

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-1103

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

BETTY JEAN STRICKLAND,
ADMINISTRATRIX OF THE
ESTATE OF JAMES JONES, JR.,

Petitioner,

v.

Wilson County
No. 06 E 506

BETTY JEAN STRICKLAND,
Individually, GLORIA JEAN
PETWAY, PRISCILLA D. WILLIAMS,
BRENDA DEW, TONY DAVIS
ADMINISTRATOR OF THE ESTATE OF
LILLIAN LUCAS JONES, deceased,
WILLIAM R. SOLOMON, Guardian
ad Litem For SHERONDA JONES,
minor, and SHANTA JONES, minor,
and PHILLIP A. LANE, Guardian
ad Litem for UNKNOWN and UNBORN
HEIRS,

Respondents.

Appeal by Khot & Associates, PLLC by its authorized agent, Bobby P. Khot, from order entered 7 May 2009 by Judge Gary E. Trawick in Wilson County Superior Court. Heard in the Court of Appeals 11 March 2010.

No brief for petitioner-appellee.

Khot & Associates, PLLC, by Bobby P. Khot, for petitioner-appellant.

No brief for respondents-appellees.

JACKSON, Judge.

Attorney Bobby P. Khot ("petitioner"), on his own behalf and as the authorized agent of Khot & Associates, PLLC, appeals the trial court's affirmation of an order entered by the Honorable Andrew J. Whitley, Wilson County Clerk of Superior Court ("the Clerk"), awarding petitioner \$3,500.00 out of \$11,250.00 in attorneys' fees requested.

James Jones, Jr. ("decedent") died intestate on 23 August 2006. On 17 October 2006, decedent's niece, Caretha Wilkes ("Wilkes"), qualified as personal representative of decedent's estate. Attorney Allen G. Thomas ("Thomas") of Thomas & Farris, PA represented Wilkes. On or about 5 December 2006, Wilkes voluntarily resigned at the request of decedent's heirs. On 20 April 2007, decedent's daughter, Betty Jean Strickland ("Strickland"), was appointed as administratrix. Strickland hired petitioner to represent the estate.

On or about 27 February 2007, Thomas filed a petition for attorneys' fees in the amount of \$2,685.00. On 19 March 2007, the Wilson County Assistant Clerk entered an order awarding attorneys' fees to Thomas in the amount requested. Sometime between 1 March 2009 and 26 March 2009¹, petitioner also filed a petition for attorneys' fees in the amount of \$11,250.00. On 26 March 2009, the

¹ The record is unclear as to the exact date on which the petition was filed. The petition is dated 10 February 2009. The file stamp indicates that it was filed in March 2009 but the specific date is illegible. Both the clerk's and petitioner's testimony indicates that it probably was filed at least two weeks prior to 26 March 2009.

Clerk entered an order awarding petitioner \$3,500.00 in attorneys' fees, of which \$1,023.00 already had been paid by Strickland, leaving \$2,477.00 to be paid out of the estate. On 28 March 2009, petitioner filed an amended petition, which was identical to the first petition, except that it included the removal of the outstanding encumbrance of a mortgage from the title to real property and increased the amount of attorneys' fees requested from \$11,250.00 to \$14,512.50. On 30 March 2009, petitioner filed an affidavit detailing the attorneys' fees requested. On 31 March 2009, petitioner gave notice of appeal from the Clerk's 26 March 2009 order awarding \$3,500.00 in attorneys' fees.

The superior court held a hearing to consider the appeal on 20 April 2009. At the hearing, the Clerk testified as to events that had occurred during the two and one-half to three weeks prior to his 26 March 2009 order. The Clerk testified that, although Thomas's petition for \$2,685.00 in attorneys' fees seemed reasonable, the Clerk thought that petitioner's request for \$11,250.00 was "unconscionable." The Clerk testified that, in his four years of experience, he had never seen a fee in excess of \$4,000.00 for work similar to the work petitioner had done. The Clerk further testified that he had asked petitioner whether he wanted a hearing on the attorneys' fees request, and petitioner had declined the opportunity for a hearing. Subsequently, the Clerk asked petitioner to send him a detailed affidavit of attorneys' fees. Although the Clerk did not enter an order specifying a date by which the affidavit should be filed, he testified that he made

numerous phone calls and talked to one of petitioner's employees on numerous occasions to request the affidavit. The Clerk testified that "[i]t is customary when a judge asks for the order or asks for information that the attorneys provide that information as expeditiously as possible and three weeks is not expeditious." After waiting approximately three weeks without an affidavit or any communication regarding the Clerk's request for an affidavit from petitioner, the Clerk entered an order awarding petitioner \$3,500.00 in attorneys' fees on 26 March 2009. When the trial court asked the Clerk why the order was entered at that point in time, the Clerk said, "I wanted to make sure the money was disbursed properly." The Clerk testified that while "everything was moving in the proper direction with [Thomas]," it "[s]eemed like when [petitioner] got involved, everything kind of came to a stop." Additionally, the Clerk said that his office gave "quite a bit of assistance" to petitioner, "ben[ding] over backwards to help [petitioner]" and "[e]ssentially . . . almost on the verge of practicing law to assist [petitioner] in getting [the] estate matter closed out." The Clerk also testified that petitioner still had not filed a list of all creditors with the amounts of their claims, which had been requested for inclusion in the petition for the sale of real estate filed on 6 August 2007.

