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THE WEEK'S OPINIONS

Criminal Practice

Search & Seizure - Warrant - Affidavit - Trash at Curb - Origin

Even though police officers found marijuana plants in a trash bag at the curb in front of the defendant's house, since there were no documents in the trash bag linking it to the house or the defendant, and since there was no evidence establishing how the trash bag got to its location in front of the defendant's house, the marijuana plants in the trash bag did not supply a basis for the magistrate to issue a search warrant for the house, concludes the N.C. Court of Appeals. *State v. Sinapi.* (Lawyers Weekly No. 04-07-0604, 22 pp.) 17 NCLW 0222 .... page 14.

Criminal Practice

Assault With a Deadly Weapon - First Impression - Dog as Weapon

Where the defendant escaped from police officers, ran into his sister's backyard, pushed his sister's dog towards a pursuing officer and told the dog to bite him, and where the dog did bite two officers before one of the officers shot the dog, there was sufficient evidence to go to the jury on the issue of whether the defendant used the dog as a deadly weapon, holds the N.C. Court of Appeals. *State v. Cook.* (Lawyers Weekly No. 04-07-0602, 11 pp.) 17 NCLW 0224 .... page 16.

Grandparents Could Seek Visits After Dad's Death

By ERTEL BERRY
Legal Editor

The paternal grandparents of a Harnett County girl had standing to sue for visitation, even though the child's father had died and the mom had permanent custody, the Appeals Court held May 4.

Grandparents are usually barred from seeking visitation with a grandchild if there's no ongoing custody battle and the child's family is intact, albeit with a single parent. Case law also says that a trial court loses jurisdiction over custody and visitation issues if one of the parties dies.

Daughtry

Citing those jurisdictional rules, the mother in *Sloan v. Sloan* (North Carolina Lawyers Weekly No. 04-07-0609, 10 pages) moved to dismiss the grandparents' visitation claim, but a trial judge refused. Although the grandparents weren't originally parties in the custody action, they became de facto parties under two orders entered before the dad died, the trial judge said.

- In the mom's permanent custody order, the dad and his parents were given the right to telephone the child twice a week for 30 minutes.
- The father and his parents had also been given temporary custody of the girl for a month before the mother was granted permanent custody.

The Appeals Court affirmed, saying those orders took the case outside the

■ Continued on PAGE 3

Laundry Gets $409,000 Verdict For Rust In City Water Line

A Fayetteville laundry's claim that the wall with a

Verdicts &

State Bar Again Proposes Limits On Mailings To Accident Victims

By MICHAEL DAYTON
Editor

A proposed State Bar rule that would place new limits on targeted mailings to accident victims is again up for public debate.

The Bar council has agreed to publish proposed amendments to ethics Rule 7.3. If approved, the changes would ban targeted mailings to accident victims and their relatives within 30 days of an accident or death.

■ Text of proposed rule, page 4.

The 30-day restriction is intended to "delay delivery of a direct mail communication to a time when the recipient's ability to make a reasoned decision about legal representation is less likely to be impaired by a vulnerable emotional or mental state," according to an accompanying comment.

A similar ban was approved by the Bar council in 1996 but withdrawn before the state Supreme Court gave it a final okay.

"The impetus for the rule was concern expressed to us by Sen. [Tony] Rand, who had written to [Bar presi-

Grandparents Could Seek Visits After Dad's Death

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general rules for grandparents.

"[W]hile it is clear that statutory authority and case law would support [the mom's] contention if the issue of grandparent visitation and/or custody had been raised for the first time when [the grandparents] filed their motions, such was not the case here because the trial court had already awarded temporary custody and visitation to them in previous orders," said Judge Robert Hunter.

Chief Judge John Martin and Judge Alan Thornburg concurred in the decision.

"I think this case carves out a new little niche in the law," said the grandparents' attorney, Parrish Hayes Daughtry of Dunn. "Although the grandparents in this case had not formally been made parties, they had been ordered to do certain things in previous orders and had joint temporary custody with their son. That was the difference between this case and others addressed by the courts when one of the parents is dead."

'Although the grandparents in this case had not formally been made parties, they had been ordered to do certain things in previous orders and had joint temporary custody with their son. That was the difference between this case and others addressed by the courts when one of the parents is dead.'

