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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

DEAN VANDERLINDEN, Executor of the Estate of W. F. VANDERLINDEN, Deceased,	)	
Plaintiff-Appellee,	)	Filed February 20, 1980
vs.	)	
RICHARD VANDERLINDEN and RICHARD VANDERLINDEN, Executor of the Estate of AGATHA VANDERLINDEN Deceased,	)	310 2-63211
Defendant-Appellant.	)	

Appeal from Warren District Court - M. C. Herrick, Judge.

Defendant appeals from trial court's granting of summary judgment for plaintiff and denying summary judgment for defendant in plaintiff's declaratory judgment action to void a land contract entered into pursuant to a court-authorized conservator's sale of property. - Reversed.

P. F. Elgin & Claire B. Patin, of Elgin, Hoyman & Clogg, Indianola, for defendant-appellant.

E. J. Gallagher, III, & Michael M. Pedersen, of Gallagher, Martin, Keith & Langlas, Waterloo, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from the trial court's granting of summary judgment for plaintiff in a declaratory judgment action brought by plaintiff to set aside a land contract entered into pursuant to a court-authorized conservator's sale of property. The trial court held that the five-day mailed notice prescribed by the probate court for the hearing on the conservator's application to sell the property was an abuse of discretion and a denial of procedural due process. The trial court also held that a prior Iowa Supreme Court opinion in this case determined that plaintiff's allegations of fraud and undue influence did not constitute a collateral attack on the order authorizing the conservator's sale, and consequently denied defendant's motion for summary judgment. We reverse.

Plaintiff's petition for declaratory judgment was brought in equity pursuant to section 633.33, The Code 1973. Thus, our review is de novo. In re Estate of Lemke, 216 N.W.2d 186, 189 (Iowa 1974); Iowa R. App. P. 4. We give weight to the trial court's findings of fact, but we are not bound by them. Lemke, 216 N.W.2d at 189; Iowa R. App. P. 14(f)(7).

In ruling on a motion for summary judgment, the trial court is required to look at the whole record, including pleadings, answers to interrogatories, admissions on file, and affidavits, in the light most favorable to the party against whom the motion was made. Tasco, Inc. v. Winkel, 281 N.W.2d 280, 282 (Iowa 1979). The burden is on the moving party to show the absence of a fact issue, and even if the facts are undisputed, if reasonable minds could draw different inferences from them, the motion should be denied. Id. We apply these same principles in reviewing the trial court's ruling on the motion. Id.

I. We conclude that the trial court erred in ruling that the probate court's ordering of mailed notice to the ward at least five days before the hearing on the conservator's application to sell the property was an abuse of discretion and a denial of procedural due process. The notice was prescribed by the trial court pursuant to sections 633.40 and 633.389, The Code 1971, which gave the probate court complete discretion over the time and manner of the service of notice. The trial court interpreted the case of Flanders v. Waterloo Community School District, 217 N.W.2d 579

(Iowa 1974) as requiring proof of receipt of notice when notice was mailed. However, Flanders stated that proof of receipt of notice is crucial whenever the statute "requires a person to notify in writing or to give written notice." Id. at 582. Section 633.40, The Code 1971 did not require the notice to be given in writing, since it gave the court full discretion to determine the manner of service of the notice. That the notice here was, in fact, given in writing does not automatically require invocation of the general rule stated in Flanders, since written notice was not the manner necessarily prescribed by the statute. Furthermore, the preceding distinction notwithstanding, there is a long-established presumption in Iowa of receipt of mailed notice if it was properly addressed and otherwise conforming to postal laws and regulations regarding postage. Eves v. Iowa Employment Security Commission, 211 N.W.2d 324, 327 (Iowa 1973). There is an affidavit in the record of this case stating that the mailed notice was properly addressed and mailed according to the postal laws and regulations. Thus, the notice was presumed to have been received. Plaintiff could have rebutted the presumption by merely asserting that the notice was not received. Roshek Realty Co. v. Roshek Brothers Co., 249 Iowa 349, 356, 87 N.W.2d 8, 13 (1957). However, our review of the record reveals no such assertion. Indeed, the application of the Flanders rule to the case at bar is weakened since in Flanders, the court emphasized that the notice was not in fact received, 217 N.W.2d at 583, whereas in the case at bar, plaintiff has not contended that notice was not received, thus leaving the presumption of receipt of the notice unrebutted. The above-mentioned affidavit further shows that the notice was mailed ten days prior to the hearing date to both the ward, Della Vanderlinden, and her guardian ad litem, who is an attorney. An answer was timely filed by the guardian ad litem.

