NO. COA10-552

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2010

IN THE MATTER OF THE ESTATE OF

JOHNNIE H. FORTNER, SR.,
Deceased.

Swain County
No. 07 E 20

Appeal by respondents from order entered 14 December 2009 by Judge James L. Baker, Jr. in Swain County Superior Court. Heard in the Court of Appeals 14 October 2010.

Cogburn & Brazil, P.A., by Peter L. Roda, for petitioner-appellee.

Moody & Brigham, PLLC, by Fred H. Moody, Jr., for respondents-appellants.

THIGPEN, Judge.

Respondents, the administrators of the Estate of Johnnie H. Fortner, Sr. ("the Estate"), appeal from an order awarding attorney's fees to petitioner's attorney for "his services in opposing the probate of a paper writing."

Respondents, sons of the decedent, were appointed as administrators of the Estate on 5 March 2007. On 22 May 2008, two daughters of the decedent filed a "Petition to Probate Copy of Will Dated September 18, 2005, As the Last Will and Testament of Johnny H. Fortner, Sr." The paper writing, if determined to be a will and probated, would have disinherited petitioner, a granddaughter of

the decedent. The issue came for trial on 5 October 2009. A jury found that the paper writing offered was not a copy of a will and a judgement upon the verdict of the jury was signed on 15 October 2009. Petitioner filed a motion requesting an award of reasonable attorney's fees to be paid from the Estate. Following a hearing, an order was entered awarding petitioner's counsel attorney's fees in the amount of $18,060.00 to be paid from the Estate. Respondents appeal.

Respondents argue on appeal that the trial court did not have statutory authority to tax the petitioner's attorney's fees to the Estate under N.C. Gen. Stat. § 6-21(2). We agree.

"In North Carolina, costs may be taxed solely on the basis of statutory authority." *In re Estate of Moore*, 29 N.C. App. 589, 592, 225 S.E.2d 125, 127 (1976), *modified and aff'd*, 292 N.C. 58, 231 S.E.2d 849 (1977). "Attorney's fees may be taxed as part of the costs only in actions as enumerated by statute." *Id.* N.C. Gen. Stat. § 6-21(2) allows "[c]osts" to be taxed for "[c]aveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights or duties of parties thereunder . . . ." N.C. Gen. Stat. § 6-21(2) (2009). "When the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d

819, 824 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999).

We conclude the plain meaning of this statute awards attorney's fees for caveat proceedings and various proceedings to fix the rights of devisees under a probated will. The case of *Batcheldor v. Boyd,* 119 N.C. App. 204, 458 S.E.2d 1, *disc. review denied*, 341 N.C. 418, 461 S.E.2d 753 (1995), states that actions under "intestate succession" and dealing with "inheritance rights" are also relevant to N.C. Gen. Stat. § 6-21(2). *Id.* at 208, 458 S.E.2d at 4. Under *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), we are bound by this result. *Id.* at 384, 379 S.E.2d at 36. Thus, we must determine if the action in the case *sub judice* was one of the aforementioned proceedings. We conclude that it was not.

A caveat may be filed to initiate a caveat proceeding "[a]t the time of application for probate of any will, and the probate thereof in common form, or at any time within three years thereafter . . ." N.C. Gen. Stat. § 31-32 (2009). In the case *sub judice*, no will had been admitted to probate. The daughters of the decedent had failed in their attempt to establish the paper writing as a copy of a lost will and to admit it to probate. Therefore, a caveat proceeding could not have been initiated. This proceeding was also not an action or proceeding requiring the construction of a will or determining the rights of parties under a will. Since no will was probated there was no will to construe or under which to fix rights. Nor was this a proceeding under intestate succession and dealing with inheritance rights. This was an action to determine the legal

status of a paper writing and to then admit that paper writing, if determined to be a will, to probate. Upon the determination the paper writing was not a will, the Estate will pass by the laws of intestacy, but the action was not to determine the inheritance rights of the parties by intestate succession.

"A trial court's decision whether to award attorney's fees and costs . . . under G.S. § 6-21 is within its sound discretion." *In re Will of McDonald*, 156 N.C. App. 220, 235, 577 S.E.2d 131, 141 (2003). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). The trial court lacked statutory authority to award attorney's fees to petitioner, therefore, the award was an abuse of discretion and error. *Moore*, 29 N.C. App. at 592, 225 S.E.2d at 127 (holding "[s]ince the superior court acted without statutory authority, it was error to include an attorney's fee in the costs of the action.")

Reversed.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).