Petitioner admitted that "[the Clerk] conveyed to [him] to prepare an affidavit," but they did not discuss a due date for the affidavit. Petitioner testified that he had "absolutely . . . no knowledge" that the order was going to be entered on 26 March 2009.

Petitioner testified that, in his experience, he had "never ever appeared before a Clerk on [an] attorney's fees issue" and that the Clerk could have entered an order for a hearing if he wanted to have petitioner appear. Petitioner denied ignoring the Clerk's office's requests for the affidavit and "thought that [he] had communicated it pretty effectively that [he] was working on it to try to get together [the affidavit]." Petitioner conceded that, with the estate valued at approximately \$23,000.00, an award of \$14,512.50 would leave only approximately \$8,000.00. Petitioner acknowledged that the award amount was up to the Clerk's discretion, but argued that \$2,000.00 for his work spanning two years was not fair and that the matter should be remanded for further consideration in light of the affidavit.

On 7 May 2009, the trial court entered an order affirming the Clerk's order awarding \$3,500.00 in attorneys' fees. Petitioner appeals.

North Carolina General Statutes, section 28A-2-1 states that "[t]he clerk of superior court of each county, ex officio judge of probate, shall have jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to . . . probate of wills[.]" N.C. Gen. Stat. § 28A-2-1(1) (2007). Pursuant to North Carolina General Statutes, section 1-301.3(b), "the clerk shall determine all issues of fact and law." N.C. Gen. Stat. § 1-301.3(b) (2007).

"On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate

court." *In re Estate of Pate*, 119 N.C. App. 400, 402, 459 S.E.2d 1, 2 (citing *In re Estate of Swinson*, 62 N.C. App. 412, 303 S.E.2d 361 (1983)), *disc. rev. denied*, 341 N.C. 649, 462 S.E.2d 515 (1995). North Carolina General Statutes, section 1-301.3(d) states that, when an appeal is taken of a clerk's order in probate matters, the trial court

shall review the order or judgment of the clerk for the purpose of determining only the following:

(1) Whether the findings of fact are supported by the evidence.

(2) Whether the conclusions of law are supported by the findings of facts.

(3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

. . . .

. . . *If the record is insufficient, the judge may receive additional evidence on the evidentiary issue in question.*

N.C. Gen. Stat. § 1-301.3(d) (2007) (emphasis added). "The standard of review in this Court is the same as in the Superior Court." *In re Estate of Pate*, 119 N.C. App. at 403, 459 S.E.2d at 2-3 (citing *In re Estate of Outen*, 77 N.C. App. 818, 336 S.E.2d 436 (1985), *disc. rev. denied*, 316 N.C. 377, 342 S.E.2d 896 (1986)). We "only review[] those 'findings of fact which the appellant has properly challenged by specific exceptions.'" *In re Whitaker*, 179 N.C. App. 375, 382, 633 S.E.2d 849, 854 (2006) (quoting *In re Estate of Lowther*, 271 N.C. 345, 354, 156 S.E.2d 693, 700-01 (1967)) (emphasis in original). We note that petitioner's three

assignments of error challenge findings and conclusions of the Clerk's order. Our review is limited to the trial court's order. We are limited to reviewing whether the trial court's (1) findings of fact are supported by the evidence, (2) conclusions of law are supported by the findings of fact, and (3) order or judgment is consistent with the conclusions of law and applicable law. See N.C. Gen. Stat. § 1-301.3(d) (2007); *In re Estate of Pate*, 119 N.C. App. at 403, 459 S.E.2d at 2-3.

Petitioner first contends that the trial court exceeded its scope of review by making additional findings of fact. We disagree.

Petitioner correctly states the applicable statute setting forth the standard of review, North Carolina General Statutes, section 1-301.3(d), yet omits that portion of the statute which directly applies to the case *sub judice*: "*If the record is insufficient*, the judge may receive additional evidence on the evidentiary issue in question." N.C. Gen. Stat. § 1-301.3(d) (2007) (emphasis added). On appeal to the superior court, petitioner objected to the Clerk's finding of fact number seventeen. Because there was insufficient evidence in the record to support this finding, the trial court did not err in receiving additional evidence and entering its own findings based upon the additional evidence it received pursuant to section 1-301.3(d) of our General Statutes. Petitioner argues that *In re Estate of Severt*, 194 N.C. App. 508, 512-13, 669 S.E.2d 886, 889-90 (2008), *disc. rev. denied and appeal dismissed*, 363 N.C. 126, 675 S.E.2d