The trial court also characterized the five-day time period as being too short to adequately notify plaintiff of the conservator's application to sell and still allow sufficient time to appear and object to the application, and was thus an abuse of discretion and a denial of procedural due process. We disagree. The trial court relied on In re Estate of Lemke, 216 N.W.2d 186 (Iowa 1974), which held that a ten day notice was insufficient to meet procedural due process requirements when the notice was mailed from Iowa to the recipient who was a resident of Texas. Id. at 188-90. We think

the differences between Lemke and the case at bar are sufficient to limit Lemke's applicability to this case. Here, the notice was mailed a distance of less than twenty miles as opposed to the distance between Iowa and Texas. The recipient of the notice here did not have to go through the process of obtaining Iowa counsel to make an appearance as did the Texas recipient in Lemke. In fact, the recipient here had counsel in the form of a guardian ad litem appointed for the very purpose of representing her in the proceedings. Consequently, we conclude that Lemke is too easily factually distinguishable from the case at bar to warrant direct application of its factual holding.

The general due process principles with regard to notice that were espoused in Lemke and drawn from the Supreme Court case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950) are directly applicable to this case and we apply them accordingly. To comply with due process,

> [t]he notice must be of such nature as reasonably calculated to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Id. at 314-15, 70 S. Ct. at 675, 94 L.Ed. at 873. We think that under the circumstances of this case, including the distance involved and the availability of counsel for the recipient, five days was a reasonably calculated amount of time within which the recipient of the notice could have received the required information and made the necessary arrangements to make an appearance. Consequently, the probate court did not abuse its discretion or deny due process in prescribing mailed notice at least five days before the hearing on the conservator's application to sell the property. The trial court erred in granting plaintiff's motion for summary judgment on that ground and we reverse that ruling.

II. We now turn to defendant's claim that the trial court erred in denying its motion for summary judgment. Defendant contends that plaintiff's allegations of fraud and undue influence constituted a collateral attack on the order authorizing the conservator's sale of the property. The trial court held that a prior supreme court opinion reversing the granting of defendant's motion to dismiss in earlier proceedings in this case effectively determined that plaintiff's allegations did not constitute a

collateral attack on the prior order. We conclude that the trial judge erred in so holding. The basis for reversal of defendant's motion to dismiss in Vanderlinden v. Vanderlinden, No. 2-57357 (Iowa, filed Jan. 19, 1977) was the failure to introduce the order of the conservatorship proceedings. Thus, the reversal was based on defendant's failure to introduce an essential element of its contention that plaintiff's action was a collateral attack, not on the sufficiency of the case pleaded by plaintiff.

The order of the probate court authorizing the sale of the property has the force and effect of a judgment and as such is accorded the same protection against collateral attack as judgments in law and equity. Stake v. Cole, 257 Iowa 594, 602, 133 N.W.2d 714, 718 (1965). We find plaintiff's allegations of fraud and undue influence in his petition for declaratory judgment raised matters intrinsic in the matters before the court at the hearing on the conservator's application to sell, and as such constituted an impermissible collateral attack on the probate court's order authorizing the sale. See Gagen v. Bankers Trust Co., 251 Iowa 953, 956, 103 N.W.2d 743, 745 (1960); Anderson v. Schwitzer, 236 Iowa 765, 772, 20 N.W.2d 67, 71 (1945). Consequently, we reverse the trial court's denial of defendant's motion for summary judgment and order summary judgment to be granted in favor of defendant.

REVERSED.