

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

**IN THE MATTER OF THE ESTATE OF
JOY M. GANSER, Deceased.**

LINDA STANFIELD,
Plaintiff,

vs.

**THOMAS B. GANSER and WILLIAM A.
GANSER III, Personal Representatives of
the Estate of Joy M. Ganser, Deceased,**
Defendants.

Case No. 6805

**ORDER ON MOTIONS
FOR SUMMARY JUDGMENT**

DATE OF HEARING: July 14, 1999.

DATE OF DECISION: July 19, 1999.

APPEARANCES:

For plaintiff:

Larry R. Baumann without plaintiff.

For defendants:

Rodney J. Palmer with defendant Thomas B. Ganser.

SUBJECT OF HEARING: (1) defendants' motion for summary judgment; and,
(2) plaintiff's motion for summary judgment.

PROCEEDINGS: shown in order entered on July 14, 1999.

FINDINGS: The court finds and concludes that:

1. The applicable principles of law are well-known:
 - a. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Parker v. Lancaster Cty. School Dist. No. 001*, 256 Neb. 406, ___ N.W.2d ___ (1999).
 - b. The court views the evidence in a light most favorable to the party against whom the judgment is sought and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

c. On a motion for summary judgment, the question is not how a factual issue is to be decided but whether any real issue of material fact exists. *Id.*

d. Where reasonable minds may differ as to whether an inference supporting an ultimate conclusion can be drawn, summary judgment should not be granted. *Id.*

2. As to the issues raised by the defendants' motion for summary judgment, viewed in the light most favorable to the plaintiff, either (a) there are genuine issues of material fact or as to the ultimate inferences that may be drawn from those facts, or, (b) the defendants have failed to show that they are entitled to judgment as a matter of law. The defendants' motion for summary judgment must be denied.

3. As to the issues raised by the plaintiff's motion for summary judgment, the situation is more complex.

4. NEB. REV. STAT. § 30-2431 (Reissue 1995) (emphasis supplied) provides:

In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. *Proponents* of a will have the burden of establishing prima facie proof of *due execution, death, testamentary capacity, and venue*. *Contestants* of a will have the burden of establishing *undue influence, fraud, duress, mistake or revocation*. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

5. Viewed in the light most favorable to the defendants, the plaintiff has met her burden to show that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law on the issues of due execution, death, venue, and mistake (also characterized by defendants as "false assumption"). See *Sadler v. Sadler*, 184 Neb. 318, 167 N.W.2d 187 (1969). The plaintiff's motion for summary judgment will be granted to the extent of specific findings of fact as to those issues as set forth below.

6. There is very little evidence to oppose a determination that the decedent possessed testamentary capacity at the time of the making of the proposed will. However, viewed in the light most favorable to the defendants, and in view of Nebraska Supreme Court precedent showing how little factual

dispute is required, the court cannot find in favor of the plaintiff as a matter of law on that issue. See, e.g., *Parker v. Lancaster Cty. School Dist. No. 001*, *supra*.

7. The remaining issues raised by the defendants' first amended answer are undue influence and duress.

a. Although the answer also pleads lack of testamentary capacity, the statute imposes the burden of proving that issue upon the proponent. However, some Nebraska authority suggests that a contestant may be required to plead the issue. *In re Estate of Alexander*, 128 Neb. 334, 258 N.W. 655 (1935). In any event, this court has already addressed the issue in a preceding paragraph.

b. As to those remaining issues of undue influence and duress, viewed in the light most favorable to the defendants, there are genuine issues of material fact or as to the ultimate inferences that may be drawn from those facts. Consequently, the plaintiff has failed to show that she is entitled to judgment as a matter of law on those issues. The plaintiff's motion for summary judgment must be denied as to those issues.

ORDER:

IT IS THEREFORE ORDERED that:

1. The defendants' motion for summary judgment is denied.

2. The plaintiff's motion for summary judgment is granted to the extent that the court determines, as a matter of law, that:

- a. The Will was in writing;
- b. The Will was signed by the decedent, Joy M. Ganser;
- c. At the time she signed the Will, Joy M. Ganser was more than 18 years of age;
- d. Before Joy M. Ganser's death, the Will was signed by at least two other persons each of whom witnessed the signing of the Will;
- e. The Will was duly executed;
- f. Joy M. Ganser is deceased, having died on October 14, 1998;
- g. The decedent was, at the time of her death, a resident of Brown County, Nebraska, and venue is proper in Brown County; and,
- h. The Will was not the result of mistake or false assumption.

3. Except to the extent of the relief expressly granted in paragraph 2 above, the plaintiff's motion for summary judgment is denied.

4. This order is interlocutory in character and does not constitute a final order.

Dated: July 19, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19____ by _____.
- : Note the decision on the trial docket as: 7/19/99 Signed "Order on Motions for Summary Judgment" entered.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge