

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

NO. COA01-727

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

KAREN MCKINNEY, Individually
and as Administratrix of the
Estate of MICHAEL EDWARD
MCKINNEY,
Plaintiff

v.

Wake County
No. 00 CVS 07578

JAMES EVERETT RICHITELLI,
Defendant

Appeal by defendant from order entered 14 March 2001 by Judge Narley Cashwell in Wake County Superior Court. Heard in the Court of Appeals 13 March 2002.

Pipkin, Knott, Clark & Berger, L.L.P., by Joe Thomas Knott, III and Ashmead P. Pipkin, for plaintiff.

Huggard, Obiol & Blake, P.L.L.C., by John P. Huggard, for defendant.

BRYANT, Judge.

Plaintiff Karen McKinney and defendant James Richitelli were married in 1976 and had a son born to the union on 30 July 1977. The parties divorced in 1981, and the son's name was subsequently changed from Michael Richitelli to Michael McKinney.

Starting from the time of the divorce until Michael was eighteen years of age, defendant failed to provide any financial support for Michael - - even though defendant was under a court

order to provide such support. For the majority of that time, defendant was either in prison, suffering from severe alcoholism, or suffering from chronic drug abuse. However, starting in March 1997, when Michael was almost twenty years of age, defendant and Michael attempted to re-establish their father-son relationship.

During this time, Michael was a plaintiff in a medical malpractice suit alleging that a radiologist caused Michael to develop cancer. Michael died from cancer in February 1999. From March 1997 until February 1999, defendant and Michael maintained a father-son relationship.

Plaintiff was appointed as the personal representative of Michael's estate. As the personal representative of Michael's estate, plaintiff amended the complaint in Michael's malpractice suit to include a wrongful death cause of action. During the pendency of the wrongful death action, plaintiff filed a complaint on 6 July 2000 seeking a declaration of the rights of the parties to Michael's estate and to the potential proceeds from the wrongful death action.

Defendant filed an answer and motion to dismiss the complaint pursuant to N.C. R. Civ. P. 12(b)(6). Plaintiff filed a motion for summary judgment pursuant to N.C. R. Civ. P. 56. Both motions were heard at the 29 January 2001 civil session of Wake County Superior Court with the Honorable Narley Cashwell presiding. By order filed 14 March 2001, defendant's Rule 12(b)(6) motion was denied and plaintiff's Rule 56 motion was granted. Defendant filed notice of appeal on 16 April 2001.

We note that defendant did not provide timely notice of appeal in that the underlying order was filed on 14 March 2001 and defendant did not file his notice of appeal until 16 April 2001. To provide proper notice of appeal to this Court, defendant must have filed his notice of appeal within 30 days of the filing of the order he is contesting. See N.C. R. App. P. 3. However, this Court will consider the submitting of defendant's notice of appeal and assignments of error as a *petition for writ of certiorari*; and we will grant said petition as we find that at least one of defendant's arguments has merit. Therefore, we will review this appeal pursuant to N.C. R. App. P. 21.

I.

First, defendant argues that the trial court erred in granting summary judgment in favor of plaintiff. We agree and reverse the decision of the trial court.

The granting of summary judgment is proper if the pleadings, discovery, admissions, affidavits and deposition testimony, if any, show that there does not exist a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C. R. Civ. P. 56. N.C.G.S. § 31A-2 (1999) provides:

- Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except –
- (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
 - (2) Where a parent has been deprived of the

custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child.

Plaintiff argues and defendant essentially concedes that during Michael's term as a minor child, defendant failed to provide support for Michael. Moreover, during the abovementioned term, defendant acknowledges that he failed to keep in contact with Michael. However, defendant argues that the trial court failed to consider the relationship he assumed with Michael after Michael reached the age of majority.

Plaintiff cites to *In re Lunsford*, ___ N.C. App. ___, 547 S.E.2d 483, rev. on additional issues allowed by 353 N.C. 727, 550 S.E.2d 779, opinion vacated by 354 N.C. 571, 556 S.E.2d 292 (2001) in support of her argument that the trial court properly disregarded evidence that defendant resumed a relationship with Michael after Michael reached the age of majority – thus negating defendant's argument that he cannot be found to have abandoned Michael pursuant to N.C.G.S. § 31A-2. However, as *Lunsford* is no longer 'applicable law', we find that plaintiff's reliance on that case is misguided.

In *Lunsford*, the father petitioned for removal of his ex-wife as administratrix of their daughter's estate. On appeal from the decision of the clerk of superior court, the trial court entered judgment for the ex-wife and the father appealed. This Court held, *inter alia*, that the father had wilfully abandoned his daughter

pursuant to N.C.G.S. § 31A-2, and thus was not entitled to inherit from his daughter by intestacy. In addition, the Court found that, as a matter of first impression, the term "child" as used in the statute barred abandoning parents from inheriting regardless of whether the child was actually an adult or a minor child at the time of the child's death. A dissent was filed in the *Lunsford* case disagreeing with the majority's interpretation of the term "child."

