees as described in the [ALAA]." Specifically, the trial court determined that the following expenses were attributable to the "unjustified actions" of Harvison: Burleson's fees in the amount of $2,670; Baker's fees in the amount of $5,859; conservator fees for Nail in the amount of $15,483; and estate and conservator attorney fees for Cason's services in the amount of $23,849. Those amounts, the trial court concluded, "were incurred for unnecessary, frivolous and/or unjustified actions on the part of [Harvison]--over and above proceedings and expenses which were justified in and about the proceedings necessary to ensure the fair, careful and proper administration of the estate of [McSwain] and her welfare." Accordingly, the trial court entered a judgment in favor of McSwain's estate and against Harvison in the amount of $47,861.

On August 27, 2019, Harvison filed a notice of appeal to our supreme court, which subsequently transferred the appeal to this court pursuant to § 12-3-10, Ala. Code 1975. That same day, she also filed a timely motion to alter, amend, or vacate the judgment. The postjudgment motion was scheduled for a hearing; however, on October 2, 2019, the trial court entered an order purporting to continue the hearing pending the results of this appeal. As a result, the motion was denied by operation of law on November 25, 2019. See Rule 59.1, Ala. R. Civ. P.

On appeal, Harvison argues that the trial court erred by failing to hold a hearing on her motion to alter, amend, or vacate the judgment, as she had requested in her motion, and by allowing the motion to be denied by operation of law. Lynn and Nail contend that Harvison "denied herself the right to that hearing by filing an appeal."

Harvison is correct in her contention that the postjudgment motion, filed on the same day as the notice of appeal, was denied by operation of law pursuant to Rule 59.1, Ala. R. Civ. P. It is well settled that a notice of appeal filed before a ruling on a Rule 59, Ala. R. Civ. P.,

postjudgment motion is held in abeyance pending the disposition of that postjudgment motion. Rule 4(a)(5), Ala. R. App. P. ("A notice of appeal filed after the entry of the judgment but before the disposition of all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59, Alabama Rules of Civil Procedure, shall be held in abeyance until all post-judgment motions filed pursuant to Rules 50, 52, 55, and 59 are ruled upon; such a notice of appeal shall become effective upon the date of disposition of the last of all such motions."); Colby Furniture Co. v. Overton, [Ms. 2180532, Dec. 6, 2019] ___ So. 3d ___ (Ala. Civ. App. 2019); V.L. v. A.W., 275 So. 3d 156, 157 (Ala. Civ. App. 2018)(noting that, when a postjudgment motion and a notice of appeal were filed on the same day, the notice of appeal was held in abeyance until the denial by operation of law of the postjudgment motion). Thus, in this case, Harvison's notice of appeal became effective on November 25, 2019--the 90th day after the postjudgment motion was filed and the day on which the motion was deemed denied by operation of law. See Rule 59.1. Thereafter, the trial court lost jurisdiction to consider or act upon the postjudgment motion.

Cornelison v. Cornelison, 180 So. 3d 883, 887 (Ala. Civ. App. 2015); Sibley v. Sibley, 90 So. 3d 191, 193 (Ala. Civ. App. 2012).

Regarding whether the trial court erred in not holding a hearing on the postjudgment motion, this court has held that,

> "[g]enerally, a movant who requests a hearing on his or her postjudgment motion is entitled to such a hearing. Rule 59(g), Ala. R. Civ. P.; Flagstar Enters., Inc. v. Foster, 779 So. 2d 1220, 1221 (Ala. 2000). A trial court's failure to conduct a hearing is error. Flagstar Enters., 779 So. 2d at 1221."

Dubose v. Dubose, 964 So. 2d 42, 46 (Ala. Civ. App. 2007); see also Staarup v. Staarup, 537 So. 2d 56, 57 (Ala. Civ. App. 1988) ("[Rule 59(g)] mandates that, when a hearing is requested on a motion for new trial, the hearing must be granted.").

"A trial court errs by not granting a hearing when one has been requested pursuant to Rule 59(g); however, that error is not necessarily reversible error." Gibert v. Gibert, 709 So. 2d 1257, 1258 (Ala. Civ. App. 1998). Therefore, "[o]n appeal, ... if an appellate court determines that there is no probable merit to the motion, it may affirm based on the harmless error rule." Palmer v. Hall, 680 So. 2d 307, 307-08 (Ala. Civ. App. 1996).

"The Alabama Supreme Court has stated:

> "'Harmless error occurs, within the context of a Rule 59(g) motion, where there is either no probable merit in the grounds asserted in the motion, or where the appellate court resolves the issues presented therein, as a matter of law, adversely to the movant, by application of the same objective standard of review as that applied in the trial court.'

"Greene v. Thompson, 554 So. 2d 376, 381 (Ala. 1989). However, '[w]hen there is probable merit to the motion, the error cannot be considered harmless.' Dubose [v. Dubose], 964 So. 2d [42] at 46 [(Ala. Civ. App. 2007)]."

Wicks v. Wicks, 49 So. 3d 700, 701 (Ala. Civ. App. 2010). Accordingly, our first task is to determine whether there is probable merit to the grounds asserted in Harvison's postjudgment motion.

Among the arguments raised in the postjudgment is Harvison's contention that the trial court's judgment is not supported by the evidence or the law.

