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NO. COA10-618
NORTH CAROLINA COURT OF APPEALS

Filed: 2 August 2011

In the Matter of the Estate of Alamance County
Ervin Guy Reeder, No. 09 E 325
Deceased.

Appeal by executor from order entered 29 March 2010 by
Judge Paul G. Gessner in Alamance County Superior Court. Heard
in the Court of Appeals 15 November 2010.

*Walker & Bullard, P.A., by Daniel S. Bullard, for the
Executor.*

Charles N. Stedman, for the Petitioner.

ERVIN, Judge.

Stephen L. Reeder, in his capacity as Executor of the
Estate of Ervin Guy Reeder, appeals from an order granting
summary judgment in favor of Petitioner Constance E. Reeder on
the grounds that she was entitled to claim an elective share in
the Estate as a matter of law. On appeal, Executor contends
that the trial court erred by rejecting his contention that Ms.
Reeder had waived her right to claim an elective share in the
Estate. After careful consideration of the Executor's

challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial court erred by entering summary judgment in favor of Ms. Reeder and that this case should be remanded to the Alamance County Superior Court for further remand to the Clerk of Superior Court for additional proceedings not inconsistent with this opinion.

I. Factual Background

Decedent and Ms. Reeder were married on 5 November 1941. Although the couple was divorced for a short period of time, they ultimately remarried. Two children were born to the couple's marriage: a son, the Executor, and a daughter, Christine Ann Reeder, who died on 24 December 2008.

After their remarriage, the couple continued to experience marital discord. Acting upon the advice of their counsel, the couple executed the following instruments on 24 May 2002: reciprocal last wills and testaments, durable powers of attorney, durable health care powers of attorney, and an Agreement Regarding Status of Property.

In December 2006, the couple sold their primary residence in the State of Washington, where they had resided since 1999 or 2000. At that point, Decedent moved to North Carolina to live with the Executor, while Ms. Reeder relocated to Montana, where she lived with the couple's now-deceased daughter.

On 17 June 2008, Decedent executed a last will and testament in which he revoked "all earlier wills and codicils," recited that he was married but "currently separated from [his] spouse," and left the majority of his property to Executor. (R3) Decedent died on 1 April 2009. The 17 June 2008 will was admitted to probate on 15 April 2009, with Decedent's son being appointed as the Executor.

On 20 July 2009, Ms. Reeder, in her capacity as Decedent's surviving spouse, filed a claim seeking to have an elective share awarded to her from the Estate. On 31 July 2009, Executor filed a written response to Ms. Reeder's claim in which he denied that Ms. Reeder was entitled to "any sum whatsoever from the Estate of Ervin Guy Reeder by reason of a Claim For Elective Share" and alleged that Ms. Reeder had "waived all rights she had in the Estate [] because or by virtue of their marriage relationship [by executing] the Agreement Regarding Status of Property dated May 24, 2002."

Ms. Reeder's claim for an elective share came on for hearing before the Clerk of Superior Court of Alamance County on 11 January 2010. On 25 January 2010, the Clerk entered an order awarding Ms. Reeder an elective share in Decedent's Estate. Executor appealed the Clerk's order to the Alamance County

Superior Court by means of a notice of appeal which alleged that:

certain conclusions of law made by the Clerk of Superior Court of Alamance County are not supported by the findings of fact made by said Clerk, certain findings of fact were not supported by the evidence presented, uncontested evidence submitted by the Executor of the Estate was not included in the findings of fact, and the Order entered by said Clerk is not consistent with applicable law.

On 11 February 2010, Ms. Reeder sought the entry of summary judgment in her favor "on the ground that there is no genuine issue as to any material fact . . . and movant is entitled to judgment as a matter of law."

This case came on for hearing before the trial court at the 22 February 2010 civil session of the Alamance County Superior Court. On 29 March 2010, the trial court entered an order granting Ms. Reeder's motion for summary judgment based on its determination that no genuine issue as to any material fact existed and that Ms. Reeder was entitled to claim an elective share of the Estate as a matter of law. Executor noted an appeal to this Court from the trial court's order.