362 (2009), controls the issue. In *Severt*, we held that the superior court erred by exceeding the scope of review set forth by section 1-301.3(d) when it ignored the clerk's challenged findings of fact and substituted its own findings for those of the clerk. *Id.* Nor did the superior court in *Severt* receive any additional evidence to support its findings. *Id.* However, *Severt* is distinguishable from the case *sub judice* because, here, the trial court did not ignore the Clerk's findings and substitute its own. Rather, the court performed the review required by section 1-301.3(d) and properly considered the Clerk's findings, conclusions, and order. See N.C. Gen. Stat. § 1-301.3(d) (2007). It is axiomatic that, if the court determines that "the record is insufficient" in accordance with section 1-301.3(d), the judge may make appropriate findings supported by additional evidence adduced at the hearing. *Id.*

Next, petitioner contends that the trial court erred in finding "[t]hat all the findings of fact in the order of the Clerk of Superior Court of Wilson County dated March the 26, 2009 are supported by competent evidence." On appeal to the trial court, the only finding of fact to which petitioner objected was the Clerk's finding of fact number seventeen. That finding states: "The [Clerk] requested hearing on the issue of attorney fees which was ignored by [petitioner]; the [Clerk] additionally requested that [petitioner] prepare an affidavit which detailed the hours billed in this matter which was also ignored."

At the hearing before the trial court, the Clerk testified that petitioner's request for \$11,250.00 was "unreasonable," "unconscionable," and "not customary for the work that is typically done in estates." Therefore, the Clerk offered petitioner an opportunity for a hearing, which petitioner did not pursue. Because petitioner did not seek a hearing on the petition for attorneys' fees, the Clerk asked petitioner to send him an affidavit detailing the attorneys' fees billed. The Clerk testified that, after repeated calls to petitioner about the requested affidavit and having waited approximately three weeks without a response, he entered the order awarding attorneys' fees on 26 March 2009. The affidavit detailing petitioner's hours billed was not filed until 30 March 2009. This is competent evidence to support the Clerk's finding number seventeen. Accordingly, we hold that the trial court did not err in finding "[t]hat all the findings of fact in the order of the Clerk of Superior Court of Wilson County dated March the 26, 2009 are supported by competent evidence."

Petitioner's brief further contends that both the trial court and the Clerk erred in concluding that petitioner was entitled to \$3,500.00 in attorneys' fees. Again, we note that, pursuant to North Carolina General Statutes, section 1-301.3(d) and our holding in *In re Estate of Pate*, it is not our province to review the Clerk's order. Our review is limited to whether the trial court appropriately concluded that the Clerk's award of \$3,500.00 in

attorneys' fees was supported by the Clerk's findings of fact and consistent with the conclusions of law and applicable law.

Based upon a thorough review of the record, we hold that the trial court did not err in affirming the Clerk's award of \$3,500.00 in attorneys' fees. Contrary to petitioner's argument, the trial court did not rely "solely on the size of the estate and the amount of attorney fees requested by Petitioner-Appellant." The record shows that the trial court received testimony as to why the Clerk believed that \$3,500.00 was a reasonable award of attorneys' fees. The trial court also received testimony from petitioner as to why petitioner believed that \$11,250.00 would be a reasonable award. The bulk of petitioner's argument on appeal is directed to the Clerk's alleged abuse of discretion in awarding \$3,500.00 in attorneys' fees, which is not reviewable by this Court. The trial court received additional evidence and entered appropriate findings. The findings support the court's conclusion that \$3,500.00 was a reasonable amount of attorneys' fees for the work petitioner performed. Because the trial court did not err (1) in entering additional findings based upon additional evidence, (2) in finding that the Clerk's finding of fact was supported by competent evidence, and (3) in affirming the Clerk's award of \$3,500.00 in reasonable attorneys' fees, this assignment of error is overruled.

Petitioner's next assignment of error states:

It is reversible error for the Clerk of Superior Court to issue an order giving preference to creditor[s] that do not have priority over administration expenses (attorney fees) without a review of services performed by the attorney and without taking

into account if such services were beyond the customary services of Estate Administration with findings as to the difficulty and skill required to render those services.

Again, petitioner asks this Court to review the Clerk's order, which we cannot do. Because we hold that the trial court did not err in affirming the Clerk's order awarding \$3,500.00 in attorneys' fees, this assignment of error is overruled.

Petitioner's final assignment of error states: "It is reversible error and against public policy for a Clerk of Superior Court to Order the performance of legal services without an objectively reasonable basis and then to use its legal authority to prevent payment for those services." Petitioner's brief does not contain a single case or statute in support of this contention, violating Rule 28(b)(6) of our North Carolina Rules of Appellate Procedure. N.C. R. App. P. 28(b)(6) (2007) ("Assignments of error . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Additionally, this argument was not raised to the trial court and is not properly before us. See N.C. R. App. P. 10(b)(1) (2007) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]"). Accordingly, this assignment of error is overruled.²

² In support of this assignment of error, petitioner claims that "[t]o affirm [the Clerk's order] would be a gross injustice and would relegate our legal system more akin to that of a third-world dictatorship." Petitioner also contends that "[the Clerk's] actions reek[] of bias and favoritism," and "[t]he bias and partiality displayed here has no place in a civilized society and should not be allowed to stand."

For the foregoing reasons, the trial court's order affirming the Clerk's order awarding attorneys' fees is affirmed.

Affirmed.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).