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NO. COA 07-1324

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

IN THE MATTER OF  
PAUL NEBENZAHL,  
Respondent.

Guilford County  
No. 07 S.P. 1235

Appeal by Andrew Nebenzahl from order dated 15 June 2007 by Judge John O. Craig, III in Superior Court, Guilford County. Heard in the Court of Appeals 26 August 2008.

*Henson & Talley, L.L.P., by Perry C. Henson, Jr. and Karen Strom Talley, for Petitioner-Appellee.*

*Wyrick Robbins Yates & Boston LLP, by K. Edward Greene and Tobias S. Hampson, for Appellant Andrew Nebenzahl.*

McGEE, Judge.

Paul Nebenzahl (Respondent) was diagnosed with Alzheimer's disease in 2003. At the time of Respondent's diagnosis, he resided with his wife, Judith Hirsch Nebenzahl (Petitioner), in San Francisco, California. Petitioner moved with Respondent to Greensboro, North Carolina in June 2006. Approximately four months later, Petitioner placed Respondent in the Brighton Gardens Assisted Living facility (Brighton Gardens) in Greensboro, North Carolina. Respondent was moved from Brighton Gardens to New York City on or about 15 March 2007.

Respondent's children filed a petition for the appointment of

a guardian in North Carolina prior to Respondent's move to New York City, but then filed a notice of voluntary dismissal on 16 March 2007. Respondent's children petitioned the Supreme Court of New York for the appointment of a guardian for Respondent on 19 March 2007.

Petitioner filed a petition for adjudication of incompetence and application for appointment of guardian and interim guardian, requesting that Respondent be declared incompetent and that Petitioner be appointed guardian. Petitioner served the petition on Respondent's next of kin, including Respondent's son, Andrew Nebenzahl. A guardian ad litem was appointed for Respondent on 2 April 2007. The guardian ad litem filed a response to the petition dated 5 April 2007. The guardian ad litem's response stated that the allegations of incompetency were "not denied" and requested that the court "conduct an inquiry into the competence of [Respondent]."

Andrew Nebenzahl filed a motion dated 23 April 2007 to dismiss the petition. Petitioner filed an affidavit of service upon Respondent pursuant to N.C. Gen. Stat. § 35A-1109, dated 24 April 2007, indicating that a copy of the pleadings regarding the incompetency proceeding was delivered to the doorman at the New York City apartment building in which Respondent resided. Petitioner filed a motion on 25 April 2007 to strike all pleadings filed by a non-party, arguing that Andrew Nebenzahl was not a party to the action. On that same date, a hearing was held before the clerk of court of Guilford County regarding the petition for

adjudication of incompetence of Respondent and the appointment of a guardian. At that hearing, the clerk found Andrew Nebenzahl to be a non-party to the proceeding and struck all pleadings filed on behalf of Andrew Nebenzahl. Respondent was determined to be incompetent, and Petitioner was appointed as Respondent's guardian.

Andrew Nebenzahl appealed from the clerk's order to superior court on 4 May 2007. He argued that Respondent was not properly served with the petition and notice of hearing. Petitioner filed a motion to dismiss Andrew Nebenzahl's appeal on 16 May 2007, and the motion was granted on 23 June 2007. In the order dismissing Andrew Nebenzahl's appeal, the trial court found that Respondent was properly served and affirmed the decision of the clerk of court. Andrew Nebenzahl filed notice of appeal to our Court on 6 July 2007. Respondent died on 16 February 2008.

Andrew Nebenzahl argues on appeal that the trial court erred by: (1) concluding Andrew Nebenzahl was not a party to the action and dismissing his appeal from the clerk's ruling, (2) concluding Andrew Nebenzahl was not a party aggrieved by the clerk of court's ruling, and (3) concluding Respondent was personally served with a copy of the petition and initial notice. However, during the pendency of the appeal and following the death of Respondent, Petitioner filed a motion to dismiss Andrew Nebenzahl's appeal as moot, which is the dispositive issue in this matter.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Assn.*,

344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Our Supreme Court has stated that:

When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

*Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969).