II. Legal Analysis

A. Scope of Review

As a preliminary matter, we must ascertain the applicable standard of review and address the validity of Ms. Reeder's contention that the Executor failed to file a sufficient notice of appeal at the time that he sought review of the Clerk's order in the Alamance County Superior Court. Although we conclude that Executor's notice constituted a "general" or "broadside" objection to the Clerk's order that did not suffice to support any challenge to the Clerk's findings of fact, that fact does not preclude us from reviewing the principal substantive issue raised by Executor's appeal.

"In probate matters, . . . the Clerk of Superior Court has original jurisdiction. After an evidentiary hearing the Clerk has a duty to make findings of fact, to make conclusions of law, and to enter the judgment accordingly." *In re Estate of Swinson*, 62 N.C. App. 412, 415, 303 S.E.2d 361, 363 (1983). According to N.C. Gen. Stat. § 1-301.3(c), an aggrieved party may appeal an order entered by the Clerk in a probate matter to the Superior Court by filing a notice which "shall specify the basis for the appeal." After the filing of an adequately-detailed notice of appeal:

. . . the judge of the superior 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.

N.C. Gen. Stat. § 1-301.3(d). As a result:

If there is evidence to support the findings of the Clerk, the judge must affirm. If a different finding could be supported on the same evidence, the trial judge cannot substitute his own finding for that of the Clerk. It is not a *de novo* hearing. The trial court is sitting as an appellate court, since its jurisdiction is derivative.

Swinson, 62 N.C. App. at 415, 303 S.E.2d at 363. In the event that the notice of appeal fails to include specific exceptions, "the role of the trial judge is to review the order of the Clerk for errors of law only[, and i]t is not proper to have a trial *de novo* or to hear any evidence in Superior Court." *Id.* "Our review is the same as that of the [S]uperior [C]ourt." *In re Williams*, ___ N.C. ___, ___, 701 S.E.2d 399, 401 (2010) (citing *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2-3, *disc. review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995)).

In her brief, Ms. Reeder contends that the Executor's notice of appeal from the Clerk to the Superior Court contained nothing more than a general objection to the Clerk's order and

did not, for that reason, suffice to support a challenge to the Clerk's findings of fact. Ms. Reeder's contention has merit. See *In re Estate of Whitaker*, 179 N.C. App. 375, 382, 633 S.E.2d 849, 854 (2006) (holding that a notice of appeal indistinguishable in any material sense from the one filed by Executor in this case constituted "only a broadside attack on the findings of fact" and amounted to nothing more than a "general objection" to the Clerk's order). As a result, given that Executor failed to challenge any of the Clerk's findings in his notice of appeal, we conclude that the only issue properly before the trial court in this case was the extent, if any, to which the Clerk's findings of fact supported its conclusions of law. See *In re Taylor*, 293 N.C. 511, 519, 238 S.E.2d 774, 778 (1977) (stating that, "[u]pon appeal to the Superior Court, . . . absent specific exceptions to specific findings of fact, a general exception to the judgment only presents the question of whether facts found support the conclusions of law") (citations omitted).

After carefully reviewing the record, we are unable to identify with any clarity the exact procedure utilized by the trial court in the course of entering the order that is before us at this time. Although the review process outlined in N.C. Gen. Stat. § 1-301.3 clearly contemplates that the Superior

Court will sit "as an appellate court" and grants the Superior Court only "derivative" jurisdiction, *Swinson*, 62 N.C. App. at 415, 303 S.E.2d at 363, the trial court appears to have accepted an affidavit filed by the Executor and entered an order addressing this matter as if it were deciding a summary judgment motion rather than conducting an appellate review. See *In re Estate of Severt*, 194 N.C. App. 508, 511-13, 669 S.E.2d 886, 889-90 (2008), *disc. review denied*, 363 N.C. 126, 675 S.E.2d 362 (2009).¹ Although the procedural approach apparently adopted by the trial court in this instance was indistinguishable from the *de novo* review held to be impermissible in *Severt*, we need not decide whether that error, standing alone, suffices to require a grant of appellate relief given that Executor's challenge to both the Clerk's order and the trial court's order revolves around a purely legal issue which the trial court would have been required to address in the event that it had utilized the correct standard of review. As a result, we will proceed to address Executor's challenge to the trial court's order on the merits.

