FILED
NOV 2 9 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

140

WAYNE HARWOOD,)
Plaintiff-Appellant,)
vs.)
SHIRLEY SCHWARTZ,) 8-208
Defendant-Appellee.) 87-861

Appeal from the Iowa District Court for Benton County (No. CL-1733), Thomas L. Koehler, Judge.

Plaintiff appeals from a district court judgment rejecting plaintiff's claim for damages. **AFFIRMED.**

Charles C. Brown, Jr. of the Tom Riley Law Firm, Cedar Rapids, for plaintiff-appellant.

James F. Pickens of Pickens, Barnes & Abernathy, Cedar Rapids, for defendant-appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

Plaintiff-appellant, Wayne Harwood, appeals an order of the district court overruling his motion for a new trial. He further disputes the late settlement fee taxed to him pursuant to Iowa Rule of Civil Procedure 181.4. We affirm.

Mr. Harwood's mother, Eunice, died testate. Her estate was opened, her will admitted to probate, and her daughter, Shirley Schwartz, appointed executor. Eunice was survived by the appellant and his sister, the appellee, Shirley Schwartz.

Mr. Harwood first filed a petition in the probate proceedings asking that his mother's will be set aside on grounds of lack of necessary testamentary capacity and undue influence. A jury demand was filed and not resisted by the appellee.

Wayne then filed the instant case against Shirley Schwartz in her individual capacity and alleged in substance that he and Shirley were children of Eunice, whose will had been admitted to probate, and that Shirley had exercised undue influence by having Eunice's money placed in accounts jointly in the name of defendant (Shirley) and Eunice Harwood. He further alleged that Shirley had a duty to distribute the proceeds of the joint accounts and that she failed to do so. He seeks damages in the amount of $68,000. A jury demand was also filed in this case and not resisted by Shirley.

Both cases were subsequently consolidated. On the morning of trial, Mr. Harwood dismissed without prejudice his action to set aside the will. The appellee then moved that the instant case be transferred to equity. The motion was sustained. Trial to the court was held and resulted in a dismissal of the appellant's petition. Mr. Harwood moved for a new trial on several grounds, one of which was that he was deprived of a trial by jury.

I.

A new trial will be granted to an aggrieved party if there was an "irregularity in the proceedings of the court . . .; or any order of the court" or if "errors of law occur[red] in the proceedings" and if such irregularity or error of law materially affected the aggrieved party's substantial rights. Iowa R. Civ. P. 244(a) and (h). The question then arises whether the appellant was entitled to a trial by jury as he demanded.

Usually, the character of the proceeding (whether to be tried at law or in equity) is determined by the prayer and conclusion of the petition. The Christian Church at Pella v. Scholte, 2 Iowa 27, 29, 2 N.W. 27, 29 (1855). However, in this case, the body of appellant's petition and prayer are inconsistent. The prayer alleges monetary damages. However, the body of the petition sounds as a proceeding to impress a constructive trust, which is equitable in nature. First National Bank in Sioux City v. Curran, 206 N.W.2d 317, 320 (Iowa 1973).

We find the trial court correctly transferred this cause to equity. In addition, although the claim of the plaintiff against his sister seeks money damages, the case was pled in such manner as to bring us to the conclusion that any rights which the plaintiff had to the proceeds of the joint tenancy property (or damages) stems from the mother's probate proceedings. As such, the plaintiff, as a residual legatee under her will, had standing to challenge the joint tenancy property. Although in his pleadings he claims the defendant "had a duty to distribute proceeds of joint accounts" to him, he does not refer us to how or from where this duty springs other than as a residual legatee under his mother's will.

Section 633.33 provides:

> Actions to set aside or contest wills, for the involuntary appointment of guardians and conservators, and for the establishment of contested claims shall be triable in probate as law actions, and all other matters triable in probate shall be tried by the probate court as a proceeding in equity.

Under that section, the plaintiff's action to set aside the will was properly triable at law. That action was dismissed. The instant case, however, is pled in such manner as to be triable in probate as a proceeding in equity. The plaintiff suggests this for he makes reference to his mother's estate in his pleadings and his proof as to property and values centered around the probate inventory.

We find that the district court correctly transferred this matter to equity. Ordinarily, a prayer of a well-constructed petition will serve as a guideline as to whether the case is in equity or at law. However, the body of the petition must be consistent with the prayer in order to state a proper claim upon which such relief may be granted. We affirm the district court's order denying the appellant a new trial.

II.

Appellant also argues that a new trial should have been granted because it was error for the court to entertain appellee's untimely motion to transfer the case to equity the morning of the first day of trial. Appellee failed to object to appellant's jury demand in a timely fashion as prescribed by Iowa Code section 611.9. There may be merit to this contention, but it is not grounds for reversal for the plaintiff has not been prejudiced.

The district court found that the appellant had not met his burden of showing the existence of a confidential relationship and, therefore, dismissed his petition. Under these circumstances, the defendant was entitled to a directed verdict at the close of the plaintiff's testimony even if the case had been tried to a jury. Our review of the record does not reveal rulings on any objections adverse to the plaintiff that would affect this finding of the court whether the case was tried in law or in equity.

Mr. Harwood does not dispute this finding on appeal. We determine that the appellant has not been prejudiced and, therefore, there is no reversible error "where it appears in a trial to the court that the prevailing party would have been entitled to a directed verdict even if the trial had been to a jury." In re Estate of Tomin, 152 N.W.2d 286, 288 (Iowa 1967). Appellant's substantial rights were not materially affected by the court's entertaining Shirley's untimely objection to his jury demand. We affirm the district court's denial of appellant's motion for new trial.

III.

Finally, appellant argues that he should not be taxed $500 late settlement fee pursuant to Iowa Rule of Civil Procedure 181.4 because he vigorously objected to the transfer of the case to equity. The fee pursuant to this rule is assessed for late settlement of a jury trial. Iowa R. Civ. P. 181.4. Appellant, of his own choosing, dismissed the action to set aside the will the morning of trial. This was the only action to which he was entitled a jury. We affirm the trial court's assessment of this fee and its inclusion in court costs against the appellant.

AFFIRMED.