

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1323

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

IN THE MATTER OF:

THE ESTATE OF DOROTHY  
KIGER WADE,  
Deceased

Rowan County  
No. 03 E 460

Appeal by executor from an order entered 8 August 2005 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 12 April 2006.

*Woodson, Sayers, Lawther, Short, Parrott & Walker, LLP, by Donald D. Sayers, for appellee Herbert F. Wade.*

*Kluttz, Reamer, Hayes, Randolph & Adkins, L.L.P., by Nathan C. Prater and Jennifer B. Flynn, for appellant William C. Moore, Jr.*

HUNTER, Judge.

William C. Moore, Jr., executor of the estate of Dorothy Kiger Wade, appeals on behalf of the estate from an order entered 8 August 2005 allowing claims to proceed for an elective share and year's allowance filed after the statutory deadlines had expired. For the reasons stated herein, we dismiss this appeal as interlocutory.

On 15 February 2003, Dorothy Kiger Wade ("decedent") died in North Carolina. The decedent was survived by her husband, Herbert F. Wade ("Wade"), a resident of Florida, and two children from a

previous marriage, her son, William C. Moore, Jr., and a daughter, Brenda Moore Johnson. The decedent's will provided for distribution of her property in equal shares between her children and specifically excluded Wade from her estate. The will was admitted to probate in Rowan County, and Moore was appointed as executor of the estate on 11 July 2003.

On 22 April 2004, Wade filed a "Claim for an Elective Share, Alternatively, Notice of Election to Take Life Estate, And Year's Allowance" with the Rowan County Clerk's office. Wade's claim was denied by the clerk on 27 April 2004, as the deadline for a claim for an elective share of the decedent's estate expired on 11 January 2004, and the deadline for the year's allowance had expired on 15 February 2004.

Wade appealed the denial on 6 May 2004, but the executor was not informed of the hearing date for the trial *de novo* by the clerk's office. The matter was heard on 18 October 2004 before the superior court, which reversed the clerk's denial and entered an order allowing the claim for elective share and year's allowance to proceed as if timely filed.

The executor filed a motion for relief on 31 March 2005 after learning of the 18 October 2004 order, on the grounds that the lack of notice of the proceedings to the executor constituted surprise. A hearing was held on the executor's motion and the 18 October 2004 order was set aside on 25 April 2005.

On 9 May 2005, the executor filed an answer and motion to dismiss Wade's claim for an elective share. A hearing was held on

16 June 2005 pursuant to a commission issued by the Administrative Office of the Courts. On 8 August 2005, an order was entered which reversed the 27 April 2004 order of the clerk, denied the executor's motion to dismiss, and ordered that the claims for an elective share and year's allowance be allowed to proceed as timely filed. The executor appeals from this order.

Although neither party has addressed whether the trial court's order was immediately appealable, as a threshold issue, we must first consider whether the appeal is properly before this Court. As we find that the order the executor appeals from is interlocutory, we are precluded from reviewing the order.

An appeal from a denial of an elective share by the clerk may be made to the superior court. N.C. Gen. Stat. § 30-3.4 (2005). The superior court may review the findings of fact of the clerk, as well as find facts or take other evidence to determine the appeal. *Id.* When the trial court has not entered a final determination of the appealed matter, as in this case, but has remanded to allow the claims to proceed as though timely filed, the order is interlocutory, as it does not dispose of plaintiff's claims. "Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999). "Generally, an order denying a motion to dismiss is not appealable." *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (finding plaintiff's

appeal from a denial of a motion to dismiss a claim filed beyond the statute of limitations interlocutory and not appealable).

However, an interlocutory order

"is immediately appealable if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed."

*Currin & Currin Constr., Inc. v. Lingerfelt*, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (citation omitted). Although an appeal from an interlocutory order which affects a plaintiff's substantial rights is appealable, "[i]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal," . . . "and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]"" *Thompson*, 140 N.C. App. at 121, 535 S.E.2d at 401 (citations omitted). The executor has failed to present any grounds for acceptance of this appeal as a matter affecting a substantial right and has not included a Rule 54(b) certification. We are therefore precluded from reviewing this order and must dismiss this appeal.

Dismissed.

Judges McGEE and STEPHENS concur.

Report per Rule 30(e).