— Dunn attorney Parrish Hayes Daughtry

Dunn attorney Cecil Jones, who represented the mother, said "it's hard for me to see how the court distinguished this from previous cases."

Jones said his client couldn't have challenged the temporary custody order relied on by the Appeals Court.

"The court says those orders weren't appealed, but you can't appeal temporary custody orders," Jones said. "That was bewildering to me."

Facts

In January 2001, the father in *Sloan* sought temporary and permanent custody after the mom left him and took their child to Washington state. In August 2001, a Harnett County trial judge set out a schedule for temporary custody over the following two months. During the first month, the dad and "the paternal family of the minor child" had custody. During the next month, the mom "and the maternal family of the minor child" had custody.

The judge also ordered a study of the parties' homes, as well as the home of the paternal grandparents. The grandparents lived close to their son, had a loving relationship with their granddaughter, and would be helping care for her.

In October 2001, the court gave permanent custody to the mom but said the dad "and/or his parents" could telephone the child two times a week for 30 minutes.

However, the father was killed on Sept. 26, 2002. After his death, his parents complained that they were denied "telephonic contact" with their granddaughter on six occasions. In a "Motion to Intervene, Motion to Show Cause, and Motion to Modify Previous Order," they asked the court to make them formal parties in the custody case and requested the mom be held in contempt for cutting off their phone contacts. They also sought expanded visitation rights.

The mom moved to dismiss the motions on several grounds, including the grandparents' alleged lack of standing to intervene.

The trial court disagreed. He allowed the grandparents to intervene because they "had actually been made de facto parties to the child custody action when they were awarded temporary custody and telephonic visitation in the previous orders before plaintiff's death."

The court also found the mom in contempt and expanded the grandparents' visitation based on a substantial change in circumstances.

The mother appealed.

Ruling

The Appeals Court affirmed.

Grandparents have standing to sue for visitation in limited circumstances set out in several statutory provisions, the court said.

Among them is G.S. § 50-13.1(a), which says a grandparent may institute an action for custody of a grandchild. A grandparent is not entitled to visitation, under that provision, when there is no ongoing custody proceeding and the grandchild's' family is intact, the Appeals Court held in *Montgomery v. Montgomery*, 136 N.C. App. 435, 524 S.E.2d 360 (2000).

G.S. § 50-13.5(j) also allows a grandparent to seek visitation "in any action in which the custody of a minor child has been determined, upon a showing of changed circumstances...."

The mom in *Sloan* argued the grandparents lacked standing to seek visitation under G.S. § 50-13.1(a) because there was no ongoing custody proceeding and the child's family — with the mom as a single parent — was intact.

The trial court also lost jurisdiction on the visitation issue after the child's father died, the mom said, citing *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995). In that case, the Supreme Court held trial courts retain jurisdiction over custody and visitation "until the death of one of the parties."

Judge Hunter rejected both arguments because the trial court had already awarded temporary custody and telephonic visitation to the grandparents in its previous orders.

Those orders were entered in the underlying custody dispute before the father died, the court said.

"The trial court was well within its discretion to issue those orders ... and defendant never appealed either order resulting in each becoming a standing order of the court.

"Moreover, after a trial court has awarded custody to a person who was not a party to the action or proceeding, this court has held that 'it would be proper and advisable for that person to be made a party ... to the end that such party would be subject to orders of the court," wrote Judge Hunter.

"By filing a motion to intervene in the matter, intervenors were simply requesting to be formally recognized as parties to a child custody action in which they had already been awarded visitation rights," Judge Hunter said.

Thus, it was proper to grant their intervention motion even after the mom was awarded permanent custody and the dad had died, the court said.

— Questions or comments may be directed to eberry@nc.lawyersweekly.com.

No Job Accommodation Required Under REDA

■ Continued from PAGE 1

his medications, UPS retained him in non-driving jobs until 1997, when he was terminated.

In February 1999, the company rehired the plaintiff as a car wash fueler, which required him to pump diesel fuel into UPS vehicles. While performing his job in August 2000, he suffered another seizure and spilled fuel.

The plaintiff's doctor released him to return to work but physicians selected by UPS said he shouldn't work at heights, with hazardous materials, or around water. He should also be limited to lifting objects less than 30 pounds, the UPS doctors said.

