

IN THE COURT OF APPEALS OF IOWA

No. 0-70 / 88-1633

FILED

APR 24 1990

CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF GAIL F. ALLEN, DECEASED

LEONE ALLEN,

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Claimant-Appellee/Cross-Appellant,

vs.

RICHARD GOVEDNIK,

Fiduciary-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Des Moines
County, John C. Miller, Judge.

The executor appeals a district court order granting Leone's claims in probate, including recovery on a promissory note, subject to the executor's claims against Leone concerning, among other things, 1985 income taxes.

AFFIRMED.

Edward W. Dailey of Edward W. Dailey Law Offices,
Burlington, for appellant.

Michael J. Schilling of Ford Law Offices, Burlington,
for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SCHLEGEL, J.

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The executor of the estate of Gail F. Allen appeals a district court order granting Leone's claims in probate, including recovery on a promissory note, subject to the executor's claims against Leone concerning, among other things, 1985 income taxes. We affirm the district court.

Gail and Leone were both widowed at the time they were married on July 1, 1978. Prior to their marriage, the parties executed several documents. Leone deeded to Gail an undivided one-half interest in her Burlington residence, subject to a reserved life estate in herself. Leone also deeded to Gail a joint life estate in the remaining undivided one-half interest in the property subject to one-half of a then existing mortgage. For value received, Gail executed a promissory note promising to pay Leone \$18,560.49 on June 30, 1979, or at such earlier date as Gail received proceeds from a contemplated sale of his Davenport property. The parties also signed an antenuptial agreement agreeing to waive rights or claims to the property of the other which might arise during their marriage. In October 1978, Gail sold his Davenport property on contract.

On March 2, 1986, Gail died. The Davenport and Burlington contracts remained unsatisfied. As of his death, neither Gail nor Leone had filed their federal or Iowa income tax returns for 1985.

On July 18, 1986, Leone filed claims against Gail's estate for \$64,798.46, including a claim against the proceeds on the sale of the Davenport property. No specific reference to the promissory note was made until December 1986, which was after the period for filing a claim. In December, Leone filed a copy of the note arguing that this substantiated her claim for proceeds. In June 1988, Leone amended her claim to make specific reference to the promissory note. Following trial, Leone was awarded the amount of the promissory note as well as several other claims. The executor recovered a lesser amount from Leone, including an amount for 1985 taxes. No attorney fees were awarded. The executor filed this appeal and Leone filed a cross-appeal.

The executor contends that Leone failed to make a timely claim to recover on the promissory note. He also claims the antenuptial agreement bars any claim on the promissory note. Finally, he challenges the award of the life estate in the one-half interest in the Burlington property.

Leone contends the district court erred by granting the executor's claim for federal and state taxes. She also challenges the trial court's refusal to award attorney fees under the promissory note, and she requests attorney fees on appeal.

The claim was filed in probate. The case was tried in probate to the court as a law action under section 633.33,

Code of Iowa. Knight v. Anderson, 292 N.W.2d 411, 412 (Iowa 1980). We review this case for correction of errors at law. Id. The finding and judgment of the court has the effect of the verdict of a jury and may not be set aside if it finds any substantial support in the record. In re Estate of Green, 227 Iowa 702, 706, 288 N.W. 881, 883 (1939).

The original claim in probate, which was timely filed, clearly referred to the Davenport property. It also referred to the sale of the property subsequent to his marriage to Leone, the fact that a sizable balance remained due in connection with the contract sale, and that the claim is related to or based upon a claimed right or entitlement to the proceeds from the sale of that house. The executor contends this notice was insufficient. The trial court held that the notice was sufficient under notice pleading and we agree.

Iowa is a notice pleading jurisdiction. Peoples Bank & Trust Co. v. Lala, 392 N.W.2d 179, 182 (Iowa 1986). The petition must contain a short, plain statement showing the pleader is entitled to relief. Id. The petitioner need not set forth specific theories of recovery or ultimate facts. Id. All that is required is that petitioner set forth sufficient facts to give the other party "fair notice" of the claim asserted. Id.

