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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE ESTATE OF CHARLES SAMUEL MATHERS, Deceased.

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| WAYNE J. BADOLLET, LESLIE W. BADOLLET and LEWIS S. BADOLLET, | ) | Filed April 14, 1977 |
| Appellants, | ) | |
| v. | ) | |
| SUE ANN WOLCOTT, et al, | ) | 76 / 2-58030 |
| Appellees. | ) | |

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Appeal from Davis District Court - L. R. Carson, Judge.

Appeal from order vacating default and judgment by default in estate proceedings. Affirmed in part, reversed in part and remanded.

D. W. Harris and C. K. Pettit of Harris and Pettit of Bloomfield, for appellants.

Dick R. Schlegel of Barnes, Schlegel and Walter of Ottumwa, for appellee.

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

CARTER, J.

This is an appeal in advance of final judgment granted pursuant to rule 332, Rules of Civil Procedure. The issues presented all relate to an order of the trial court granting a petition to vacate a default and judgment by default pursuant to rule 252, R.C.P. We reverse the order setting aside the default and hold that plaintiffs are entitled to a new judgment by default somewhat different from the judgment previously entered.

This action involves a petition with three divisions filed June 19, 1972. The first two divisions attack the validity of the 1970 will of Charles Mathers, deceased, on grounds of mental incapacity and undue influence. Each of these divisions prays that the probate of said 1970 will be annulled and that a will executed by the decedent in 1967 be admitted to probate in its stead. The third division of the petition contains allegations that the decedent, Charles Mathers, and his predeceased wife had contracted each with the other to make a certain disposition of their property. This alleged contractual disposition involved half of the property of the survivor going to Charles Mathers' heirs-at-law and the other half going to his wife's heirs. It is further alleged that the decedent's 1967 will accorded with his obligations under this contract but that his 1970 will did not. The relief requested in the prayer of the third division of the petition is that the decedent's property be impressed with a trust in favor of the plaintiffs to the extent that plaintiffs were to share in said property under decendent's alleged contract with his wife.

The plaintiffs are two brothers and the administrator of a third brother of decedent's predeceased wife. Under the provisions of the 1967 will plaintiffs each were to receive

one eighth of the residue as was defendant-appellee Sue Ann Wolcott, a niece of decedent's wife. As that disposition relates to the contractual theory alleged in the third division of the petition, plaintiffs and Sue Ann collectively were to receive the one-half share allocated to the heirs of decedent's wife. Plaintiffs were not included among the beneficiaries of the 1970 will. Sue Ann was a beneficiary under the 1970 will and, after a lapse of one of the bequests, receives one third of the residue thereunder. The defendants in this action include the executor and named beneficiaries under the 1970 will (including Sue Ann) and Dema Felknor, an heir-at-law.

Following the filing of the petition, the executor of the 1970 will was served personally with original notice. All other defendants, including Sue Ann, were served by publication and mailing pursuant to rule 60.1, Rules of Civil Procedure. On September 21, 1972, an answer was filed on behalf of the executor and the defendants Alberta Hendrix and Marian Puckett. The latter two defendants are nieces of the decedent who, like Sue Ann, each receive one third of the residue under the 1970 will. Under the 1967 will these two nieces were to share equally in one half the residue. As that disposition relates to the claims of the third division, these nieces were to collectively receive the one-half share allocated to decedent's heirs. No appearance was entered on behalf of Sue Ann or Dema Felknor and this situation continued to exist up to and including April 15, 1974, when, at plaintiffs' request, their default was entered of record.

On May 31, 1974, a hearing was held and plaintiff offered evidence in support of the claims made in the third division of the petition. Such evidence consisted in part of the depositions of three witnesses who testified they heard the decedent,

Charles Mathers, acknowledge that he had made an agreement with his deceased wife to leave one half of his property to her family and one half to his own family.

Following this hearing a judgment entry was filed and entered of record in favor of the plaintiffs and against Sue Ann providing that to the extent she takes any property in said estate it is impressed with a trust in favor of the plaintiffs. Said judgment entry further provided that Sue Ann's share be distributed one fourth to her and one fourth to each of the three plaintiffs.

On June 1, 1974, plaintiffs dismissed their action without prejudice as to the defendants not in default. Thereafter, on July 25, 1974, the executor under the 1970 will, previously admitted to probate in the Davis district court, filed his final report proposing distribution as provided in the 1970 will but also providing that Sue Ann's share (one third of the residue) would be distributed by the clerk of court in accordance with the provisions of the judgment entry of May 31, 1974.

On August 14, 1974, Sue Ann filed a petition to vacate the May 31, 1974 judgment entry under the provisions of rule 252, Rules of Civil Procedure. The various grounds relied upon in said petition, being five in number, will be referred to in our discussion of the issues relating to each ground. Plaintiffs filed an answer and resistance to this petition and, on December 9, 1974, a hearing was held on the issues thus presented. Subsequently, on February 6, 1975, the trial court sustained the petition and ordered that both the judgment entry and prior entry of Sue Ann's default be vacated and set aside.

