

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA14-635
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

JOHN BRYAN SETZLER,
Plaintiff

v.

Catawba County
No. 12 CVD 1337

EVETTE LYNN SETZLER [now ROCKETT],
Defendant

Appeal by Plaintiff from order entered 2 January 2014 by Judge Jane V. Harper in Catawba County District Court. Heard in the Court of Appeals 3 November 2014.

Crowe & Davis, P.A., by H. Kent Crowe, for Plaintiff-Appellant.

Morrow Porter Vermitsky Fowler & Taylor, PLLC, by John F. Morrow, Sr., for Defendant-Appellee.

BELL, Judge.

Plaintiff John Bryan Setzler appeals from an order denying his motion to terminate alimony payments to Defendant Evette Lynn Rockett. On appeal, Plaintiff alleges that the trial court erred in determining that Defendant was not cohabitating, as defined by North Carolina case law, with another man. We do not reach the merits of Plaintiff's appeal, however, concluding that

Plaintiff's appeal is interlocutory. We therefore dismiss Plaintiff's appeal.

I. Factual Background

Plaintiff and Defendant were married to each other on 25 April 1992. Two children were born of the marriage. On 11 May 2012, Plaintiff filed a verified complaint seeking an ex parte custody order giving him custody of the parties' children, a divorce from bed and board, equitable distribution, an injunction disallowing Plaintiff to return to their marital home or have access to their bank accounts, and an interim distribution of their marital home. Defendant was represented by attorney W. Wallace Respess. The trial court entered an order on 6 November 2012 which required Plaintiff to pay post-separation support in a lump sum amount of \$33,000. On 13 June 2013, the trial court entered a judgment of equitable distribution and an order granting permanent alimony by consent. Plaintiff was ordered to pay alimony in the amount of \$2,350 per month beginning 15 July 2013 and lasting for a period of sixty months unless terminated earlier by death, remarriage, or cohabitation.

In March of 2013, during litigation, Defendant began a monogamous sexual relationship with her attorney, Mr. Respess.

When Plaintiff found out about this relationship in June 2013, he filed a motion to terminate alimony alleging as grounds for termination that Defendant had begun cohabitating with another male. Plaintiff also stopped paying the court-ordered alimony. Defendant, in response, filed a motion for contempt for Plaintiff's failure to comply with the court order requiring alimony payments.

Evidence at trial tended to show that Plaintiff maintained her own residence, one at which Mr. Respass never spent the night, and maintained a separate bank account. The couple was engaged to be married at the time of the hearing and had set a wedding date for the middle of May 2014. Based on these facts, the trial court concluded that Defendant was not cohabitating with Mr. Respass and denied Plaintiff's motion to terminate alimony payments. The trial court also concluded that Plaintiff was not in contempt of court when he failed to pay alimony because he had, in good faith, properly filed a motion to terminate his alimony payments. The trial court reserved a ruling on the issues of child support, child custody, and attorneys' fees. Plaintiff noted an appeal to this Court from the trial court's order.

II. Legal Analysis

Plaintiff recognizes that his "appeal may be interlocutory" but requests that this Court rule on his case based upon some future promise to consolidate his current appeal and the appeal from the actual final judgment in this case. According to Plaintiff, these subsequent notices of appeal were filed "out of caution." We do not agree with Plaintiff's framing of his subsequent notices of appeal and conclude that they were necessary to preserve the issues he now seeks to raise for appeal and that this appeal should be dismissed as interlocutory.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). However, "[a] final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Id.* at 361-62, 57 S.E.2d at 381. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). The purpose behind this rule is "to prevent fragmentary and premature appeals that

unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980). Still,

[n]otwithstanding this cardinal tenet of appellate practice, immediate appeal of interlocutory orders and judgments is available in at least two instances. First, immediate review is available when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay. . . . Second, immediate appeal is available from an interlocutory order or judgment which affects a "substantial right."

Sharpe, 351 N.C. at 161-62, 522 S.E.2d at 579.

Plaintiff filed the present action seeking a divorce from bed and board, equitable distribution, a determination of child custody and other remedies. The trial court entered a judgment for equitable distribution in June 2013. The order from which Plaintiff appeals relates to issues of alimony, but in no way disposed of the entirety of the case. It was not until 9 May 2014 that the trial court entered an order determining child custody between the parties. An order awarding attorneys' fees was entered on 27 May 2014.

It is clear from the record that Plaintiff's appeal is interlocutory and Plaintiff failed to obtain N.C. Gen. Stat. §

1A-1, Rule 54(b) certification or alleged that he has been deprived of a substantial right. In seeking to remedy this, or "out of caution," Plaintiff noted an appeal to this Court on 30 June 2014 from the order denying his motion to terminate alimony, the order awarding attorneys' fees, and the order denying his motion for non-disbursement (COA14-949). Kent Crowe, appellate counsel for Plaintiff, died during the pendency of this appeal. His law partner filed a motion with this Court on the eve of the hearing date in this case seeking a continuance in this matter on the grounds that Mr. Crowe, prior to his passing, intended to file a motion to consolidate the two cases on appeal. Plaintiff obtained an extension of time to file his appellate brief in COA14-949 on or before 2 February 2015. Considering the posture of both cases before this Court and the purpose behind disallowing piecemeal litigation on appeal, we believe that the correct course of action is to dismiss Plaintiff's present appeal as interlocutory. As a result, we additionally deny Plaintiff's motion to continue the hearing of this matter. We do note, however, that Plaintiff noted an appeal of the order denying his motion to terminate alimony in COA14-949. Nothing in this opinion shall be

construed as hindering Plaintiff from raising these issues in his second appeal to this Court.

APPEAL DISMISSED.

Chief Judge MCGEE and Judge ROBERT C. HUNTER concur.

Report per Rule 30(e).