Under a collective bargaining agreement, another doctor was selected to determine the plaintiff's capabilities. He essentially agreed with the UPS physicians. The plaintiff's own doctor then reversed his opinion, saying his exposure to diesel fuel could have triggered his seizures.

On Sept. 10, 2000, the plaintiff filed a comp claim which alleged his exposure to diesel fumes, plus job stress, was a significant factor in his August 2000 seizure.

UPS considered various other positions at the company but ultimately decided none met the plaintiff's medical restrictions. The company notified the plaintiff of its decision and inquired if any accommodations would enable him to return to work. The plaintiff didn't respond to the company's letter, the opinion states.

The plaintiff said he didn't return to work after August 2000 because UPS didn't identify a job for him. Two months later, he filed an employment discrimination complaint against UPS. Upon receiving a right-to-sue letter, he filed a REDA claim under G.S. § 95-241(a)(1a), alleging the company's refusal to return him to work was retaliation for the comp filing.

A trial judge granted summary judgment for UPS. The plaintiff appealed.

The appeals panel affirmed, saying the company's failure to return the plaintiff to work "was the result of his physician's recommendations and plaintiff's own statements, not an adverse employment action."

Because REDA doesn't have an accommodation requirement, the court said it didn't have to address the plaintiff's argument that the failure to return him to a different job violated the statute.

The plaintiff had not been discharged or suspended, the court said. The only alleged adverse action was the failure to return him to work.

"UPS's attempts to identify a position for plaintiff that met all of his medical restrictions demonstrate a lack of retaliatory intent and plaintiff has offered no circumstantial evidence otherwise," said Judge Martin.

— Questions or comments may be directed to eberry@nc.lawyersweekly.com.

PROFESSIONAL ANNOUNCEMENT

BLANCHARD, JENKINS, MILLER & LEWIS, P.A.

AND

M. GRAY STYERS, JR.

FORMERLY A PARTNER AT KILPATRICK STOCKTON LLP

ANNOUNCE THE MERGER OF THEIR PRACTICES TO FORM

BLANCHARD, JENKINS, MILLER, LEWIS & STYERS, P.A.

AND ALSO ANNOUNCE THAT

SENATOR ERIC M. REEVES

WILL JOIN THE FIRM AS OF COUNSEL

THE FIRM HAS RELOCATED ITS OFFICES TO

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THE FIRM WILL CONCENTRATE ITS PRACTICE ON CIVIL LITIGATION, ADMINISTRATIVE LAW, PERSONAL INJURY, MEDICAL AND NURSING HOME NEGLIGENCE, ZONING/LAND USE MATTERS, UTILITIES, GOVERNMENTAL RELATIONS, CRIMINAL DEFENSE AND APPELLATE PRACTICE.

APRIL 15, 2004

// GENERAL PRACTICE

NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

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The Chair's Comments

THE NEW YEAR MARKS THE MIDPOINT IN a year that has been both rewarding and challenging for the General Practice Section. I am honored to serve as your chair during the tenure of former section chair, Hank Van Hoy, as president of the North Carolina Bar Association.

PAULA GREENE

Hank's leadership and continued contributions to our section are a source of pride for our members. Additionally, many thanks to Robert Campbell, past chair and newly elected NCBA Board of Governors member, for his exemplary dedication, leadership and continued service to our section and the NCBA Board of Governors. The efforts of these individuals and many others have been instrumental in the accomplishment of many of our section goals. Thanks to you all.

Before highlighting this year's objectives, permit me to recognize several other individuals and recount several memorable section events. In August, the General Practice, Solo and Small Firm Section received the national GP Link Project of the Year Award for its North Carolina Habitat for Hu-

See **Comments** *page 2*

Can a Duly Executed Lost Will Operate as a Revocation of a Prior Will?

BY PARRISH HAYES DAUGHTRY

PURSUANT TO N.C.G.S. SECTION 31-5.1, A written will may be revoked by a subsequent written will executed in accordance with the general statutes. There must be evidence of the subsequent will having revoking language (for example, the standard "I hereby revoke all wills and codicils previously made") and that it was executed with the formalities necessary to make it a valid will. The necessary formalities are listed in Section 31-3.3: written, signed by testator and attested by two witnesses

When a will is missing at the testator's death, or is lost, it is presumed to have been destroyed by the testator with the intent of revoking the instrument. Absent any proof to the contrary and if no later instrument is found, then intestacy results, even if an earlier executed instrument is found. This is because the mere revocation of a subsequently written will does not revive a previously executed will.