I. We must initially answer the contention made by the plaintiffs that the trial court's ruling on the petition to vacate failed to accord with rule 118, R.C.P., requiring separate rulings on each ground of the petition. Our examination of the

trial court's order leads us to the conclusion that it in effect sustained the petition on each of the five grounds urged. Thus, there has been technical compliance with rule 118. None of these grounds appears to be entirely frivolous so we can see no reason to remand for further compliance with rule 118. See, e.g., Ruby v. Easton, 207 N.W.2d 10 (Iowa 1973); Turner v. Thorp Credit, Inc., 228 N.W.2d 85 (Iowa 1975). We therefore will examine the record to see if any of said grounds were sufficient to warrant the vacation of the May 31, 1974 judgment.

II. Three of the five grounds relied upon by Sue Ann in her petition to vacate judgment may be considered summarily. These are her contentions (1) that the judgment was invalid because the clerk failed to give notice as required by rule 233, Rules of Civil Procedure; (2) that the judgment was an invalid personal judgment rendered against a defendant served only by publication and mailing contrary to rule 234, R.C.P.; and (3) that there had been an unauthorized withdrawal from the defense of Sue Ann, without her knowledge, by the attorneys representing the executor and the defendants Hendrix and Puckett.

Ground (1) is without merit because rule 233 does not apply to judgments in rem or quasi-in-rem. Moreover that rule expressly provides that failure of the clerk to give the notice therein provided does not serve to invalidate the judgment. See Peterson v. Eitzen, 173 N.W.2d 848, 851 (Iowa 1970). Ground (2) is also without merit because the judgment in question was not a personal judgment as claimed but rather a judgment quasi-in-rem. By such a judgment Sue Ann's interest in this Iowa property was finally adjudicated on the basis of the notice and opportunity to defend which was afforded her under established rules of procedure. There was no irregularity involved which would invalidate the judgment. See rules 60(g) and 60.1, Rules of

Civil Procedure; Federal Land Bank v. Jefferson, 229 Iowa 1054, 295 N.W. 855 (1941); Restatement, Judgments § 3; Vestal & Willson, Iowa Practice § 10.02(9).

III. Ground (3) must be rejected because it is totally lacking in factual support in the record. The initial appearance and answer of attorney McMurray was clearly limited to his representation of certain designated defendants not including Sue Ann. Subsequent appearance on May 2, 1973, by attorney Kenneth Keith, additional counsel retained by the estate to defend against the claims, was originally designated for "defendants". Any indication that this included Sue Ann was dispelled by a corrected appearance of counsel filed by attorney Keith on January 4, 1974. The most significant evidence with respect to this claim is the unequivocal testimony of Sue Ann herself, given at the hearing on the petition to vacate, that she never intended to appear in the litigation and did not request that the attorneys for the executor and other defendants appear for her. In her written argument presented in this court Sue Ann seeks to expand upon the grounds of her motion by now asserting that her reliance was upon the duty of the executor to sustain the 1970 will. As was the case with her claim of reliance on the executor's attorneys, the record does not support and in fact dispels such contention. The record is clear that Sue Ann consciously chose to sit out the litigation and was not relying on anyone to protect her interests. Her default was clearly a matter of conscious choice and she must accordingly abide the legal effect of such conduct.

IV. The final two grounds of the petition to vacate (which we designate (4) and (5) ) require more extended consideration. These are the claims that (4) it is "irregular practice in probate

to permit the 1967 will to govern the distribution of the estate as to certain beneficiaries and the 1970 will to govern distribution as to the others; and (5) that all defendants are necessary parties to this action under section 633.312, The Code, whose interests must be adjudicated jointly and consistently. We believe ground (4) is based upon a misconception of the effect of the judgment entry of May 31, 1974. The judgment upholds the probate of the 1970 will but impresses a trust in favor of the plaintiffs on the property passing to Sue Ann under that will. This result is to vindicate the contract rights alleged in the third division of the petition and does not involve the 1967 will except as that will may be evidence of these alleged contract rights. The proposed final report of the executor under the 1970 will gives this effect to the judgment, and Sue Ann's counsel, in oral argument before this court, conceded that this was the effect of the judgment. We conclude that this procedure is consistent with that approved in Stewart v. Todd, 190 Iowa 283, 291, 173 N.W. 619 (1920) where the court states:

> "The [later] will undoubtedly passed the property to these parties named in the last will, but they took it impressed with a trust, in favor of the party to whom the promise was originally made."

For this reason we do not believe that there was any irregularity so as to permit vacation of the judgment under ground (4).

V. The proceeding conclusion leads directly to a discussion of ground (5) which is the claim that in a proceeding of this type the rights of all parties must be adjudicated jointly and consistently. We recognize that in certain types of cases involving joint interests a plaintiff must recover against all defendants or he can recover against none. In such instances, a final judgment in favor of the plaintiff may be entered only

against all defendants and a several judgment cannot be entered against only those who have defaulted. 49 C.J.S. Judgments § 191(b)(2); cf. rule 221, Rules of Civil Procedure. Sue Ann urges that she was protected by this rule even though she wished at all times to remain neutral as to the result. She cites § 633.312, The Code, and In re Estate of Ditz 255 Iowa 1272, 125 N.W.2d 814 (1964) as supporting such a rule in will contest litigation.

