

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-284  
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

IN THE MATTER OF THE ESTATE OF  
JAMES F. HENDRICK,

Decedent.

Cleveland County  
No. 11 E 568

Appeal by respondents from the order entered 27 September 2012 and from the order entered 15 October 2012 by Judge Robert T. Sumner in Cleveland County Superior Court. Heard in the Court of Appeals 27 August 2013.

*Cerwin Law Firm, P.C., by Todd R. Cerwin, for respondent-appellants.*

*Arthurs & Foltz, LLP, by Douglas P. Arthurs and Travis G. Page, for petitioner-appellee.*

STEELMAN, Judge.

Where there was evidence presented that supported the Clerk of Court's ultimate finding of fact that wife did not willfully abandon decedent without justification, the trial court did not err in affirming the order of the Clerk of Court. Since this finding supported the trial court's conclusion that wife was

entitled to an elective share, the trial court did not err in denying respondents' motion to dismiss wife's petition based upon a lack of standing.

### I. Factual and Procedural History

On 30 September 1997, James F. Hendrick (decedent), age 69, married Jane J. Hendrick (wife), age 70. After briefly living together, wife moved into her own apartment in Gastonia. On 28 April 2008, wife was removed from her apartment due to her dementia and inability to care for herself. She was admitted to Carolina Care Center in Cherryville. On 17 May 2008, decedent removed wife from Carolina Care Center to care for her in his home in Cleveland County. Wife was subsequently readmitted to Carolina Care Center, where she currently resides. On 8 August 2011, decedent died testate.

Decedent's will bequeathed his tangible personal property to the Salvation Army. The residue of his real and personal property was left to an *inter vivos* trust.

On 25 October 2011, wife, by and through her attorney-in-fact, filed a petition seeking an elective share of the estate pursuant to Article 1A of Chapter 30 of the North Carolina General Statutes. On 11 May 2012, a hearing on the petition was held before the Assistant Clerk of Superior Court for Cleveland

County. The parties stipulated that the "sole issue to be determined by the Court at this hearing was the right of the spouse to an elective share and the defense raised by the Executor that the spouse is barred from an elective share by her actions as set forth in N.C.G.S. §31-A-1." On 22 May 2012, the Assistant Clerk of Superior Court of Cleveland County entered an Order awarding wife an elective share of decedent's estate.

On 1 June 2012, respondents appealed to the Superior Court of Cleveland County, asserting as the only basis for appeal the issue of willful abandonment. On 19 September 2012, respondents filed a motion to dismiss wife's petition due to lack of standing. On 27 September 2012, the trial court affirmed the Clerk's award of an elective share to wife. On 15 October 2012, the trial court entered a written order denying respondents' motion to dismiss.

Respondents appeal both the 27 September 2012 order affirming the Clerk's award of an elective share to wife and the 15 October 2012 order denying the motion to dismiss.

## II. Standard of Review

On appeal of estate matters determined by the clerk, the superior court reviews an order of the clerk for purposes of determining: (1) whether the findings of fact are supported by the evidence; (2) whether the conclusions of law are supported

by the findings of fact; and (3) whether the order or judgment is consistent with the conclusions of law and applicable law. N.C. Gen. Stat. § 1-301.3(d). The superior court, however, only reviews those "findings of fact which the appellant has properly challenged by specific exceptions." *In re Estate of Lowther*, 271 N.C. 345, 354, 156 S.E.2d 693, 700-01 (1967) (emphasis added). See also *In re Estate of Longest*, 74 N.C. App. 386, 390, 328 S.E.2d 804, 807 ("Thus, in an appeal from an order of the Clerk in a probate matter, the Superior Court is not required to conduct a *de novo* hearing. Rather, ... when a finding of fact by the Clerk of Court is properly challenged by specific exception, the Superior Court judge will review those findings, and either affirm, reverse, or modify them." (internal citation and quotation marks omitted) (emphasis added)), *appeal dismissed and disc. review denied*, 314 N.C. 330, 333 S.E.2d 488 (1985).

*In re Estate of Whitaker*, 179 N.C. App. 375, 382, 633 S.E.2d 849, 854 (2006); see also N.C. Gen. Stat. § 1-301.3(d) (2011). "The standard of review in this Court is the same as that in the Superior Court." *In re Estate of Archibald*, 183 N.C. App. 274, 276, 644 S.E.2d 264, 266 (2007).

### III. Findings of Fact

In their first argument, respondents contend that the trial court erred by making findings of fact which were not supported by competent evidence. We disagree.

Specifically, respondents challenge findings of fact numbers 8, 9, 13, 15, and 16, concerning wife's decision to live apart from decedent. Respondents contend that no evidence supports the trial court's findings that the parties chose willingly to live apart, that they visited each other regularly, that there was no evidence that wife willfully abandoned decedent, that wife was entitled to an elective share, and that her choice to live apart from husband did not constitute willful abandonment. We note that, pursuant to *Whitaker*, we may only consider those issues on appeal from the Superior Court which were properly appealed to that court from the Clerk of Court.