Our Court held in *In re Higgins*, 160 N.C. App. 704, 706, 587 S.E.2d 77, 78 (2003), that "when the trial court dismisses a petition for adjudication of incompetence, the action abates upon the death of the respondent during the pendency of the petitioner's appeal." In *Higgins*, the petitioner appealed from an order in which the superior court declined to find the respondent to be incompetent. *Id.* at 705-06, 587 S.E.2d at 77-78. Respondent died during the pendency of the appeal. *Id.* at 706, 587 S.E.2d at 79. Our Court dismissed the appeal, holding that the action abated upon the death of the respondent. *Id.* at 707, 587 S.E.2d at 79.

The death of a party while an appeal is pending does not automatically render the appeal moot. See N.C.R. App. P. 38 ("No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives."). A cause of action does not survive if "the relief sought could not be enjoyed, or granting it would be nugatory after death." N.C. Gen. Stat. § 28A-18-1(b) (3) (2007). Thus, in determining what effect

granting Andrew Nebenzahl's requested relief would have on this matter, we must, as set forth in *Higgins*, consider the primary purpose "of incompetency proceedings for adults to determine whether the death of the respondent obviates that purpose." *Higgins*, 160 N.C. App. at 707, 587 S.E.2d at 78.

In *Higgins*, our Court explained that the main purpose of incompetency proceedings for adults is to determine whether a guardian is needed to help individuals exercise their rights and to make decisions on their behalf when the individuals are incapable of doing so. *Id.* at 707, 587 S.E.2d at 79. Our Court held that "a petition to declare a respondent incompetent does not survive the death of the respondent under N.C. Gen. Stat. § 28A-18-1. Thus, the appeal abated upon the . . . death of the respondent. The appeal has become moot and is accordingly dismissed." *Id.*

Andrew Nebenzahl argues that either (1) vacating the order adjudicating Respondent incompetent and appointing Petitioner as guardian or (2) reversing the order dismissing Andrew Nebenzahl's appeal would render the appointment of the guardian void *ab initio*, as if the guardianship never existed. According to his argument, nullifying Petitioner's guardianship would subject any action taken by Petitioner while acting as Respondent's guardian to legal challenge.

Andrew Nebenzahl cites *Alford v. Shaw*, 327 N.C. 526, 543 n.6, 398 S.E.2d 445, 455 n.6 (1990) and *Hutchins v. Dowell*, 138 N.C. App. 673, 531 S.E.2d 900 (2000) in support of his contention. However, the footnote Andrew Nebenzahl cites from *Alford* merely

provides the definition of the word "vacate," which is "'[t]o annul; to set aside; to cancel or rescind[.]'" *Alford*, 327 N.C. at 543 n.6, 398 S.E.2d at 455 n.6 (quoting Black's Law Dictionary 1388 (rev. 5th ed. 1979)). Andrew Nebenzahl cites *Hutchins* in support of his argument that voiding Respondent's guardianship would render any action taken by Petitioner during the purported guardianship unauthorized and invalid. *Hutchins*, however, merely determined that unauthorized actions by an attorney-in-fact may give rise to actions for conversion and/or breach of fiduciary duty. See *Hutchins*, 138 N.C. App. 673, 531 S.E.2d 900. Therefore, neither of Andrew Nebenzahl's arguments are supported by the decisions in either of these cases.

Andrew Nebenzahl also cites N.C. Gen. Stat. §§ 35A-1253, 1262-68, 1295 in support of his argument, but none of these statutes involve voiding the actions of a guardian. N.C. Gen. Stat. § 35A-1295 (2007) provides:

(a) Every guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward: . . .

(3) Dies.

(b) Notwithstanding subsection (a), a guardian of the estate or a general guardian is responsible for all accountings required by Article 10 of this Chapter until the guardian is discharged by the clerk.

We conclude, as we held in *Higgins*, that Andrew Nebenzahl's appeal of the order adjudicating Respondent incompetent abated with Respondent's death. *Higgins*, 160 N.C. App at 707, 587 S.E.2d at 79. We therefore dismiss Andrew Nebenzahl's appeal as moot.

Dismissed.

Judges GEER and STROUD

Report per Rule 30(e).