Pursuant to N.C.G.S. Section 31-5.8, the only way a revoked will can be revived is by a re-execution of the revoked will. Mere revocation alone does not revive a previous will.

In this case, there was clear evidence that two wills were executed: the 1984 document originally offered for probate and the 1996 document the caveators contended revoked the 1984 document. The 1996 document was never offered into evidence because at the death of the testator the 1996 document could not be found.

Sworn statements were offered to prove the existence of the 1996 document, including statements of the drafting lawyer and his secretary, that showed the following facts: a self-proving will was executed in 1996, it had a standard revocation clause, and it was completely read to and signed by the testator, with two witnesses, only one of which could be remembered. This 1996 document was sent to the testator before his death but could not be found after his death.

The executor offered the 1984 will for probate, which was the only document that was found. There was no evidence presented by the executor-propounder controverting the existence of the 1996 document other than that it

See **Will** *page 3*

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GENERAL PRACTICE

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Comments *from page 1*

manity Form Book.

Former section chair and project chair Malvern King and Legal Assistants Division liaison Kaye Summers traveled to Chicago to accept the award. Martha Odom, vice chair, prepared and submitted our successful application. Our Hall of Fame event, held at the Biltmore Forest Country Club, resulted in the induction of six new members into the General Practice Hall of Fame. Thanks to Jane Weathers, director of sections and divisions, and Carolyn Winfrey, project chair, for the hard work that made this event so memorable.

Regarding the Hall of Fame, please note the application form reprinted on page 7 of this newsletter. Applications are now being accepted for the next Hall of Fame, and the application deadline is Feb. 4, 2002. The Hall of Fame Banquet is scheduled to be held in June at the Landfall Country Club in Wilmington in conjunction with the 2002 Bar Association Annual Convention.

The popularity of this event continues to grow, and the recognition of these truly outstanding general practitioners is always inspirational. If you have a nominee in mind, please complete and submit an application to the Bar Center. Contact Robert Campbell if you have questions.

Regarding other objectives and ongoing events: Charles Baldwin, CLE chair, is working on ideas for a "Practice Before the Clerk" manual and seminar that is tentatively scheduled for Oct. 5, 2002. Vince Durham continues to gather the last outstanding manuscripts for our update of the three-volume Desk Book set.

Additional copies of the Habitat for Humanity Form Book are now available, due to grant monies made available from the NCBA Endowment Fund for this purpose. Dawn Battiste, project chair, reports that the new edition of the Small Law Office Resource Manual (SLORM) is available and selling well. For additional information on SLORM, contact Bill Schoeffler with the Bar Association

Our primary goals continue to be to assist general practitioners in practice every day and to publicize the resources available to general practitioners through our section and the Bar Association in general. We are also seeking to diversify the makeup of our section council and recruit new section council members, so please contact me, Vice-Chair Martha Odom, or Nominations Chair Robert Campbell if you are interested.

Ed Adams has graciously agreed to serve as newsletter chair this year, so please contact Ed if you have an idea for an article for a future newsletter or if you wish to submit an article for a future issue.

Finally, I look forward to hearing your thoughts and suggestions for our section, and hope you will share them with me by calling me at (910) 872-0555 or e-mailing me at *phg@intrstar.net.* ■

Join the NCBA Lawyers in the Schools Committee!

We are seeking volunteers from your section to serve as committee members, county coordinators and school facilitators. If you have an interest in the education of our youth and would like to find out more, please contact either committee co-chair Nan Hannah, (919)510-8585 or *nehannah@vanattorneys.com*, or co-chair Judge Linda McGee, (919) 733-4228 or *mgj@coa.state.nc.us*. You can also sign up at *www.ncbar.org/stud_teach/lis/volunteer_reg.asp*.

Lawyers in the Schools

Will *from page 1*

had not been produced.

In order for the executor to probate the 1984 document, he would have had to do one of two things: either disprove the existence of a duly executed revoking instrument (the 1996 will with revocation clause) or produce an instrument which revived the 1984 will with the necessary formalities. Under North Carolina statutory and case law, there was and is no other way for the 1984 will to be probated.

