An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-425

No. COA21-803

Filed 21 June 2022

McDowell County, No. 20 E 265

IN THE MATTER OF THE ESTATE OF JAMES CARROLL RANDOLPH

Appeal by former co-guardian Donny Randolph from order entered 23 July 2021 by Judge Mark E. Powell in Superior Court, McDowell County. Heard in the Court of Appeals 24 May 2022.

Charles R. Brewer, for former co-guardian Donny Randolph.

No brief for appellee.

STROUD, Chief Judge.

¶ 1 Former co-guardian Donny Randolph, appellant, appeals a Superior Court order determining there was "[n]o error" in the order from the Clerk of Court and remanding the case back to the Clerk. Because the trial court remanded the order and noted a possible issue with contempt, it is not a final order, and we dismiss this interlocutory appeal.

¶ 2 This is a complex case involving guardianship of an adult. There are many motions and orders as part of our record on appeal, but relevant to this appeal, on 12

May 2021 the Clerk of the Superior Court in McDowell County entered an order requiring appellant, a former guardian of the estate of James Randolph, to produce "all assets" including "the guns" owned by the estate. Appellant appealed the order to Superior Court.

¶ 3 During the hearing before the Superior Court, appellant's attorney noted,

> [T]he new guardian filed a show cause order for contempt. Now, this was after -- after both the revocation of his power of attorney and also after he was removed as the coguardian of the estate.
>
> A hearing was held on this motion for show cause on May 11, 2021 before the clerk, who issued the order on May 12, 2021, which is the subject of this appeal.
>
> Now, Your Honor, no motion was made before the clerk contesting her jurisdiction to consider the matter. But it is our argument, Your Honor, that jurisdiction exists as a matter of law. It cannot be conferred by the parties. It cannot be waived by the parties. The Clerk of Court either had jurisdiction or did not have jurisdiction. Everything that my client did in regard to the gun was after he had the durable power of attorney and before he was named as guardian of his father. Therefore, Your Honor, it cannot be that he can be brought before the Court in an estate based on a show cause order. At the time of all of this conduct, he just -- he -- he had no relationship to this guardianship. And, therefore, since he was no longer the power of attorney and was no longer the guardian, he cannot be brought before the clerk as though he were a party.
>
> Instead -- instead, it was our contention that if there was some problem with this conduct either under the durable power of attorney or under his guardianship obligations which he held for three months, then the new guardian would have to bring some sort of civil actions or perhaps a special proceeding nami[n]g him, summonsing him and giving him an opportunity to respond to the

> complaint or petition and then thereafter to have a hearing. But it just simply cannot, we say, be in the cause of the estate. He cannot be held in contempt of court at that stage of the proceeding. And therefore, we say, Your Honor, that the clerk acted without jurisdiction when she brought him into court and issued the order which she issued.

Appellant's attorney went on to state that "And, Your Honor, my client is authorizing me to advise the Court that we feel very strongly that *the clerk did lack the jurisdiction*. If the Court denies my motion and says we need to go forward, *we would like to file an interlocutory appeal to the Court of Appeals on that issue*." (Emphasis added.)

¶ 4 By order entered 23 July 2021, the trial court determined there was "[n]o error" in the order from the Clerk of Court and remanded the case back to the Clerk. The trial court entered its order with two conclusions of law and "no facts being found[.]" The trial court concluded:

> 1. Although §28A-15-12, dealing with the administration of decedents' estates, allows for a hearing to facilitate the recovery of estate property from third parties, §35A contains no similar provision, suggesting that an ancillary action must be pursued by the guardian of the estate to recover property from third parties in guardianship matters.
>
> 2. However, §35A-1291 allows the Clerk to enter orders safeguarding the ward's estate when the letters of a guardian have been revoked.

The trial court then "remanded to the Clerk for such further actions that are

consistent with this Order." The trial court noted,

> To the extent that an appeal of this Order would be interlocutory, in that the appellant has not been found in contempt for failing to comply with the Order of the Clerk, the Court finds that there is no just reason for delay of an appeal of this Order and certifies it for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

Thereafter, appellant appealed.

