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NO. COA04-1655

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

IN THE MATTER OF THE WILL
OF ROBERT LEE DUNN

Durham County
No. 95 E 751

Appeal by William Dunn from judgment entered 12 May 2004 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 23 August 2005.

Everett & Everett, by Sandra Herring, for propounder-appellant.

Nick Galifianakis & Associates, by Nick Galifianakis and David Krall, for caveator-appellee.

CALABRIA, Judge.

William Dunn, propounder ("appellant"), appeals the 12 May 2004 Order for Relief setting aside a caveat which was dismissed with prejudice. We dismiss the appeal as interlocutory.

Appellant, son of Robert Lee Dunn ("testator"), filed the first caveat to a will and codicil dated 20 September 1994 and 26 October 1994 offered by his brother, co-executor Joseph J. Dunn ("appellee"), as the final will of their father. A jury found the will and codicil were procured by undue influence. A previous will of testator, dated 29 August 1994, had been destroyed by co-executor and daughter of testator, Virginia Dunn Jones ("Virginia

Dunn"), at testator's behest and in his presence on 13 October 1994. The question of whether or not the August will was revoked by the actions of testator, however, was not submitted to the jury. Pursuant to N.C. R. Civ. P. 49(c), the trial court found the August will was destroyed and concluded that testator died intestate. Appellant appealed and the Court of Appeals reversed and remanded. A Revised Judgment was ordered on 22 October 1998 noting that any interested party could submit a paper writing purporting to be the last will of testator. Appellant replaced the previous co-executors and qualified as Executor of testator's estate on 23 March 1999, pursuant to the August 1994 will.

Appellee contested the validity of the August will submitted to probate and filed the second caveat on 21 March 2002. One month later, at an alignment hearing, Superior Court Judge Abraham Penn Jones ("Judge Jones") dismissed certain individuals who filed the caveat as disinterested parties, ordered appellee to determine whether there were any additional parties in interest and if so to properly serve them for purposes of alignment and further ordered Virginia and Patricia Dunn, as parties aligned with appellee, to post \$200.00 bond with the court. In May of 2002, appellee died without complying with each of Judge Jones' orders.

The case was called for trial on 2 June 2003. Counsel for appellee failed to appear and no personal representative had been substituted for appellee. Appellant moved, in the absence of appellee counsel, to dismiss himself as well as Virginia and Patricia Dunn as parties to the caveat, appoint a public

administrator for the estate of appellee, and identify any other parties in interest. Superior Court Judge J. B. Allen, Jr., granted all three motions on 12 June 2003. After this hearing but before the appointment of a public administrator, Timothy R. Dunn, appellee's son, qualified as administrator of his father's estate.

On 22 December 2003, appellant moved to dismiss the caveat for failure to prosecute and comply with court orders. Superior Court Judge Henry W. Hight, Jr., *sua sponte*, substituted Timothy Dunn for the deceased appellee, ordered him to serve all interested parties, and set the case for trial. When appellee's counsel failed to attend the trial date on 23 February 2004, Superior Court Judge Milton F. Fitch granted appellant's motion to dismiss with prejudice under N.C. R. Civ. P. 41(b) for failure to comply with the previous court orders.

On 23 March 2004, appellee filed a motion for relief pursuant to N.C. R. Civ. P. 60(b). Following two hearings regarding appellee's motion for relief, on 12 May 2004 Superior Court Judge Ronald L. Stephens granted appellee's motion, vacated the 23 February 2004 involuntary dismissal and set the caveat for trial. Appellant appeals.

Appellant contends the May order is immediately appealable because the trial court certified the May order as a final judgment and a substantial right was involved. We disagree.

Generally, an interlocutory order is not immediately appealable. Interlocutory orders are "made during the pendency of an action, which does not dispose of the case, but leaves it for

further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 354, 362, 57 S.E.2d 375, 381 (1950). In contrast, final judgments, which are immediately appealable, "dispose[] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361-62. Furthermore, "[a]ppellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the *whole case* for determination in a *single appeal* from the *final judgment*." *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951) (emphasis added). Accordingly, the central question before this Court is whether the trial court's 60(b) order is interlocutory or a final judgment.

Appellant's appeal of the trial court's 12 May 2004 Order for Relief is interlocutory and not a final judgment. In *Metcalfe v. Palmer*, 46 N.C. App. 622, 623, 265 S.E.2d 484, 484 (1980), this Court examined a breach of contract case where an involuntary dismissal against the plaintiff, due to plaintiff counsel's failure to appear, was set aside under N.C. R. Civ. P. 60(b) and the case returned to the regular calendar for trial. This Court, noting the nature of the trial court's order as interlocutory, stated "[the order] does not affect any substantial right of the defendants which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy *on the merits*." *Id.*, 46 N.C. App. at 624 (emphasis added). Similarly, in the instant case because the trial court's May 2004 Order is

interlocutory and appellant can appeal any later trial court disposition with which it takes issue, the "only effect is to require [the appellants] to face a trial on the merits...." *Id.* Such an occurrence is not too difficult a hardship to face in seeking an appropriate resolution.

Appellant contends that since the trial court certified the appeal under N.C. R. Civ. P. 54(b) and a substantial right exists, the order, even if interlocutory, is immediately appealable. While the above two circumstances are appropriate means to appeal an interlocutory order, see *Cagle v. Teachy*, 111 N.C. App. 244, 245-47, 431 S.E.2d 801, 802-03 (1993) (noting that both 54(b) and substantial right claims are individual means where, if correctly applied, immediate appeal is tenable), neither is applicable here. First, "a trial judge [cannot] by denominating his decree a final judgment make it immediately appealable under Rule 54(b) if it is not such a judgment." *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) (emphasis added), accord *Cagle*, 111 N.C. App. at 247, 431 S.E.2d at 803. The May 2004 Order was improperly certified by the trial court as a final judgment under N.C. R. Civ. P. 54(b).

Second, appellant possesses no substantial right that would afford an immediate appeal. "[A] right is substantial *only when it will clearly be lost or irretrievably adversely affected* if the order is not reviewable before final judgment." *Cagle*, 111 N.C. App. at 246, 431 S.E.2d at 802 (citation and internal quotation marks omitted) (emphasis added). Our Supreme Court has noted that

ascertaining whether or not a substantial right exists is no easy task and that "[i]t is usually necessary to resolve [this] question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). Appellant claims that the right to know the identity of the parties and the issues to be decided are substantial rights. Accordingly, once the trial regarding the caveat commences, appellant will be apprised of the parties and the issues and no right will be lost or adversely affected absent an appeal. "The right to avoid...trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal." *Metcalf*, 46 N.C. App. at 624, 265 S.E.2d at 485.

Since the trial court improperly certified its Rule 60(b) order as immediately appealable under Rule 54(b) and neither of the appellant's claimed rights are substantial, we hold the 60(b) order is not immediately appealable.

For the foregoing reasons, the appeal of appellant-propounder is dismissed and this cause is remanded to the trial court.

Appeal dismissed.

Judges WYNN and LEVINSON concur.

Report per Rule 30(e).