

SUPREME COURT OF NEBRASKA

In re Estate of Panter, 187 Neb. 615

193 N.W.2d 279 (1971) · No. No. 37977 · Decided December 30, 1971

SUMMARY

The Supreme Court of Nebraska affirmed dismissal of a petition seeking to vacate a decree admitting a will and codicil to probate. The court held that, although the petitioner alleged undue influence and misleading conduct, he failed to plead facts showing diligence because the probate notice identified both the will and codicil and should have prompted further inquiry.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Boslaugh, Justice; White, C.J.; Spencer, J.; Boslaugh, J.; Smith, J.; McCown, J.; Newton, J.
JURISDICTION	Nebraska
DECIDED	December 30, 1971
DOCKET	No. 37977
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the district court's order sustaining a general demurrer to Flint's pleading seeking to vacate the decree admitting Agnes V. Panter's will and codicil to probate.
STANDARD OF REVIEW	Review of the sufficiency of a pleading challenged by general demurrer; the court accepts well-pleaded factual allegations as true but requires the pleading to state facts showing entitlement to relief.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion
PARTIES	Robert Wallace Flint v. Byron D. Panter

TOPICS

- probate procedure
- will contests
- estate litigation
- pleadings
- appellate procedure

PRACTICE AREAS

- Probate
- Estate litigation
- Civil procedure
- Appellate procedure

QUESTIONS PRESENTED

1. Whether a petition to vacate a decree admitting a will to probate must allege that the petitioner's failure to obtain a just decision was not caused by the petitioner's own fault or negligence.
2. Whether notice that a will and codicil would be offered for probate imposed a duty of inquiry sufficient to defeat Flint's claim of fraud or undue influence based on his lack of knowledge of the 1966 instruments.
3. Whether Flint's pleading was sufficient to withstand a general demurrer.

HOLDINGS

1. A party seeking to vacate a judgment or decree must plead not only that the decree was obtained through the adversary's fraud, but also that the failure to obtain a just decision was not attributable to the petitioner's own fault or negligence.
2. Notice that a will and codicil are being offered for probate is sufficient to put an interested person on inquiry concerning the contents or changes to the testamentary instruments.
3. *Johnson v. Richards* does not save Flint's pleading because, unlike the petitioners in *Johnson*, Flint alleged no circumstances demonstrating diligence or explaining his failure to investigate.

KEY QUOTATIONS

"It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary. The petition must also show that the failure to obtain a just decision is not attributable to his own fault or negligence." (281)

"The circumstances in this case were sufficient to put the petitioner on inquiry after receiving the notice of hearing." (281)

FACTUAL BACKGROUND

Agnes V. Panter died in 1967, leaving a son, Byron D. Panter, and a grandson, Robert Wallace Flint. Her 1966 will and codicil were admitted to probate, with Byron as executor and sole beneficiary. Flint sought to vacate the probate decree, alleging undue influence and asserting that he had believed the instrument offered was an earlier will under which he would receive a share of the estate. Flint had received notice that both a will and a codicil would be offered for probate, but he did not allege circumstances showing that he made further inquiry or otherwise exercised diligence.

PROCEDURAL HISTORY

Agnes V. Panter's will and codicil were admitted to probate in the Saline County Court. Flint later petitioned the county court to vacate the probate decree, alleging undue influence and that he had been misled about the instruments being offered for probate. The county court sustained a general demurrer and dismissed the proceeding. After Flint appealed to the district court and filed an answer to the executor's petition for final settlement, the district court sustained a general demurrer to that pleading and entered judgment for Panter. The Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Gleason v. Poore, 167 Neb. 312, 92 N.W.2d 705
- In re Estate of Reikofski, 144 Neb. 735, 14 N.W.2d 379
- Miller v. Estate of Miller, 69 Neb. 441, 95 N.W. 1010
- Owens v. Doyle, 152 Conn. 199, 205 A.2d 495, 11 A.L.R. 3d 1006
- Johnson v. Richards, 155 Neb. 552, 52 N.W.2d 737

OPINION

BOSLAUGH, J.

193 N.W.2d 279 (1971) 187 Neb. 615 In the Matter of the ESTATE of Agnes V. PANTER, Deceased. Robert Wallace FLINT, Appellant, v. Byron D. PANTER, Appellee. No. 37977. Supreme Court of Nebraska. December 30, 1971. *280 Woods, Aitken, Smith, Greer, Overcash & Spangler, Richard L. Spangler, Jr., Lincoln, Jack Craven, Crete, for appellant. Gerald J. Hallstead, Crete, for appellee.