The authority listed above applies to causes of action in general. Our case was filed in probate. It has never

been held that claims in probate are subject generally to the rules of pleading which prevail in ordinary litigation. Chariton National Bank v. Whicher, 163 Iowa 571, 578, 145 N.W. 299, 302 (1914). A defect which would render a petition demurrable is not necessarily fatal in the statement of a claim in probate. Id. It is a matter of common observation that these claims are almost universally stated in very general and informal terms, being often prepared without the aid of counsel, and no court thinks of applying the strict and technical rules of the law of pleading as it is observed in ordinary court proceedings. Knight, at 414.

The claim in our case was amended to include the promissory notes as evidence of the debt owed on the Davenport property. No amendment which is germane to a claim as originally stated, which does not destroy the substantial identity of the claim or substitute some other new or different subject of the claimant's demand, will deprive him of the advantage of his original filing. Id. The amendment in our case clearly relates back to the original filing, unless such amendment stated a new cause of action. Id. We do not believe a new cause of action was stated. In Peoples Bank & Trust v. Lala, the court held that failure to mention two promissory notes did not render the pleading insufficient. Specific facts regarding the claim are not necessary in the original pleading. Chariton National Bank v. Whicher, 163 Iowa at 578, 145 N.W. at 303.

The trial court was correct in holding the claim regarding the Davenport property and, hence, the related promissory note was timely filed. The trial court was also correct in ruling that the subsequent amendment related back to the original filing.

The executor also contends the antenuptial agreement executed before the marriage bars Leone's claim based on the promissory note. The antenuptial agreement only bars claims arising during the marriage. The promissory note was executed specifically before the marriage and even before the antenuptial agreement. It also used Leone's previous name. In addition, the clear intent of the parties was not to make this promissory note and then bar any claim against it based on an antenuptial agreement executed a short time later. All of these circumstances show that the antenuptial agreement did not bar Leone's claim.

The executor also claims that Leone is not entitled to a life interest in the undivided one-half interest of the Burlington property. The argument made by the appellant on this issue is extremely unclear. There is also no authority cited in support of whatever argument the executor is making. We do not consider this claim made by the appellant. When no authority is cited on an issue, the issue is considered to be waived. Iowa R. App. P. 14(a)(3); see also Moore v. Vanderloo, 386 N.W.2d 108, 113 (Iowa 1986); Bush v. Iowa Dist. Court, 369 N.W.2d 424, 426 (Iowa 1985).

Leone contends in her counterclaim that she owed no taxes to the estate. The trial court allowed the executor's counterclaim for the taxes based on Leone's improper signing of the tax returns. Leone filed "married filing jointly." In order to file under this status she had to sign her deceased husband's name. This action was clearly the executor's prerogative. 26 U.S.C. § 6013(a)(3). A "married filing separately" return would have benefited the estate to a greater degree and, therefore, the executor should have been allowed to file under that status. The trial court's ruling requiring the reimbursement of certain taxes to the estate was correct.

Leone also claims the trial court should have awarded her attorney fees as required under the promissory note. She also requests attorney fees for this appeal. While the possible award of attorney fees is supported by Iowa Code section 625.22, the Iowa Supreme Court has held notice requirements to apply to any claim for such fees. In Peoples Trust & Savings Bank v. Baird, 346 N.W.2d 1, 3-4 (Iowa 1984), the court held the notice provisions of an earlier version of Iowa Code section 625.22 to apply to the present version of the statute. The request for attorney fees was not raised until two years after the original claim was filed in probate. The executor had notice of the general claim against the Davenport property, however the attorney fees are related specifically to the promissory note of which notice came much later. This was

insufficient to place the executor on notice and the trial court was correct in denying the request. In addition, while we must award attorney fees under the same statute as the lower court, we must also deny them if notice is not provided. The failure of the appellee to properly bring the issue to the attention of the executor precludes us from awarding such fees on appeal.

AFFIRMED.