Section 633.312 and the *Ditz* case involve claims to contest or set aside the probate of a will such as the first two divisions of the petition. We believe the claims of the third division are more properly subject to the provisions of rule 221, R.C.P. which provides:

> "Where the action involves two or more parties, the court may, in its discretion, and though it has jurisdiction of them all, render judgment for or against some of them only, whenever the prevailing party would have been entitled thereto had the action involved him alone, or whenever a several judgment is proper; leaving the action to proceed as to the other parties."

Under the theory of Stewart v. Todd, supra, property of the deceased passes to the beneficiaries under the 1970 will. Under the claims of the third division of the petition Sue Ann's bequest comes to her impressed with a trust in favor of the plaintiffs. We believe the situation thus presented is one where plaintiffs would have been entitled to proceed separately on these claims against the various beneficiaries to the extent of the property each received under the 1970 will. For this reason the entry of a separate judgment against Sue Ann was permissible under rule 221.

VI. We do not believe the record supports the order of the trial court vacating the May 31, 1974 judgment or the April 15, 1974 entry of default on any of the grounds considered. The only remaining matter which we feel obliged to consider is the

claim of Sue Ann, made in oral argument, that the judgment is void in whole or in part.

The affidavit attached to her petition states that she is in fact receiving less under the May 31, 1974 judgment than she was entitled to receive under the 1967 will. It is without dispute in the record that this contention is correct. While this contention could well have been articulated with more particularity in the trial court with respect to any effect which it might have on the validity of the judgment, we believe that the assertion that a judgment is void in whole or in part may be asserted at any time prior to a final adjudication of the validity of the judgment. 46 Am. Jur.2d Judgments § 49; Gohring v. Koonce, 224 Iowa 1186, 278 N.W. 283 (1938); cf. Gaar, Scott & Co. v. Taylor, 128 Iowa 636, 105 N.W. 125 (1905). Indeed, since the subject of void judgments relates to the integrity of the judicial process we believe the court can properly consider such matters *sua sponte*. 46 Am. Jur.2d Judgments § 49. See Dimmitt v. Campbell, 260 Iowa 884, 151 N.W.2d 562 (1967).

It is generally recognized that a judgment by default in the absence of appearance is void in whole or in part if the relief afforded to the plaintiff exceeds that which is fairly embraced by the issues presented in the pleadings or prayer for relief. Restatement, Judgments § 8 comment (c); Oviatt v. Oviatt, 174 Iowa 512, 156 N.W. 687 (1916); Manassa v. Garland, 200 Iowa 1129, 206 N.W. 33 (1925); Blain v. Dean, 160 Iowa 708, 142 N.W. 418 (1913). This rule applies to judgments in rem or quasi-in-rem as well as to personal judgments. Restatement, Judgments § 8 comment (e); Blain v. Dean, supra. If the extent of the relief which can be afforded under the prayer is uncertain, resort must be had to the allegations of the petition. Oviatt v. Oviatt, supra. ("By suffering default to be entered against

him, he does not concede to plaintiff the right to take any decree which the pleading itself does not fairly justify.")

Application of these principles to the present case leads us to the conclusion that the default judgment against Sue Ann exceeded that which was called for by the allegations of plaintiffs' petition. In the third division of the petition, upon which plaintiffs concede the judgment is based, paragraphs 10 and 12 of division I of the petition are realleged by reference. These paragraphs are the significant factual allegations upon which the contractual theory of the third division is predicated. Paragraphs 10 and 12 of division I allege the making of the agreement between decedent and his wife and further allege that the 1967 will evidences the disposition of decedent's property which he was bound to employ under said agreement. We believe the prayer for relief under the third division should be limited by these allegations. Under these pleadings, if plaintiffs prevailed completely, Sue Ann's share could not have been reduced to less than one eighth of the distributable estate assets. Any additional trust which might be impressed in furtherance of plaintiffs' claims would involve property passing to the other distributees under the 1970 will. Stated somewhat differently we hold that under the claims of the third division the only portion of the assets passing to Sue Ann upon which a trust may be impressed is that portion exceeding the interest she would have received under the 1967 will. It should be noted that this is one eighth of the residue under the 1967 will -- not one eighth of the residue under the 1970 will. To the extent the default judgment exceeded this limitation it was void.

Nothing herein stated is meant to adjudicate the issue of whether or not plaintiffs might be entitled to further relief

against Sue Ann's interest under an amended petition. If such amendments are allowed after remand, a matter which we leave to the discretion of the trial court, Sue Ann is entitled to answer and defend against any new claims presented by such amendments. Her default with respect to the existing allegations of the petition shall be reinstated upon remand. The judgment of May 31, 1974, shall not be reinstated but plaintiffs on remand are entitled to a new default judgment against Sue Ann consistent with the limitations established in this opinion. Plaintiffs may elect to pursue further proceedings in the trial court not inconsistent with this opinion. Reversed in part, affirmed in part and remanded.