Heard before WHITE, C. J., and SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ. BOSLAUGH, Justice. This is an appeal in an action to vacate a decree admitting a will to probate. Agnes V. Panter died on July 13, 1967. She left surviving her Byron D. Panter, a son, and Robert Wallace Flint, a son of a deceased daughter. Her will dated January 26, 1966, and a codicil dated May 13, 1966, were admitted to probate in the county court of Saline County, Nebraska, on August 9, 1967.

Byron D. Panter is the executor and the sole beneficiary under the will and codicil. On November 4, 1968, after a petition for final settlement had been filed by the executor, Robert Wallace Flint filed his petition in the county court to vacate the decree admitting the will and codicil to probate.

The petition to vacate alleged that the will and codicil were the result of undue influence practiced upon the deceased by Byron D. Panter; that Robert Wallace Flint, the petitioner, had been informed by the deceased, before she entered the hospital in 1965, that she had made a will leaving one-half of her estate to the petitioner and the other one-half to Byron D. Panter for life with the remainder to the petitioner; that the petitioner did not know about the will and codicil executed in 1966 until after they had been admitted to probate; that the petitioner "believed, and was lead (led) to believe" that the will being offered for probate was the previous will of the deceased; and that the petitioner was misled by the failure of Byron D. Panter and his attorney to inform the

petitioner that the will and codicil being offered for probate had been executed by the deceased in 1966.

On February 3, 1969, the county court sustained a general demurrer to the petition to vacate and dismissed the proceedings. The petitioner filed a notice of appeal to the district court on February 13, 1969. A transcript from the county court was filed in the district court on February 28, 1969.

On July 28, 1969, Byron D. Panter moved to dismiss the appeal because of the failure of the petitioner to plead. This motion was overruled, and on August 12, 1969, the petitioner filed an "Answer to Petition for Final Settlement" which contained allegations similar to those contained in the petition to vacate filed in the county court. A general demurrer to the answer was sustained on September 14, 1970.

The record shows that the petition for probate was filed in the county court on July 19, 1967. On the same day the court ordered that the petition be heard on August 9, 1967, and that notice be given as required by law. A notice of hearing was published as required by section 30-217, R.R.S.1943.

On July 22, 1967, the attorney for Byron D. Panter, the proponent, filed his affidavit in the county court stating *281 that he had mailed a copy of the notice of hearing to the petitioner as required by section 25-520.01, R.R.S.1943.

The notice recited that the petition for probate of the will and codicil of the deceased would be heard on August 9, 1967. The petitioner does not contend that he did not receive a copy of the notice of hearing. It is not sufficient for a party seeking the vacation of a judgment or decree to show that it was obtained by the fraud of his adversary.

The petition must also show that the failure to obtain a just decision is not attributable to his own fault or negligence. *Gleason v. Poore*, 167 Neb. 312, 92 N.W.2d 705; *In re Estate of Reikofski*, 144 Neb. 735, 14 N.W.2d 379; *Miller v. Estate of Miller*, 69 Neb. 441, 95 N.W. 1010.

The petitioner in this case had notice that, in addition to the will, a codicil was being offered for probate. This was notice that the will which was being offered for probate had been changed in some particular. The distinguishing feature of a codicil is that it is an addition to or a qualification of a will. *Owens v. Doyle*, 152 Conn. 199, 205 A.2d 495, 11 A.L.R.

3d 1006. A codicil may alter, enlarge, or restrain the provisions of a will. 94 C.J.S. Wills § 1b, p. 678. The circumstances in this case were sufficient to put the petitioner on inquiry after receiving the notice of hearing. A person exercising due diligence would have made further inquiry to determine what was being offered for probate.

In re Estate of Reikofski, supra; *Miller v. Estate of Miller*, supra. The petitioner relies upon *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737, in which a petition to set aside a decree

admitting a will to probate was held sufficient as against a demurrer.

In the Johnson case the petition alleged that Richards had sent a copy of the will to the petitioners a few days before the hearing and had advised them that it was in the process of being probated. The petitioners then wrote to Richards "immediately" requesting information as to the date of hearing. Richards did not answer the request. These circumstances were held to exempt the petitioners from a conclusion of negligence and an absence of diligence.

There are no circumstances alleged in this case that show diligence on the part of petitioner. The order of the district court sustaining the demurrer to the "answer" of the petitioner was correct. The judgment is affirmed. Affirmed. CLINTON, J., participating on briefs.