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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1176

Filed: 2 January 2018

Iredell County, No. 14 CVS 779

THOMAS DAVID BOST, Plaintiff,

v.

GALE ANN CHRISTIANA HELLER F/K/A GALE ANN CHRISTIANA BOST, Defendant.

Appeal by Plaintiff from order entered 13 January 2015 by Judge A. Robinson Hassell in Iredell County Superior Court. Heard in the Court of Appeals 19 April 2017.

Jones, Childers, Donaldson & Webb, PLLC, by Kevin C. Donaldson, for Plaintiff-Appellant.

The McIntosh Law Firm, P.C., by Robert G. McIntosh, Rachel M. Garcia, James C. Fuller, Jr., and George G. Cunningham, for Defendant-Appellee.

INMAN, Judge.

This appeal arises from a dispute between a mother and son over the ownership of real property. Thomas David Bost ("Plaintiff") appeals from an order granting summary judgment in favor of Gale Ann Christiana Heller ("Defendant"). Plaintiff argues that he is entitled to a one-half undivided interest in property devised

to Defendant by a validly probated will. After careful review, we affirm the trial court.

Factual & Procedural History

On 23 August 1985, Lloyd Bost ("Bost") and Defendant purchased three separate tracts of land located at 159 Windchime Lane in Mooresville, North Carolina (the "Property"). Bost and Defendant each owned a one-half undivided interest in the Property.

A year later, Defendant conveyed the entirety of her one-half interest in the Property to Bost, resulting in Bost having exclusive ownership. The following year, on 7 November 1987, Bost and Defendant married.

Within two years of marrying Defendant, on 14 June 1989, Bost executed a last will and testament. In the will, Bost bequeathed all of his real and personal property to Defendant. Sixteen months later, on 23 October 1990, Defendant gave birth to a son, Plaintiff.

Bost died on 12 January 1995, when Plaintiff was four years old. That same day, Defendant presented Bost's will to the Iredell County Clerk of Court for probate. Per the terms of the will, Defendant received the entirety of Bost's estate, both real and personal property. Plaintiff lived on the Property with Defendant until at least his eighteenth birthday—23 October 2008.

On 17 April 2014, Plaintiff—then age 23—filed a complaint against Defendant for conversion of a share of personal property contained in the estate and to quiet title in the Property. Defendant filed a motion to dismiss, an answer, affirmative defenses, and counterclaims. Plaintiff filed a motion for partial summary judgment on 31 December 2014. Defendant subsequently converted her motion to dismiss into a motion for summary judgment. Following a hearing on the motions in Iredell County Superior Court, Judge A. Robinson Hassell entered an order granting Defendant's motion for summary judgment and denying Plaintiff's motion for partial summary judgment.

Plaintiff timely appealed to this Court; however, the appeal was dismissed as interlocutory because Defendant's counterclaims remained pending. *Bost v. Heller*, __ N.C. App. __, 779 S.E.2d 787 (2015) (unpublished). Defendant then voluntarily dismissed her pending counterclaims, and Plaintiff filed a second notice of appeal.

Analysis

Plaintiff contends that upon his father's death, he was immediately vested with a one-half undivided interest in the Property as if his father had died intestate, pursuant to N.C. Gen. Stat. § 31-5.5 (1994), a statute providing for a child born after the date a parent executes a will. We hold that because Defendant received the entirety of the Property pursuant to Bost's validly probated will, because no civil action was instituted during the probate period, and because Plaintiff failed to bring

a claim within three years after turning eighteen, the trial court did not err in awarding judgment in favor of Defendant.

I. Standard of Review

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). Our standard of review of an appeal from summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

II. Discussion

Section 41-10 of the North Carolina General Statutes provides that "[a]n action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims[.]" N.C. Gen. Stat. § 41-10 (2015). "To establish a prima facie case for removing a cloud upon title, two requirements must be met: (1) the plaintiff must own the land in controversy, or have some estate or interest in it; and (2) the defendant must assert some claim in the land adverse to plaintiff's title, estate or interest." *Hensley v. Samel*, 163 N.C. App. 303, 307, 593 S.E.2d 411, 414 (2004) (citation omitted).

