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NO. COA07-191

NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2007

IN THE MATTER OF THE
ESTATE OF ROBERT LEE
DUNN, Deceased

Durham County
No. 95-E-751

Appeal by caveator from an order entered 29 June 2006 by Judge Abraham Pein Jones, and cross-appeal by propounder from an order entered 12 May 2004 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 18 September 2007.

Nick Galifianakis & Associates, by Nick Galifianakis and David Krall for caveator-appellant.
Everett & Everett, by Sandra Herring, for propounder-appellant.

HUNTER, Judge.

This appeal is the latest installment in the twelve years of litigation over the will of Robert Lee Dunn. Mr. Dunn died in 1995, and his six children have been litigating ever since as to which of several documents is Mr. Dunn's actual last will and testament. The full background and facts can be found at *In re Will of Dunn*, 129 N.C. App. 321, 500 S.E.2d 99 (1998). We note in this opinion only the facts and procedural history relevant to our holding.

Both the caveator and the propounder appeal in this instance. After careful consideration, we affirm the court's grant of the motion to vacate the order of dismissal with prejudice but reverse the court's order granting summary judgment.

I.

Three papers are at issue here: A will executed on 29 August 1994 ("August will"); a will executed on 20 September 1994 ("September will"); and a codicil executed on 26 October 1995 ("October codicil"). The August will was filed with the Clerk of Court in Durham County shortly after its execution, but retrieved and destroyed by Mr. Dunn in early October 1994.¹ He was taken to the Clerk of Court's office by daughter Virginia and son Joe. The August will names only daughter Betty and son Bill as legatees. The September will leaves everything in equal shares to his six children. The October codicil disinherited daughter Betty and son Bill.

These conflicting documents were presented to a jury in 1996. The jury found that the September will and October codicil were procured by undue influence, but not submitted to them was the question of whether the August will was validly revoked. *In re Will of Dunn*, 129 N.C. App. at 324-25, 500 S.E.2d at 101-02. In entering the judgment on this verdict, the trial court then made its own findings pursuant to North Carolina Rule of Civil Procedure

¹ There is conflicting evidence in the record as to whether Mr. Dunn himself destroyed the will or whether his daughter Virginia did so at his behest. The deputy clerk of court who was present at the time, Glenda Lilley, testified that Mr. Dunn performed the action himself.

49(c) that the August will was validly revoked and, thus, Mr. Dunn died intestate. *Id.* at 324-25, 500 S.E.2d at 102. On appeal, in April 1998, this Court reversed the portion of the judgment holding that the will was validly revoked, holding that the issue should have been submitted to a jury. *Id.* at 329, 500 S.E.2d at 104. This Court remanded the case to the superior court for further proceedings as to both (1) whether the August will was validly revoked and (2) whether it was procured under undue influence. *Id.* at 330, 500 S.E.2d at 105.

Instead of submitting the issue to a jury, however, on 22 October 1998 the superior court entered a revised judgment restating the jury verdicts that the September will and October codicil were not Mr. Dunn's last will and testament, and stating that "any interested person may submit the [August will] to the Clerk of Superior Court to be probated." The August will was presented by Bill Dunn ("propounder"), and on 21 March 2002 Joseph Dunn filed a caveat opposing that will.

On 23 February 2004, the superior court found that two persons deemed necessary parties had not been properly noticed of the proceedings and thus dismissed the action with prejudice. The caveator filed a motion for relief pursuant to North Carolina Rule of Civil Procedure 60(b) from that order, and the trial court granted the motion and ordered that the case be set for trial on the issues of whether the August will was validly executed without undue influence and whether it was revoked without undue influence. In that order, the court correctly noted that this Court in *In re*

Will of Dunn, 129 N.C. App. at 327-29, 500 S.E.2d at 103-04, had ordered that these two issues be put before a jury. Propounder appeals from this order.

On 29 June 2006, the superior court heard two motions from propounder asking for partial summary judgment on two issues: (1) undue influence in the execution of the September will and October codicil, and (2) undue influence in the revocation of the August will. The court granted both motions, holding that the August will was valid and not procured by undue influence, and that the August will was never validly revoked because its revocation was obtained by undue influence. The court ordered that the August will be submitted for probate. Caveator appeals from this order.

II.

We first address propounder's appeal from the court's May 2004 grant of caveator's motion for relief from the February 2004 order of dismissal with prejudice. We uphold the trial court's granting of the motion.