¹ Admittedly, the trial court had the authority to "receive additional evidence" concerning a disputed "evidentiary issue" on appeal from the Clerk. N.C. Gen. Stat. § 1-301.3(d). However, the record contains no indication that the trial court's apparent decision to receive Executor's affidavit and other materials during its consideration of Ms. Reeder's summary judgment motion resulted from an effort to resolve such a disputed evidentiary issue.

B. Substantive Legal Analysis

"The surviving spouse of a decedent who dies domiciled in this State has a right to claim an 'elective share[,]'' which means an amount equal to (i) the applicable share of the Total Net Assets, as defined in [N.C. Gen. Stat. §] 30-3.2(4), less (ii) the value of Net Property Passing to Surviving Spouse, as defined in [N.C. Gen. Stat. §] 30-3.2(2c)." N.C. Gen. Stat. § 30-3.1(a). The right to claim an elective share "may be waived, wholly or partially, before or after marriage, with or without consideration, by a written waiver signed by the surviving spouse[.]" N.C. Gen. Stat. § 30-3.6(a). However, a purported waiver is unenforceable if the surviving spouse proves that either "[t]he waiver was not executed voluntarily" or that he or she was not provided with a "fair and reasonable disclosure of the property and financial obligations of the decedent, unless the surviving spouse waived, in writing, the right to that disclosure." N.C. Gen. Stat. § 30-3.6(b). Executor argues, in reliance upon the language of Section 2.3 of the Agreement, that Ms. Reeder waived her right to claim an elective share from Decedent's Estate.

The Agreement provides, among other things, that:

2.3 I[t is further agreed] that in the event of the separation, dissolution of marriage or divorce of the parties, neither of the parties shall have nor will assert

any claim, interest, estate or title under the laws of the State of Washington or any other state, because or by virtue of their marriage relationship, in or to any separate property, of the other as described in this instrument, whether real, personal or mixed.

According to the clear language of the Agreement, Ms. Reeder's ability to claim an elective share from Decedent's Estate hinges upon the extent, if any, to which Decedent and Ms. Reeder had separated, divorced, or otherwise dissolved their marriage prior to Decedent's death. As a result of the fact that Decedent and Ms. Reeder remained married at the time of Decedent's death, the extent to which Ms. Reeder did or did not have a right to claim an elective share in Decedent's Estate depended entirely upon whether a "separation" had occurred. Thus, the proper resolution of this case requires us to determine what the term "separation," as used in the Agreement, should be understood to mean.

In its order, the clerk of superior court found as a fact that:

16. Ervin Guy Reeder and the petitioner lived at 101 Wright Road, Sequim, Washington from 1999 to 2006 when they sold their house.

17. On 24 May 2002, Ervin Guy Reeder and the petitioner executed reciprocal last wills and testaments, durable powers of attorney and durable powers of attorney for health care. . . .

18. After the execution of the

aforesaid documents, more than four and one-half (4 1/2) years later in December 2006, Ervin Guy Reeder and the Petitioner sold their house in Sequim, Washington. The Petitioner went to live with their daughter in Libby, Montana and Ervin Guy Reeder went to live with their son in Burlington, North Carolina because the petitioner could no longer safely take care of her husband due to his deteriorating health.

19. No waiver, release or relinquishment of the rights of the petitioner to assert her claims against the decedent's estate is found in their "Agreement Regarding Status of Property" in the absence of a legal separation, dissolution of marriage or divorce of the petitioner and the decedent.

20. From the time they executed the aforesaid documents on 24 May 2002, through the date of his death on 1 April 2009, Ervin Guy Reeder and the petitioner never executed any separation agreement, property settlement agreement or any other document whereby either of them waived any rights to any claim or claims of curtesy, inheritance, descent, distribution or any other rights or claims emanating from their marital relationship or the rights pursuant to the estate of the other spouse.