Defendant asserts sole ownership in the Property, satisfying the second prong of N.C. Gen. Stat. § 41-10. Thus, the determinative issue on appeal is whether

Plaintiff has asserted a cognizable interest in the Property such that he would have standing to bring an action under N.C. Gen. Stat. § 41-10.

A. Vesting of Interest

Section 31-5.5 addresses the validity of a will in regard to any child born to the testator after the will's execution. The version of N.C. Gen. Stat. § 31-5.5 in effect at the time of Bost's death[1] provides:

> (a) A will shall not be revoked by the subsequent birth of a child to the testator . . . , but any after-born . . . child shall have the right to share in the testator's estate to the same extent he would have shared if the testator had died intestate unless:
>
> (1) The testator made some provision in the will for the child, whether adequate or not, or
>
> (2) It is apparent from the will itself that the testator intentionally did not make specific provision therein for the child.

N.C. Gen. Stat. § 31-5.5 (1994). Although this language provides that afterborn children are entitled to an intestate share in a parent's estate, it does not provide for automatic vesting of that right. No prior decision by this Court or the North Carolina Supreme Court has addressed the issue. So we must resolve this dilemma based on

[1] After Bost's death, N.C. Gen. Stat. § 31-5.5 was amended to include three additional exclusionary provisions: "(3) [t]he testator had children living when the will was executed, and none of the testator's children actually take under the will; (4) [t]he surviving spouse receives all of the estate under the will; or (5) [t]he testator made provision for the child that takes effect upon the death of the testator, whether adequate or not." An act to amend the law relating to the share of after-born or after-adopted children, and recommended by the General Statutes Commission, ch. 161, 1995 N.C. Sess. Laws 707, § 7. The amended statute does not apply to this case.

the most closely analogous authorities and common sense.

Section 28A-15-2(b) of the North Carolina General Statutes provides in pertinent part:

> The title to real property of a decedent is vested in the decedent's heirs as of the time of the decedent's death; but the title to real property of a decedent devised under a valid probated will becomes vested in the devisees and shall relate back to the decedent's death, subject to the provisions of [N.C. Gen. Stat. §] 31-39.

N.C. Gen. Stat. § 28A-15-2(b) (2015). Section 31-39 provides for the rights of lien creditors and purchasers. N.C. Gen. Stat. § 31-39 (2015).

Plaintiff argues that construing Section 31-5.5 *in para materia* with Section 28A-15-2(b) requires this Court to hold that an afterborn child who meets the qualifications of Section 31-5.5 is immediately—*i.e.* before a will omitting the after-born heir could be deemed valid in a probate proceeding—vested with an intestate share of any real property existing in a deceased parent's estate. We do not interpret N.C. Gen. Stat. § 31-5.5 to provide for the automatic vesting of an afterborn child's interest. Nor do we interpret N.C. Gen. Stat. § 28A-15-2(b) to provide for the immediate vesting of Plaintiff's interest, because Bost did not die intestate.

Plaintiff cites *Wachovia Bank & Trust Co. v. McKee*, 260 N.C. 416, 132 S.E.2d 762 (1963), for the proposition that an afterborn child is immediately vested with an intestate share of the testator's estate, automatically precluding a different devise. *McKee* is inapposite to this case, in which an afterborn child's interest was not raised

until years after a will was probated and real property vested in another party.

McKee arose from a will devising all of the testator's real and personal property to his wife at a time when the testator had one child. 260 N.C. at 418, 132 S.E.2d at 764. Subsequently, two more children were born to the testator and his wife. *Id.* at 418, 132 S.E.2d at 764. Following the testator's death, but *prior to the distribution of his estate*, the executor of the estate brought an action for declaratory judgment to determine whether the two afterborn children were "entitled to share in their father's estate as if he had died intestate." *Id.* at 417, 132 S.E.2d at 763. The trial court concluded that the will devised the testator's entire estate to his widow, and entered judgment ordering distribution to that effect. *Id.* at 417, 132 S.E.2d at 763. The guardian *ad litem* for the two afterborn children appealed. *Id.* at 417-18, 132 S.E.2d at 763. The North Carolina Supreme Court reversed the trial court, holding that it was not evident from the will that the testator intentionally did not provide for afterborn children:

> In simple terms, a child born after the will is executed takes as in case of intestacy, unless (1) provision is made for it in the will, or (2) it appears from the will itself that the testator's failure to make provision was intentional. Certain it is, that the testator in the will did not make provision for any afterborn child. It is equally certain the will itself does not disclose whether this failure was intentional or unintentional. Afterborn children, in fact all children, are ignored in the will. Hence we cannot say the will discloses an intent to exclude afterborn children. We are limited to the will as the source from which intent to exclude must appear. Such intent does not appear from the

> will. The law is so written. We must so apply it.

Id. at 418, 132 S.E.2d at 764.

In this case, the executor—Defendant—did not bring an action to determine her son's interest prior to having the will probated and distributing the estate. Further, Plaintiff did not assert a claim until nearly two decades after the will was probated. Bost's will was offered for probate on 12 January 1995—the day he died—and left the entirety of his estate to Defendant. Pursuant to the express language in N.C. Gen. Stat. § 28A-15-2(b), title in the Property vested in Defendant and related back to Bost's death.

Plaintiff also cites *Howe v. Hand*, a nearly century-old decision interpreting a prior version of North Carolina's afterborn child statute—Revisal § 3145—which included the language "the rights of any such after-born child *shall be a lien on every part of the parent's estate* until his several share thereof is set apart[.]" 180 N.C. 103, 104, 104 S.E. 38, 38-39 (1920) (citing Revisal § 3145) (emphasis added). However, in 1953, the legislature recodified Revisal § 3145 as N.C. Gen. Stat. § 31-5.5, and eliminated the provision that an afterborn child's rights shall be a lien on his parent's estate. An Act to Amend the General Statutes Relating to the Execution, Revocation and Probate of Wills, ch. 1098, 1953 N.C. Sess. Laws 26, § 7. Thus, *Howe*'s holding—allowing afterborn children to assert lienholder rights against a bona fide purchaser for value who had possessed the property for ten years—is inapposite. Because N.C.

Gen. Stat. § 31-5.5 does not provide for the rights of afterborn child by way of a lien against the estate, we consider *Howe* neither controlling nor persuasive to our determination.

B. Procedural Posture & Statute of Limitations

Our Court has summarized the law regarding procedural mechanisms for disputing a will:

> Our Supreme Court has held that the construction of a will presents "a proper justiciable question . . . under the provisions of the North Carolina Declaratory Judgment Act." *Johnson v. Wagner*, 219 N.C. 235, 238, 13 S.E.2d 419, 421 (1941). That Act, as codified in relevant part in N.C. Gen. Stat. § 1–254, provides that "[a]ny person interested under a . . . will . . . may have determined any question of construction . . . arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C. Gen. Stat. § 1–254 (2014). Thus, any interested party under a will may bring an action for a declaratory judgment, *see Taylor v. Taylor*, 301 N.C. 357, 364, 271 S.E.2d 506, 511 (1980), including the executor of the estate, *see First Sec. Trust Co. v. Henderson*, 226 N.C. 649, 651, 39 S.E.2d 804, 805 (1946).
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> By contrast, a caveat proceeding is the method by which a writing offered for probate and purporting to be a will is challenged. *Rogel v. Johnson*, 114 N.C. App. 239, 241, 441 S.E.2d 558, 560 (1994). As our Supreme Court has explained,"[w]hen a paper writing purporting to be a will is presented to the Judge of Probate he takes proof with respect to its execution. If found in order the script is admitted to probate in common form as a will. . . . It stands as the testator's will, and his only will, until challenged and reversed in a proper proceeding before a competent tribunal. The challenge must be by *caveat* and be heard in the Superior Court." *In re Charles's Will*, 263 N.C. 411,

