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NO. COA11-1472  
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

IN THE MATTER OF THE WILL OF NELLE  
W. BARRON  
Deceased.

Burke County  
No. 06 E 40

Appeal by caveator from an order entered 3 April 2011 by Judge Beverly T. Beal in Burke County Superior Court. Heard in the Court of Appeals 10 May 2010.

*Clyde Gary Triggs, attorney for caveator-caveator.*

*Forrest A. Ferrell and Stephen L. Palmer of SIGMON, CLARK, MACKIE, HUTTON, HANVEY & FERRELL, PA, attorneys for propounder-appellee.*

ELMORE, Judge.

Janice Elizabeth Barron Rushing (caveator) appeals from an order denying her motion for award of attorney's fees and costs. We affirm.

In 2007, caveator filed a caveat action contesting the last will and testament (the will) of her mother, Nelle Elizabeth

Woodbury Barron, which excluded caveator entirely from inheritance. In the caveat, caveator alleged that the will should be set aside because 1) it was obtained by fraud, coercion or undue influence, and 2) that her mother lacked testamentary capacity when she signed it. The caveat action was tried by a jury in September 2008. On 18 September 2008, the jury rendered a verdict, finding that Nelle did not lack sufficient mental capacity to make and execute the will and that that the will was not procured by undue influence. The trial court then admitted the will to probate.

Then, in August 2010, caveator filed a motion for award of attorney's fees and costs for the caveat action. On 3 April 2011, the trial court entered an order denying this motion, finding that caveator was not entitled to attorney's fees because the caveat action did not have substantial merit. Caveator now appeals.

Caveator's sole argument on appeal is that the trial court erred in denying her motion for attorney's fees and costs pursuant to N.C. Gen. Stat. § 6-21(2). We disagree.

"Whether to allow costs and attorneys' fees under this section is a matter within the trial court's discretion." *In re Will of Sechrest*, 140 N.C. App. 464, 474, 537 S.E.2d 511, 518

(2000). Under this statute, the trial court may tax the costs of a caveat action against the estate even when judgment is entered against the caveator, so long as the trial court finds that the caveat was apt and proper and done in good faith. See *In re Will of Slade*, 214 N.C. 361, 199 S.E. 290 (1938) (affirming an order for attorney's fees taxed against the estate when the caveat action was found to be apt and proper and done in good faith).

Here, the trial court found to the contrary. In its order, the trial court stated that it "does not find that the Caveator's case had substantial merit" and that as a result "Caveator is not entitled to an award of attorney's fees." The trial court based its conclusion on a number of findings which summarized some of the evidence that was presented to the jury during the original caveat action. This evidence included the following: 1) The testimony of John Ervin, an attorney who prepared and was present at the execution of the will, and who testified about Nelle's testamentary capacity; 2) The testimony of Mrs. Howerton, a bank employee who testified about Nelle's ability to know the objects of her bounty, her mental sharpness, and her mental capacity; 3) The testimony of Mrs. Chapman, Nelle's beautician, who testified that Nelle knew who her

relatives were, and that she had the capacity to make the will;  
4) The testimony of Mr. Weir, a man who worked with Nelle on the preparation of her tax returns, and who testified that she knew who her children were, what her property was, and what she wanted to do when she executed the will. The trial court also found that caveator did not live in the State of North Carolina when the will was executed and that she produced no witnesses at trial who could testify that Nelle lacked testamentary capacity.

As a result, we are unable to agree that the trial court abused its discretion in denying caveator's motion for attorney's fees and costs.

Affirmed.

Judges GEER and THIGPEN concur.

Report per Rule 30(e).