FILED
JUN 28 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF THE ESTATE OF HERTHA GEHRING, Deceased,	)	
WILLIAM L. GEHRING, ADELE DeCONNICK and ZOLA FRIEDRICHSEN,	)	Filed June 28, 1983
Plaintiffs-Appellants,	)	
vs.	)	
ARLENE SOVINSKI JONES and LOUIS GEHRING,	)	3-105 / 2-69035
Defendants-Appellees.	)	

Appeal from Crawford District Court - D. M. Pendleton, Judge.

Plaintiffs appeal from the district court's summary judgment entered against them in a will contest. AFFIRMED.

Stephan M. Englehardt and Morris C. Hurd, Denison, Iowa, for plaintiffs-appellants.

R. E. Franck and D. R. Franck of Franck, Mundt, Nepper & Franck, Denison, Iowa, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson, Schlegel and Hayden, JJ.

Snell, J., takes no part.

PER CURIAM

Plaintiffs appeal from the district court's summary judgment entered against them in a will contest. The plaintiffs claim that the trial court erred: 1) in refusing to consolidate this case docketed in probate with an identical case docketed as a law action; 2) in abating this action to set aside the will and in doing so without giving notice to the parties that it intended to do so on defendant's motion for summary judgment where no party requested such an abatement; 3) in finding that plaintiffs' petition filed on November 30, 1981, was barred by the statute of limitations; and 4) in finding that plaintiffs' motion to recast and amend was mooted by the granting of the motion for summary judgment. Plaintiffs also claim that they were entitled to a jury trial on their will contest because they allegedly timely demanded such a trial in connection with the second probate petition. We affirm.

Hertha Gehring died on May 6, 1981. Her will dated July 23, 1975, was admitted to probate the next day. On May 27, 1981, the second notice to the creditors was published. An affidavit of publication indicated that the date of the last publication was on May 28, 1981, but an amended affidavit, filed on June 8, 1982, indicated that the date of last publication was May 27, 1981. In addition, the newspaper notice itself indicated that May 27 was the last date of publication. On June 10, 1981, plaintiffs filed a petition to set aside the will. The petition was filed in the probate file and was also docketed as a law action (Law No. 25821). The original notice and return of service were filed in the law action and did not accompany the petition filed in probate. The defendants filed an answer to the petition in the law action on June 22, 1981. No demand for a jury trial was filed in the law action.

The plaintiffs filed a second and identical petition to set aside the will in probate and demanded a jury trial on November 30, 1981. On December 16, 1981, the defendant filed an answer, denying the material allegations of the petition and

affirmatively stating that the petition was filed after the statute of limitations had run under the provisions of Iowa Code § 633.309 by not having been filed within six months of the second publication of notice. The defendants also filed a motion to dismiss claiming that the petition was not timely filed. On May 13, 1982, the trial court entered an order denying the motion to dismiss. On May 17, the defendants filed a motion for summary judgment, asserting that dismissal was required by section 633.309 and that the action constituted impermissible claim splitting because it was identical to another action which was pending in the court at the time the action was filed.

On May 24, 1982, the plaintiffs filed a motion to recast and to amend petition to assert that the date of the second publication of notice of the appointment of executor and to creditors was published on May 28, 1981, as shown by the first affidavit of publication and alleging additional grounds for contesting the will filed in probate. The plaintiff also filed a motion for consolidation with Law No. 25821 on the basis that "both actions contain common questions of law and facts which can be conveniently tried together." On June 3, 1982, the defendants filed resistances to these motions on the basis that the second action was barred by the statute of limitations and the action constituted impermissible claim splitting. On June 7, 1982, the plaintiffs filed a resistance to the motion for summary judgment asserting that the action was not barred by § 633.309 because the action was filed within six months of the second notice of publication to creditors as shown by the affidavit of publication which indicated that the second publication was made on May 28, 1981.

On July 15, 1982, the trial court entered a ruling on the motions. In regard to the motion to consolidate, the trial court noted that the petition in the probate proceedings and in Law no. 25821 were identical and that the proper procedure in such a case was for one action to be abated and not for consolidation. On this basis, the trial court overruled the motion to consolidate. In regard to the motion

for summary judgment, the trial court concluded that the petition docketed in probate was barred by Iowa Code § 633.309 because the action was not filed within six months of the date of the second publication of notice to creditors as shown by the amended affidavit. On this basis the trial court granted a summary judgment for the defendant and dismissed the petition filed on November 30, 1981. On the basis of the granting of defendants' motion for summary judgment, the trial court concluded that the motion to recast and amend was moot and overruled the motion. The court stated that its ruling had no impact on Law no. 25821 which was still pending. Plaintiffs brought this appeal.

We agree with the trial court that plaintiffs' November 30 petition to set aside the will is barred by the statute of limitations. Iowa Code § 633.309 provides in part:

> An action to contest or set aside the probate of a will must be commenced in the court in which the will was admitted to probate within six months from the date of second publication of notice of admission of such will to probate and not thereafter.

Here, the date of second publication of notice was May 27, 1981. The first affidavit of publication admittedly indicated a second publication date of May 28, 1981. We believe, however, that it was unreasonable for plaintiffs to rely on that date since the newspaper notice itself, reprinted on that first affidavit, clearly shows a second publication date of May 27. To dispel all doubts, an amended affidavit was filed on June 8, 1982, showing that second publication did in fact take place on May 27. The last day to file a petition to set aside this will, therefore, was Friday, November 27, 1981. This petition, filed the following Monday, November 30, is barred by § 633.309.

Our holding on this issue makes it unnecessary for us to consider plaintiffs' remaining issues. We note, as did the trial court, that plaintiffs' petition Law no. 25821, the June 10, 1981, petition to set aside the will, raises the same claims as the November 30 petition and is still pending. Plaintiffs will still have their day in

court. The trial court did not err in finding the November 30 petition barred by the statute of limitations. Its summary judgment is affirmed in all respects.

AFFIRMED.