In order for the issuance of a peremptory instruction to be avoided, the propounders would have had to produce sufficient evidence to allow reasonable minds to conclude that the presumed fact does not exist. Here the presumed fact was that the 1984 will was revoked.

The propounders presented absolutely no evidence to refute the existence, or to even cast doubt on the existence, of the 1996 revoking instrument. Thus, the caveators were entitled to the peremptory instruction that the 1984 will was revoked because no evidence was presented; much less any that would allow a reasonable mind to conclude that the document had not been revoked.

The caveators in this case were never trying to probate the 3996 document. The propounders contended, but offered no legal authority, that the caveators were required to produce the 1996 writing that revoked the 1984 will. However, the caveators are only required to show that a second instrument was created, duly executed and that it revoked the first will.

The caveators met this burden and the propounders produced no evidence to the contrary, therefore summary judgment was correctly granted in favor of the caveators.

Fortunately for the caveators, the sworn statements of the lawyer who drafted the 1996 will and his secretary who typed it remembered not only the due execution of the document but such details that there was almost no way that the propounder could possibly deny the existence of the document.

Their statements even contained the specific language of the revocation clause in the 1996 document and the fact that the testator not only understood the revoking language but that he wanted it in the 1996 document.

The propounder in this case maintains still, in his recently filed but yet to be decided Petition for Writ of Certiorari, that an attested written will can only be revoked by a writing. The caveators fully agree with this statement. Our statute clearly states a written will can only be revoked by a subsequent written will or other written revocation duly executed.

The question then becomes how to prove a writing. The propounder would have the only competent evidence of a writing to be the document itself, but that is not the law. As the Court of Appeals pointed out, there must be evidence presented that the subsequent document was duly executed, and to revoke, that it contained such a clause.

In addition, pursuant to N.C.G.S. Section 31-5.1, to establish the revocation of a will by a subsequent writing it is necessary to prove only that the revocation was duly executed. Clearly this can be proven in other ways than by producing the revoking instrument. The courts of this state long ago, even before the era of self-proving wills such as this 1996 document, recognized that although the law makes two subscribing witnesses to a will indispensable to its formal execution, its validity does not hinge solely upon the testimony. **In re Redding's Will**, 216 N.C. 497, 498, 5 S.E.2d 544, 545 (1939).

The court in **Redding** went on to say that if witnesses forget or deny their attestations, the due execution and attestation of a will should be found on other credible evidence and so the law provides. *Id.* Here the caveators presented clear and convincing evidence of a duly executed revoking document. North Carolina case law is clear, in that revocation of a will by a subsequent writing must be proven to have been executed in the same manner as the original paper writing. Here, the caveators more than met that burden.

The caveators do not deny that they cannot produce the document, however, the petitioners cannot produce any instrument that revives the 1984 document either. Given the valid revocation of the 1984 will and the lost 1996 will, the only possible result in this case is for the estate to be distributed by the intestacy law of North Carolina.

The ultimate question in this case is can a lost will, or written duly executed instrument, revoke a prior will. The clear answer to this question is yes. It would be extremely bad public policy to allow a lost document, which is proven to have been duly executed, to not revoke a previous will.

The potential for fraud and overreaching would be tremendous were a proven duly executed revoking instrument prevented from doing just that. To hold otherwise would allow wills to conveniently get lost so that a previous will could be probated when it would be more beneficial to the person seeking to probate it, without that will ever having been properly revived by due execution.

The courts of this state are clear in holding that the fact of possession of the will by the testator before his death and its unexplainable absence after his death raises the presumption that the will has been destroyed by the testator with the intent to revoke. **In re Will of Jolly**, 89 N.C. App. 576, 577, 366 S.E.2d 600, 601 (1988).

Therefore, both the 1984 will and the 1996 will that revoked the 1984 will are revoked and intestacy is the result under the laws of this state. Under statutes such as N.C.G.S. Section 31-5.8 (1999) making re-execution essential to the proper revival of a revoked will, the mere loss or revocation of a subsequent will does not revive a prior will, even though the testator may have so intended. **In re Will of Farr**, 277 N.C.86, 91, 175 S.E.2d 578, 581(1970). When it is proven that a revocation was duly executed all previous wills are revoked unless subsequently revived by due execution. ■

DAUGHTRY IS AN ATTORNEY WITH THE FIRM HAYES, WILLIAMS, TURNER AND DAUGHTRY IN DUNN.