Pursuant to N.C. Gen. Stat. § 31A-1, a spouse loses "[a]ll right to petition for an elective share of the estate of the other spouse" if she "wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death[.]" N.C. Gen. Stat. §§ 31A-1(b)(3), (a)(3) (2011). The burden is on the party asserting willful abandonment to prove every element of abandonment, which is defined as the ending of cohabitation without justification, consent, or intent to return. *Panhorst v. Panhorst*, 277 N.C. 664, 671, 178 S.E.2d 387, 392 (1971).

In the instant case, the parties stipulated that wife and decedent were married. The burden was on respondents to prove that wife willfully abandoned decedent. Respondents contended at trial that wife's choice to live apart from decedent for over a decade constituted willful abandonment. The Clerk of Superior Court made the following findings of fact:

8. That James F. Hendrick and Jane J. Hendrick were set in their ways and she chose to live in the city and he chose to live in the country. Jane J. Hendrick resided in James F. Hendrick's family residence for one month after their marriage and then moved to the Gastonia apartment.

9. That James F. Hendrick and Jane J. Hendrick regularly went on dates and went square dancing together. James Hendrick also drove regularly to Gastonia to visit with his wife and they went on weekend trips together.

10. Early in 2008, Jane J. Hendrick could no longer reside in her apartment in Gastonia due to dementia. She was admitted to Carolina Care in Cherryville for approximately 21 days after which time she was discharged into the care of her husband, James F. Hendrick, and resided with him in his home.

11. James F. Hendrick arranged for Jane J. Hendrick to be enrolled in the Life Enrichment Center in Shelby. He also assumed the financial responsibility for the care of Jane J. Hendrick.

12. That the admission records of the Life Enrichment Center list James F. Hendrick as

being the husband of Jane J. Hendrick.

13. There is no evidence to substantiate a determination that Jane J. Hendrick has willfully and without just cause abandoned or refused to live with her spouse or that she was refusing to live with her spouse at the time of his death.

14. That James F. Hendrick and Jane J. Hendrick are shown as filing N. C. tax returns as husband and wife.

15. That the petitioner, Jane J. Hendrick, is entitled to an elective share of the Estate of James F. Hendrick.

16. That the fact that Jane J. Hendrick chose to reside in Gastonia in an apartment rather than with her husband in his homeplace on New Prospect Road in Cleveland County for the majority of the time that they were married until she was asked to vacate her apartment due to her dementia does not constitute a willful and without just cause abandonment and refusal to reside with her husband to the extent that she is ineligible to seek an elective share of the estate of her husband James F. Hendrick.

The superior court, reviewing the order of the Clerk of Court, held that "the Findings of Fact contained in the Order entered by the Clerk are supported by the evidence; that the Conclusions of Law are supported by the Findings of Fact; and, that the Order is consistent with the Conclusions of Law and applicable law[,]” and affirmed the Clerk’s order. We hold that the trial court was correct in holding that there was evidence

presented before the Clerk that supported the Clerk's findings of fact, that the findings supported the conclusions of law, and that the conclusions of law were consistent with the applicable law.

This argument is without merit.

#### IV. Conclusions of Law

In their second and third arguments, respondents contend that the trial court erred by making conclusions of law which were not supported by the findings of fact, and that the trial court erred by making an award not supported by the conclusions and applicable law. We disagree.

In its order, the Clerk of Court made the following relevant conclusions of law:

3. There is also no evidence to substantiate a determination that Jane Hendrick has willfully and without just cause abandoned or refused to live with her spouse or that she was refusing to live with her spouse at the time of his death.

4. That the petitioner, Jane J. Hendrick is entitled to an elective share of the Estate of James F. Hendrick.

Respondents first challenge conclusions of law numbers 3 and 4. Respondents contend that no findings of fact support the trial court's conclusion that there was no evidence of willful



abandonment without justification, that no findings of fact support the trial court's conclusion that wife is entitled to an elective share, and that the trial court erred in denying respondents' motion to dismiss based on the contention that wife lacked standing to demand an elective share.

As stated above, there was evidence presented to the Clerk that supported the finding that wife did not willfully abandon decedent without justification. This finding, along with the stipulation of the parties' marriage, supports the conclusion of law that wife was entitled to an elective share of decedent's estate. Respondents failed to meet their burden of showing that wife abandoned decedent. Since respondents did not meet their burden, wife's marriage to decedent afforded her standing to seek an elective share, and the trial court properly denied the motion to dismiss.

Respondents next contend that because the remaining findings of fact and conclusions of law do not support the award, the award itself should be vacated.

As stated above, the findings of fact were supported by the evidence, and the conclusions of law by the findings of fact. As such, respondents' arguments must fail.

This argument is without merit.

AFFIRMED.

Judges MCGEE and ERVIN concur.

Report per Rule 30(e).