Based upon these findings of fact, the Clerk concluded as a matter of law that "[t]he petitioner is entitled to claim an elective share of the estate of the decedent pursuant to Chapter 30 of the North Carolina General Statutes." As a result, the Clerk's decision in favor of Ms. Reeder rested solely on its determination that the word "separation" as used in the Agreement referred exclusively to a "legal separation."

The first substantive issue that we must address is determining whether the Agreement should be construed under the law of North Carolina or Washington, with Executor apparently contending for the former outcome and Ms. Reeder contending for the latter. In support of her argument, Ms. Reeder relies upon this Court's decision in *Muchmore v. Trask*, 192 N.C. App. 635, 639, 666 S.E.2d 667, 670 (2008) (stating that, "'North Carolina has long adhered to the general rule that *lex loci contractus*," the law of the place where the contract is executed governs the validity of the contract'") (quoting *Morton v. Morton*, 76 N.C. App. 295, 299, 332 S.E.2d 736, 738, *disc. review denied*, 314 N.C. 667, 337 S.E.2d 582 (1985)), *disc. review improvidently granted*, 363 N.C. 742, 686 S.E.2d 151 (2009). Although the issue before us in connection with this appeal involves an issue of contract construction rather than validity, we agree with Ms. Reeder that Washington law should be utilized in construing the language of the Agreement rather than that of North Carolina. *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000) (stating that "the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to making a binding contract occurred, usually delivery of the [contract], controls the interpretation of the contract") (citation omitted). Thus, since the record appears to indicate

that the Agreement was entered into in Washington, we will construe the relevant provisions of the Agreement in accordance with Washington law.

The essential interpretative dispute between the parties revolves around whether the term "separation" should, or should not, be construed to involve a "legal separation," with Ms. Reeder arguing in favor of such a requirement and with Executor arguing against it. After carefully reviewing what we believe to be the relevant Washington decisions, we do not believe, contrary to the decisions of the Clerk and the trial court, that a "legal separation" or some similar judicial determination was necessary in order for the waiver provision to become effective.

The literal language of the Agreement refers to a "separation" rather than a "legal separation." According to Washington law:

The determination whether a husband and wife are living separate and apart turns on the peculiar facts of each case. . . .
"[M]ere physical separation of the parties does not establish that they are living separate and apart sufficiently to negate the existence of a community." "The test is whether the parties by their conduct have exhibited a decision to renounce the community, with no intention of ever resuming the marital relationship."

Marriage of Nuss, 65 Wn. App. 334, 344, 828 P.2d 627, 632-33 (1992) (citing *Togliatti v. Robertson*, 29 Wn.2d 844, 852, 190

P.2d 575 (1948) and quoting *Oil Heat Co. v. Sweeney*, 26 Wn. App. 351, 354, 613 P.2d 169 (1980)). As a result, we believe that the extent to which a married couple has separated for purposes of Washington law requires an inquiry into whether the marital partners are physically living separate and apart and whether they have any intention of resuming the marital relationship.

In seeking to persuade us that the term "separation" requires a legal separation or some other judicial act as a matter of Washington law, Ms. Reeder directs our attention to a large number of decisions rendered by the appellate courts in that jurisdiction. The majority of the cases upon which Ms. Reeder relies are completely inapplicable to the present case, since they involve the construction and interpretation of contracts that lack an express termination or waiver clause. See generally *Estate of Bachmeier*, 147 Wn.2d 60, 52 P.3d 22 (2002); *In re Estate of Lyman*, 82 Wn.2d 693, 512 P.2d 1093 (1973); *Higgins v. Stafford*, 123 Wn.2d 160, 866 P.2d 31 (1994); *Estate of Catto*, 88 Wn. App. 522, 944 P.2d 1052 (1997), *disc. review denied*, 134 Wn.2d 1017, 958 P.2d 313 (1998). In each of these cases, the Washington courts merely refused to imply a termination of marital property rights at the point the marriage becomes defunct. As a result, those cases simply hold that, absence a waiver provision of the type at issue here, neither

