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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-946

Filed: 15 September 2020

Wake County, No. 17 CVD 2677

MELISSA SNELL, Plaintiff,

v.

JEFFREY SNELL, Defendant.

Appeal by plaintiff and proposed intervenors from order entered 5 June 2019 by Judge Jefferson G. Griffin in Wake County District Court. Heard in the Court of Appeals 26 May 2020.

The Connor Law Firm, PLLC, by Gregory S. Connor, for plaintiff-appellant and proposed intervenors-appellants.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, Bettie Kelley Sousa, and Max R. Rodden, for defendant-appellee.

DIETZ, Judge.

Appellants in this child custody action challenge an award of attorneys' fees entered against them under N.C. Gen. Stat. § 6-21.5. The trial court imposed those fees after determining that Appellants filed pleadings and asserted arguments unsupported by any justiciable issues of law or fact.

The legal issue at the heart of this dispute is whether a custody action automatically abates upon the death of one parent if, at the time, there is a pending motion by grandparents to intervene and seek visitation. As explained below, because our State's jurisprudence on this issue is evolving, Appellants' arguments were a good faith request for modification or extension of existing case law. This, in turn, means that these arguments could not subject Appellants to an award of attorneys' fees under N.C. Gen. Stat. § 6-21.5. We therefore reverse the trial court's order awarding attorneys' fees.

Facts and Procedural History

In 2017, Melissa Snell and Jeffrey Snell separated after seventeen years of marriage. The parties later agreed to a consent custody order that gave Ms. Snell primary custody of the parties' four children.

Ms. Snell previously had survived breast cancer. Sadly, in 2018, Ms. Snell's cancer returned and, by early 2019, her doctors advised her that all treatment options had been exhausted.

On 20 February 2019, Ms. Snell filed a motion to modify child custody. In an accompanying affidavit, Ms. Snell testified that she had stopped treatment for her cancer. She also expressed concerns that, after her death, the "close relationship that my children and family have always shared" could be threatened, and she expressed her desire that her parents and her brother be given visitation rights with her

children. That same day, Ms. Snell's mother, father, and stepfather moved to intervene to assert claims for grandparent visitation.

The following day, Ms. Snell passed away. A week later, Mr. Snell moved to dismiss both Ms. Snell's motion to modify custody and the grandparents' motion to intervene on the grounds that "the action has now abated due to the death" of Ms. Snell.

Over the course of the next month, there were two additional filings in this case. First, Ms. Snell's estate, through the executor, filed an amended motion to modify child custody. In that amended motion, the executor asserted that "[d]ue to the grandparents' motion to intervene, the custody lawsuit, including Plaintiff's motion to modify filed prior to her death, did not abate due to her death." Second, the grandparents filed an amended motion to intervene that included an express reference to N.C. Gen. Stat. § 50-13.5, the statute addressing custody and visitation rights of grandparents.

After a hearing, the trial court dismissed both Ms. Snell's motion to modify custody and the grandparents' motion to intervene for lack of subject matter jurisdiction. Several weeks later, Mr. Snell filed a motion for attorneys' fees under N.C. Gen. Stat. § 6-21.5, seeking an award of attorneys' fees against both Ms. Snell's estate and against the grandparents on the ground that they had not raised any justiciable issues in their now-dismissed motions. The trial court granted Mr. Snell's

motion and awarded $6,680 in attorneys' fees. Both Ms. Snell's estate and the grandparents timely appealed.

Analysis

Appellants argue that the trial court erred by ordering them to pay attorneys' fees under N.C. Gen. Stat. § 6-21.5. This statute permits a trial court to award attorneys' fees to a prevailing party if there was "a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." *Id.*

"We review a denial of a motion for attorneys' fees under N.C. Gen. Stat. § 6-21.5 for abuse of discretion." *Free Spirit Aviation, Inc. v. Rutherford Airport Auth.*, 206 N.C. App. 192, 197, 696 S.E.2d 559, 563 (2010). "The presence or absence of justiciable issues in pleadings is, however, a question of law that this Court reviews de novo." *Id.* In addition, because, at common law, parties are responsible for paying the costs of their own attorneys, statutes "awarding attorneys fees to prevailing parties are in derogation of the common law and therefore must be strictly construed." *McLennan v. C.K. Josey, Jr.*, 247 N.C. App. 95, 98, 785 S.E.2d 144, 147 (2016).

Applying these standards, we begin by examining whether Appellants raised any justiciable issues in their filings with the trial court. This Court defines a "justiciable issue" as one that is "real and present, as opposed to imagined or fanciful." *Id.* at 98, 785 S.E.2d at 148. This might be a suitable standard when assessing, say, factual allegations in a complaint. It is a rather bizarre standard in a case like this

one: Which attempts to intervene or substitute parties in a family law case are "real" and which are merely "imagined or fanciful"?

A better standard in these scenarios is whether there was any arguable basis in law or fact to seek to intervene or substitute parties. But we need not undertake to refine our jurisprudence on this issue because of a separate provision of Section 6-21.5 stating that a "party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees." N.C. Gen. Stat. § 6-21.5.

This Court repeatedly has applied this provision to bar attorneys' fees under N.C. Gen. Stat. § 6-21.5 when litigants made good faith arguments in areas where there was evolving legal authority over time. *See*, *e.g.*, *K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989). That is precisely what occurred here.

The general rule in these child custody proceedings is that the death of one of the parents involved in the custody dispute causes the action to abate. *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995). But over time, this Court steadily has created exceptions to this general rule. Importantly, one of those exceptions is that, in certain scenarios, an action does not abate when grandparents have a pending action for custody or visitation and the parent with primary custody dies. *Rivera v. Matthews*, 263 N.C. App. 652, 655, 824 S.E.2d 164, 166 (2019).

Appellants' legal argument below was a good faith request for an extension of that doctrine. Appellants reasoned that, although the trial court had not yet ruled on the grandparents' motion to intervene, by filing that motion, the grandparents secured standing to pursue a ruling on that issue and, thus, the trial court did not automatically lose jurisdiction over the custody action upon the death of Ms. Snell.

This is not a frivolous or bad faith argument given the evolution of our case law. *Compare McDuffie v. Mitchell*, 155 N.C. App. 587, 590, 573 S.E.2d 606, 608 (2002), *with Sloan v. Sloan*, 164 N.C. App. 190, 195, 595 S.E.2d 228, 231 (2004), *and Rivera*, 263 N.C. App. at 655, 824 S.E.2d at 166. Because the Appellants' argument was "supported by a good faith argument for an extension, modification, or reversal of law," the trial court was barred by law from awarding attorneys' fees under N.C. Gen. Stat. § 6-21.5.

Conclusion

We reverse the trial court's order.

REVERSED.

Chief Judge McGEE and Judge COLLINS concur.

Report per Rule 30(e).