> 415, 139 S.E.2d 588, 591 (1965) (emphasis in original) (internal citation omitted). *See also* N.C. Gen. Stat. § 31–32(a) (2014) ("At the time of application for probate of any will, any party interested in the estate, may . . . enter a caveat to the probate of such will"). Unlike a declaratory judgment action, "[t]he purpose of a caveat is to determine whether the paperwriting purporting to be a will is in fact the last will and testament of the person for whom it is propounded." *In re Spinks's Will*, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970). Thus, while the issue of whether a contested writing is the valid will of the testator may only be challenged by caveat, where the *construction* of an unchallenged will is contested, an action for a declaratory judgment is the appropriate procedure for determining the rights of the parties under that will. *Compare id. with Taylor*, 301 N.C. at 364, 271 S.E.2d at 511.

Brittian ex rel. Hildebran v. Brittian, 243 N.C. App. 6, 9-10, 776 S.E.2d 867, 870-71 (2015).

Defendant asserts that Plaintiff's claim constitutes a will caveat and is therefore precluded by the three-year limitations period provided for will caveats. *See* N.C. Gen. Stat. § 31-32(a) (2015) (providing a three year statute of limitations for a party interested in an estate to file a caveat to the probate of the will or, when the party is a minor, a three year statute of limitations following the removal of the disability). Plaintiff's claim is not a will caveat, because he is not challenging the validity of the will. But the procedural posture of Plaintiff's claim—asserted after the will was probated and the Property became vested exclusively in Defendant—renders it more analogous to a will caveat than to a declaratory judgment action asserting an interest in a decedent's property. Bost's estate had been closed—and title in the

Property had been exclusively vested in Defendant—for nearly twenty years before Plaintiff asserted his claim.

Plaintiff asserts that no limitations period applies to his claim, because Section 31-5.5 does not provide a limitations period for claims by afterborn children. To hold, as Plaintiff argues, that his claim is without any time limitation, would result in a cloud on the title of all real property devised by will for an indefinite period of time, without any assertion of interest by an afterborn child, depriving devisees and their successors in interest of free and clear title. *See Newbern v. Leigh*, 184 N.C. 166, 170-71, 113 S.E. 674, 676 (1922) ("If titles to real estate can be set aside by the attack on a will which constitutes a link in the chain of title, it would shake the very foundations of real estate titles and the titles in which a will is a link would be always looked upon with doubt."). We therefore reject this argument and look beyond N.C. Gen. Stat. § 31-5.5 for guidance.

Section 1-17(a) of the North Carolina General Statutes provides:

> A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed, except in an action for the recovery of real property, *or to make an entry or defense founded on the title to real property*, or to rents and services out of the real property, when the person must commence his or her action, or make the entry, within three years next after the removal of the disability, and at no time thereafter.

N.C. Gen. Stat. § 1-17 (2015) (emphasis added). Plaintiff brought an action for quiet

title pursuant to N.C. Gen. Stat. § 41-10 on 17 April 2014—five years and six months after he turned eighteen. "The purpose of [N.C. Gen. Stat. § 41-10] is to free the land of the cloud resting upon it and make its title clear and indisputable . . . ." *Hensley,* 163 N.C. App. at 307, 593 S.E.2d at 414 (quoting *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 461, 490 S.E.2d 593, 597 (1997)). As such, a quiet title action is an action "to make an entry or defense founded on the title to real property" and, pursuant to N.C. Gen. Stat. § 1-17, is subject to the three-year limitation period following removal of a disability. Although Plaintiff had three years after turning eighteen to bring his action, he failed to do so. As a result of his inaction, Plaintiff has no cognizable interest in the Property.

In sum, we hold that Plaintiff was not immediately vested with a one-half undivided interest in the Property at the time of his father's death, and the three year statute of limitations is a bar to Plaintiff's claim. It would simply be unreasonable to allow Plaintiff's claim to proceed after so long a delay.

Conclusion

For the aforementioned reasons, we affirm the trial court's entry of summary judgment in favor of Defendant.

AFFIRMED.

Judges ELMORE and BERGER concur.

Report per Rule 30(e).