¶ 5 Black's Law Dictionary defines remanding as, "[t]o send (a case or claim) back to the court or tribunal from which it came *for some further action*[.]" Black's Law Dictionary 1407 (9th ed. 2009) (emphasis added). An order remanding to the Clerk for further action, rather than affirming the Clerk's order, is not a final order. *See Bezzek v. Bezzek*, 264 N.C. App. 1, 2–3, 824 S.E.2d 865, 866 (2019) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be determined between them in the trial court. An interlocutory order, on the other hand, is one 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." (citation omitted)).

¶ 6 Appellant notes in his brief, "[w]hile this appeal is interlocutory" it should be heard due to the North Carolina Rule of Civil Procedure 54(b) certification. Before the Superior Court appellant's attorney requested an immediate appeal *specifically* to challenge the Clerk's jurisdiction, but that is not the issue he has argued on appeal.

Instead, appellant argues the evidence failed to demonstrate that he had the present ability to comply with the order. In fact, the word "jurisdiction" does not even appear in appellant's brief until the appendix.

¶ 7 Further, the trial court itself noted contempt was a pending issue.

> As our Supreme Court has observed,
>
> > there is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.
> >
> > The trial court's order fails to resolve all issues between all parties and thus is not a final judgment, but rather is interlocutory.

First Atlantic Management Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 246–47, 507 S.E.2d 56, 60 (1998) (citation and brackets omitted).

> Interlocutory orders are ordinarily not directly appealable, but may be so in two instances:
>
> > First, an interlocutory order can be immediately appealed if the order is final as to some but not all of the claims and the trial court certifies there is no just reason to delay the appeal pursuant to N.C.R. Civ. P. 54(b). Second, an interlocutory order can be immediately appealed under N.C. Gen. Stat. § 1–277(a)(1983) and 7A–27(d)(1)(1995) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review.
> >
> > Rule 54(b) certification by the trial court is reviewable by this Court on appeal in the first instance because *the trial court's denomination of its decree a final judgment does not make it so*, if it is not such a judgment.

> *Similarly, the trial court's determination that there is no just reason to delay the appeal, while accorded great deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court. See Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984), and *McNeil v. Hicks*, 111 N.C. App. 262, 264, 431 S.E.2d 868, 869 (1993), *disc. review denied*, 335 N.C. 557, 441 S.E.2d 118 (1994) (Rule 54(b) certification is not dispositional when the order appealed from is interlocutory).

Id. (emphasis added) (citation, quotation marks, brackets, and ellipses omitted).

¶ 8 Here, petitioner argued no particular substantial right, and the trial court's bare 54(b) assertion does not confer jurisdiction. *See generally id.* Subject matter jurisdiction, the issue raised only before the trial court as the reason for certification, is also an issue this Court can address *sua sponte*, even if it was not raised before the trial court, but here, as noted by the trial court, further proceedings before the Clerk are needed, and those proceedings may be under North Carolina General Statutes § 35A-1291, or an ancillary action "by the guardian of the estate to recover property" from appellant. *See generally Henson v. Henson*, 261 N.C. App. 157, 160, 820 S.E.2d 101, 104 (2018) ("An appellate court has the power to inquire into subject-matter jurisdiction in a case before it at any time, even *sua sponte*." (citation, quotation marks, and brackets omitted)). After the additional proceedings before the Clerk, there may no longer be any potential issue regarding jurisdiction. There is no reason to address this appeal in piecemeal fashion, particularly given the numerous other

ongoing issues in the case. This is not a final judgment; the trial court does not assert it is a final judgment; and the trial court's bare assertion "that there is no just reason for delay" does not confer jurisdiction. *See generally Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993) ("While the court below did attempt to certify there was no cause for delay and also stated its order constituted a final judgment as to Commercial Union, a trial court cannot by denominating its decision a final judgment confer appeal status under Rule 54(b) if its ruling is not indeed such a judgment. We hold that the trial court's order denying Commercial Union's motion for summary judgment did not constitute a final judgment and is therefore not appealable pursuant to Rule 54(b)." (citations and quotation marks omitted)).

¶ 9 This appeal is dismissed.

DISMISSED.

Judges DILLON and GRIFFIN concur.

Report per Rule 30(e).