> "The standard of review on appeal from an award of attorney fees under the ALAA 'depends upon the basis for the trial court's determination.' Morrow v. Gibson, 827 So. 2d 756, 762 (Ala. 2002). In Pacific Enterprises [Oil Co. (USA) v. Howell Petroleum Corporation, 614 So. 2d 409 (Ala. 1993)], this Court determined, as an issue of first impression, that

> "'if a trial court determines that a party's action, claim, or defense is "without substantial justification," based on the applicability of any one of these terms or phrases ["frivolous," "groundless in fact," "vexatious," or "interposed for any improper purpose"], that determination will not be disturbed on appeal "unless it is clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence." Cove Creek Development Corp. v. APAC-Alabama, Inc., 588 So. 2d 458, 461 (Ala. 1991).
>
> "'However, we conclude that the phrase "groundless in law" clearly calls for a legal determination. Therefore, if the trial court determines that a party's action, claim, or defense is "without substantial justification" because it is "groundless in law," that determination will not be entitled to a presumption of correctness. Rather, the appellate courts of this State will test the validity of the trial court's legal conclusion.'

"614 So. 2d at 418."

Ex parte Loma Alta Prop. Owners Ass'n, Inc., 52 So. 3d 518, 522 (Ala. 2010).

In her appellate brief, Harvison, as she did in her postjudgment motion, argues that the evidence does not support the trial court's award of attorney fees to the guardians ad litem, Burleson and Baker, pursuant to the ALAA. As to Burleson, Harvison points out that the only evidence regarding

his fee presented during the hearing was the amount of his fee, i.e., $2,670. There was no evidence presented to the trial court regarding when or why those fees were incurred. Burleson was appointed as McSwain's guardian ad litem in February 2015, before Harvison became involved in this matter. The record indicates that he visited with McSwain and prepared reports on her condition as part of the determination regarding whether McSwain was in need of a guardian and/or a conservator. The probate court awarded Burleson a fee of $2,670, the same amount the trial court attributed to him in awarding fees pursuant to the ALAA. There is nothing in the record to indicate that all or a portion of those fees were incurred as a result of any action, claim, or defense asserted by Harvison. Accordingly, we cannot say that there is no probable merit to Harvison's contention in her postjudgment motion that the attorney-fee award is not supported by the evidence, at least as to Burleson.

The trial court awarded McSwain's estate $5,859 attributable to fees paid to Baker. At the ALAA hearing, Baker testified that she had billed $9,765 for her work as McSwain's guardian ad litem, and she estimated that 60% of

that total was incurred because of work created by Harvison's filings in the trial court. In her appellate brief, Harvison argues that there is no factual basis for the amount of the award attributable to Baker. However, 60% of $9,765 is $5,859. Thus the award to Baker is supported by Baker's testimony.

In the postjudgment motion, Harvison asserted that Nail could not charge McSwain's estate for fees in her capacity as an attorney and, at the same time, hire legal counsel to represent her. Although Harvison's appellate brief is not a model of clarity, she asks "why an attorney would need an attorney" to handle conservatorship matters and appears to argue that Nail should not have hired an attorney, Cason, to do the conservator's work that Nail had been appointed to handle. In her appellate brief, Harvison suggests that her challenges to payments of attorney fees for those involved in this matter are not frivolous. This court also questions the need for Cason, not Nail, to file motions and responses on behalf of McSwain's estate. For example, in January 2016, Cason filed an objection to Harvison's request for a HIPAA order. Cason also filed the motion to alter, amend, or vacate

that order. In July 2016 Cason filed a petition on behalf of Nail for the sale of perishable property in McSwain's estate.

The record indicates that Nail sought approval to retain an attorney to defend her against accusations of elder abuse, which McSwain's niece Welch had made against her, and to have the resulting attorney fee paid from McSwain's estate. That request was approved. We find nothing in the record that would permit Cason to assume the duties of the conservator and receive payment for what appear to be routine filings in the trial court on behalf of the estate, especially when Nail was also paid for her work as the conservator of the estate. We cannot determine from the record whether any of Cason's fee was properly attributable to any action, claim or defense asserted by Harvison. Likewise, we cannot determine the portion of Nail's fee that is attributable to Harvison's filings. Similarly, we cannot conclude that any challenges Harvison made to the payment of certain fees were frivolous. In other words, we cannot say that all of the filings made by Harvison in this matter rise to the level warranting an award of an attorney fee pursuant to the ALAA.

Based on our review of the record and the arguments Harvison raised in her postjudgment motion, we conclude that there is probable merit to at least some of the grounds asserted in that motion. Our conclusion is not to be read as a determination that there is insufficient evidence to support the trial court's finding that "many of [Harvison's] actions and pleadings in this cause were without substantial justification; were interposed for delay and harassment; and have resulted in the estate of [McSwain] incurring unnecessary costs attorney's fees." However, Harvison does raise valid concerns regarding the factual and legal bases for the amount of the trial court's award of attorney fees pursuant to the ALAA. Therefore, the denial of the postjudgment motion by operation of law was not harmless error, and the trial court erred to reversal by allowing Harvison's postjudgment motion to be denied without a hearing.

For the reasons set forth above, we reverse the judgment ordering Harvison to pay an attorney fee of $47,861 to the McSwain estate, and we remand the cause to the trial court to hold the requested hearing on Harvison's postjudgment motion, as required by Rule 59(g), Ala. R. Civ. P. Because we are

reversing the judgment and remanding the cause to the trial court for a hearing, we pretermit discussion of the other issues Harvison has raised on appeal.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Moore, Donaldson, Edwards, and Hanson, JJ., concur.