party forfeits existing community property rights at the time of separation. In addition, Ms. Reeder cites *Kerr v. Cochran*, 65 Wn.2d 211, 396 P.2d 642 (1964), for the proposition that "[m]ere separation by the parties does not dissolve the community and has no effect on the status of property while the spouses are living separate and apart." In *Kerr*, the Washington Supreme Court addressed the issue of a complainant's ability to recover tort damages from one spouse as the result of conduct engaged in by the other based on the existence of a marriage relationship, which means that the situation at issue in *Kerr* bears little resemblance to the one at issue here. Aside from the fact that *Kerr*, like the other cases upon which Ms. Reeder relies, did not involve a waiver clause like that found in the Agreement, the Washington Supreme Court specifically distinguished the facts at issue in *Kerr* from those at issue in *MacKenzie v. Sellner*, 58 Wn.2d 101, 104, 361 P.2d 165, 167 (1961), a case in which the parties had executed a property settlement and in which the Washington Supreme Court stated that it had "declined to apply the rigors of the community property laws to a defunct marriage, where the ends of justice would not be served thereby." At bottom, none of the cases to which Ms. Reeder has directed our attention establish that, for purposes of Washington law, the word "separation" means "legal separation." Thus, the ultimate

issue before the Clerk was the extent, if any, to which, at the time of Decedent's death, he and Ms. Reeder were physically separated and that one or the other of them had no intention of resuming the marital relationship rather than whether they were legally separated.

As we have already noted, the Clerk's order awarding an elective share to Ms. Reeder rests entirely on a determination that the waiver provision of the Agreement did not become effective in the absence of a legal separation. As a result of the fact that the relevant provision of the Agreement is unambiguous, the proper construction of that Agreement was a question of law rather than of fact. *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973) (stating that, "[w]hen a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law[,] " so that "[t]he court determines the effect of their agreement by declaring its legal meaning") (citations omitted). When a trial court "clearly heard the evidence and found the facts against [a party] under a misapprehension of the controlling law[,] " "the factual findings may be set aside on the theory that the evidence should be considered in its true legal light." *A.M.E. Zion Church v. Union Chapel A.M.E. Zion*

Church, 64 N.C. App. 391, 411-12, 308 S.E.2d 73, 85 (1983) (citing *Helms v. Rea*, 282 N.C. 610, 620-21, 194 S.E.2d 1, 8 (1973) and *McGill v. Lumberton*, 215 N.C. 752, 754-55, 3 S.E.2d 324, 326 (1939)), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 649 (1984). That is clearly what happened here. As a result of the fact that the Clerk's order was predicated upon a misapprehension about the extent to which the waiver provision of the Agreement was triggered by a "separation" or a "legal separation," the Clerk granted Ms. Reeder's request to be awarded an elective share from the Estate based upon a misapprehension of the applicable law.² Thus, given the applicable standard of review and the absence of adequate factual findings from the Clerk's order, we conclude that we must reverse the trial court's order effectively affirming the Clerk's order with instructions to remand this case to the Clerk of Superior Court of Alamance County for further proceedings not inconsistent with this opinion.

III. Conclusion

² Although the Clerk did find that the parties separated in 2006 "because the petitioner could no longer safely take care of her husband due to his deteriorating health," (R161) he never addressed the extent, if any, to which the parties' continued separation after that point involved a desire on the part of either Decedent or Ms. Reeder to remain physically separate for other reasons.

Thus, for the reasons set forth above, we conclude that the trial court erred by granting summary judgment in favor of Ms. Reeder and, through the use of that procedural device, effectively affirming the Clerk's order. As a result of the fact that the findings of fact and conclusions of law in the Clerk's order were insufficient to permit a determination of the extent, if any, to which the parties had "separated" as that term is used in the Agreement, we are unable to determine the extent to which Ms. Reeder is or is not entitled to an elective share from Decedent's Estate. The trial court's order should be, and hereby is, reversed and this case is remanded to the Alamance County Superior Court for further remand to the Clerk of Superior Court for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Judge MARTIN and Judge MCGEE concur.

Report per Rule 30(e).