In its order dismissing the case with prejudice, the court found that two particular parties that the court deemed necessary parties were not properly noticed of the proceedings by the caveator. Caveator's motion for relief was made pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure on the following three bases:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- . . .
- (4) The judgment is void;
- . . .
- (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2005). Though the court does not specify which of the three grounds underpins its holding, we hold that the court properly granted the motion for relief based on Rule 60(b)(6).

As the court noted in its order, the "test by which relief can be given under subsection (6) is whether '(1) extraordinary circumstances exist and (2) there is a showing that justice demands it[,]' " along with whether "the movant has demonstrated a meritorious defense." *In the Matter of Oxford Plastics v. Goodson*, 74 N.C. App. 256, 259, 328 S.E.2d 7, 9 (1985) (citation omitted). Among the extraordinary circumstances that the court noted in support of this holding was the fact that after the action was dismissed, the court discovered in the record evidence that the two parties concerned had in fact been noticed prior to the hearing. The court also held that justice demanded this relief be granted so as to allow the heirs of Robert Lee Dunn the opportunity to present arguments to a jury. Finally, the court held that caveator had a meritorious defense, defined as his "'show[ing] facts which raise an issue sufficient to defeat his adversary, if it be found in his favor[.]'" This Court had already ordered that the issue of undue

influence should have been submitted to a jury, and as such both parties clearly had facts supporting both sides of the argument. *Bank v. Finance Co.*, 25 N.C. App. 211, 212, 212 S.E.2d 552, 553 (1975) (citations omitted).

Thus, the court did not err in granting propounder's motion to vacate the order of dismissal with prejudice. As such, we must now consider caveator's arguments as to the validity of the ensuing order granting summary judgment.

III.

Caveator argues that the court improperly granted summary judgment on the two issues of undue influence. We agree.

"A decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. '[O]ur mandate is binding upon [the trial court] and must be strictly followed without variation or departure.'" *Lea Co. v. N.C. Board of Transportation*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) (citation omitted) (alterations in original) (quoting *D & W, Inc. v. Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966)). Though this statement was made by our Supreme Court, it holds true for this Court as well. See, e.g., *Epps v. Duke University*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (1996) (holding that where a previous appeal in the same case had resolved the same issues as were presented on present appeal, previous resolution was "the law of the case"). Further, "a trial court does not have authority to modify parts of its own order which are affirmed by an appellate court and cannot

go beyond the mandate of the reviewing appellate court." *Middleton v. Russell Grp., Ltd.*, 132 N.C. App. 792, 794, 514 S.E.2d 94, 96 (1999).

Our previous opinion in this case explicitly held that the issues of undue influence as to the creation and revocation of the August will were issues for the jury, not the trial court:

Our Supreme Court has held that once a caveat to a will is filed and the proceeding is transferred to the superior court for trial, "*there can be no probate except by a jury's verdict.* The trial court may not, at least where there are any factual issues, resolve those issues even by consent" We interpret this holding to mean that in a caveat proceeding the parties may not waive, either by consent or by implication, jury resolution of an issue upon which the evidence is in conflict and material facts are in controversy. . . .

[W]here the facts are in dispute, issues with respect to the testator's capacity to revoke a will and whether the revocation occurred as a result of undue influence may not be decided by the trial judge, but must be decided by a jury.

. . .

[W]e believe the foregoing circumstances are sufficient to raise jury issues as to whether the 29 August 1994 script was Mr. Dunn's last will and testament, including the issues of whether its execution or revocation were procured by undue influence.

In re Will of Dunn, 129 N.C. App. at 327-29, 500 S.E.2d at 103-04 (emphasis added; internal citations omitted). After affirming the only other issue -- an order awarding attorneys' fees to one party -- the Court held that the order was "[a]ffirmed in part, reversed

in part, and *remanded.*" *Id.* at 330, 500 S.E.2d at 105 (emphasis added).

Here, then, where this Court explicitly held that the issues of undue influence as to the creation and revocation of the August will were issues for the jury, not the trial court, the court's grant of summary judgment on both issues was an impermissible deviation from this Court's opinion, which had become the law of the case. As such, we reverse the grant of the motions and remand the case with repeated instructions to put before a jury the following two issues: (1) whether the August will was validly revoked and (2) whether it was procured under undue influence.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and JACKSON concur.

Report per Rule 30(e).