On appeal to our Supreme Court, this Court's decision in *Lunsford* was vacated and the following mandate was issued:

This case is remanded to the Court of Appeals for further remand to the trial court for additional findings of fact as to (1) whether respondent Randy Lunsford abandoned Candice Leigh Lunsford; (2) if so, whether respondent Randy Lunsford resumed care and maintenance of Candice Leigh Lunsford at least one year prior to her death and continued the same until her death; and (3) whether respondent Randy Lunsford "substantially complied" with all orders of the trial court requiring contribution to the support of the child.

In re Lunsford, 354 N.C. 571, 556 S.E.2d 292 (2001).

In the case at bar, the evidence reveals that from the time of the divorce until the time Michael reached the age of eighteen -- a period of almost fifteen years -- defendant failed to make any support payments for Michael. In addition, defendant was awarded visitation rights, however, he failed to act upon these rights. These findings are *prima facie* evidence that defendant abandoned Michael as that term is referenced in N.C.G.S. § 31A-2. To rebut this *prima facie* showing, it is incumbent upon defendant to show

that an exception to N.C.G.S. § 31A-2 applies.

Defendant presented evidence that after Michael reached the age of majority, defendant and Michael attempted to re-establish a father-son relationship. From 1997, when Michael was almost twenty years of age, until Michael's death in February 1999, they had an ongoing father-son relationship. We note that our case law remains unclear whether a parent can resume a relationship with a child after the child reaches the age of majority and therefore fall within the first exception to N.C.G.S. § 31A-2. However, in light of the Supreme Court mandate in *Lunsford*, we conclude that a genuine issue of material fact exists as to whether defendant resumed a relationship with Michael sufficient to bring this issue within the first exception to N.C.G.S. § 31A-2. Therefore, the order of the trial court granting summary judgment in favor of the plaintiff is reversed.

II.

Second, defendant argues that the trial court lacked subject matter jurisdiction to consider plaintiff's motion for summary judgment as there did not exist an actual controversy before the trial court. We disagree.

N.C.G.S. § 1-253 (1999) provides:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect

of a final judgment or decree.

Plaintiff's complaint states in pertinent part:

Pursuant to Rule 57 of the North Carolina Rules of Civil Procedure and Article 26, Chapter 1, of the General Statutes of North Carolina, Plaintiff Karen McKinney, individually and as Administratrix, respectfully requests a Judicial Declaration of the respective rights, benefits, duties, and obligations of the parties to this action with respect to the estate of Michael Edward McKinney and to any proceeds of the wrongful death action brought on behalf of Michael Edward McKinney by plaintiff as Administratrix
. . . .

Defendant argues that plaintiff seeks a declaration concerning proceeds from the wrongful death action. However, because that action is still pending in court, defendant argues that an actual controversy cannot exist as to the *potential* proceeds. We disagree.

In reviewing plaintiff's complaint, plaintiff sought not only an adjudication of the parties' rights as to the potential proceeds, but she also sought declaration of their rights to Michael's estate. Pursuant to N.C.G.S. § 1-253, the trial court was vested with subject matter jurisdiction over the issues involved in the case. Therefore, we overrule the correlating assignment of error.

III.

Third, defendant argues that the trial court committed error in failing to grant defendant's Rule 12(b)(6) motion to dismiss plaintiff's complaint. We disagree.

In reviewing a Rule 12(b)(6) motion, the court looks to the

pleadings to determine whether the plaintiff has stated a claim for which relief can be granted. See N.C. R. Civ. P. 12(b)(6). In the case at bar, plaintiff sought a declaration of the parties' rights as to Michael's estate and potential proceeds from his wrongful death action. Plaintiff asserted that defendant should be denied rights as to Michael's estate and potential proceeds because he abandoned Michael as that term is referenced pursuant to N.C.G.S. § 31A-2. In support of her claim of abandonment, plaintiff plead that for a fifteen-year period, starting from the time Michael was three years old, defendant failed to make any support payments for Michael. In addition, she pled that defendant failed to contact Michael during this fifteen-year period.

We conclude that these pleadings were sufficient to state a claim that defendant abandoned Michael and that defendant should be denied any rights to Michael's estate or proceeds, if any, from the wrongful death action. Therefore, the correlating assignment of error is overruled.

MANDATE

We hold that the trial court erred in granting summary judgment in favor of plaintiff as a genuine issue of material fact existed as to whether defendant had resumed the care and maintenance of Michael at least one year prior to Michael's death and continued the same until Michael's death. Therefore, the order granting summary judgment in favor of plaintiff is reversed.

REVERSED.

Judges WALKER and HUNTER concur.

Report per Rule 30(e).