

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

**JAMES BARTA, by JOHN PAVLIK,
HARRY PAVLIK, and MAXINE SCHEER,
his next friends,**

Plaintiff,

vs.

**UNIVERSITY OF NEBRASKA
FOUNDATION, a corporation; UNION
BANK & TRUST COMPANY, as
Conservator of the Estate of James Barta,
a protected person; JOHN P. HEITZ, as
guardian-ad-litem for James Barta; and
BARBARA ASSARSSON,**

Defendants.

re-entitled

**JAMES BARTA, by JOHN PAVLIK,
HARRY PAVLIK, and MAXINE SCHEER,
his next friends, and BARBARA
ASSARSSON,**

Plaintiffs,

vs.

**UNIVERSITY OF NEBRASKA
FOUNDATION, a corporation; UNION
BANK & TRUST COMPANY, as
Conservator of the Estate of James Barta,
a protected person; and JOHN P. HEITZ,
as guardian-ad-litem for James Barta,**

Defendants.

Case No. 6849

**ORDER ON MOTION
TO DISQUALIFY**

DATE OF HEARING: September 21, 2000.

DATE OF RENDITION: December 6, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

TYPE OF HEARING: In chambers at O'Neill, Holt County, Nebraska, by agreement of parties for counsel's convenience.

APPEARANCES:

For plaintiffs: John Thomas for plaintiffs without plaintiffs.

For defendants:

UNF: Mark A. Christiansen without corporate representative.

UB&TC: James D. Gotschall without corporate representative.

Heitz: Defendant pro se.

SUBJECT OF ORDER: Plaintiffs' joint motion to disqualify judge.

PROCEEDINGS: At the hearing, these proceedings occurred:

Evidence was adduced for plaintiffs. Evidence was adduced for defendant University of Nebraska Foundation (UNF). Defendant Union Bank & Trust Company (UB&TC) joined in the offer of UNF's evidence. There was no evidence for defendant Heitz. Arguments of counsel were heard. All parties desiring to submit briefs had previously done so. The matter was taken under advisement.

FINDINGS: The court finds and concludes that:

1. In this action, the plaintiffs' petition alleges that a deed executed and delivered in March of 1996 should be set aside because of (1) the grantor's lack of capacity and (2) undue influence exercised upon the grantor. The plaintiffs seek to disqualify the judge in this equitable action upon three grounds, which will be noted as discussed below.

2. The judge's prior involvement relates to his representation of Barbara Assarsson (Barbara) in 1981 in the estate proceedings for her father, Arnold Barta (Arnold). James Barta (James), on behalf of whom this action is brought, and Clifford Barta (Clifford), now deceased, were Arnold's brothers.

3. Barbara's deposition testimony shows that Arnold, James, and Clifford owned undivided interests in certain real estate at the time of Arnold's death. The record discloses that Barbara was Arnold's only child, although he was also survived by a spouse who was not Barbara's mother. Barbara's testimony indicates that the estate proceedings were entirely amicable. Contemporaneously with the estate proceedings, Arnold's heirs and James and Clifford voluntarily partitioned the real estate by deed transfers. Barbara testified at her deposition that the division occurred amicably ("it was done without any problems at all"), and one can infer that the division reflected the prior separate operation that Arnold had conducted from the ranch operation of James and Clifford. Exhibit 14, at 22:2. The parties executed the deeds in

September of 1981, and the deeds were recorded in May of 1982. As the probate petition shows that Arnold died on August 12, 1981, the deeds were executed very shortly after Arnold's death. The cause for delay in recording does not appear in the record. The date of the petition for estate closing in August of 1983 suggests that the delay was probably occasioned by the determination of taxes in Arnold's estate, although other causes are certainly possible.

4. The plaintiffs cite the clause of Neb. Code of Jud. Con., Canon 3(E)(1)(b) (rev. 1996), which mandates disqualification where "the judge served as a lawyer in the matter in controversy" The matter in controversy here is the validity of James's 1996 deed. The court takes judicial notice that the judge took the oath of judicial office on April 22, 1992. This was long after the conclusion of Arnold's estate proceedings and the voluntary partition by deed transfers accomplished between Barbara on the one hand and James and Clifford on the other. It was also some time before the conveyances and wills of James and Clifford around which the controversy revolves. The record shows no involvement by the judge in James's and Clifford's subsequent wills or deeds. Indeed, the evidence shows the involvement of another attorney in those subsequent matters. The pleadings do not raise any controversy regarding the real estate division accomplished in 1981-82. In short, there is no evidence that the judge served as a lawyer in the matter "in controversy" in this case.

5. The plaintiffs also cite the clause of Neb. Code of Jud. Con., Canon 3(E)(1)(b) (rev. 1996), which mandates disqualification where "the judge has been a material witness concerning [the matter in controversy]; . . ." Although the judge has not been a witness in this case, the disqualification would extend to a situation in which the judge might reasonably be expected to be called as a witness. The evidence adduced on the motion shows nothing which would so indicate.

6. The plaintiffs apparently assert that the judge's action, as a notary public at that time, in taking James's acknowledgment on the partition deed to Barbara might make the judge a witness. Such testimony would not be material.

7. The decision of the Nebraska Court of Appeals in *Village of Exeter v. Kahler*, 9 Neb. App. 1, 606 N.W.2d 862 (2000), teaches that a judge is a material witness when the judge is in possession of independent knowledge of material facts. As the Nebraska Supreme Court observed in *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994), there are two components to relevant evidence: materiality

and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is “in issue,” that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove.

8. James’s competence or lack of competence in 1981 is not in issue. Nothing in this record suggests that the judge is in possession of any independent knowledge regarding the 1996 deed or the matters surrounding the execution and delivery of that deed, and this judge expressly disclaims any such knowledge.

9. This becomes even more obvious upon consideration of NEB. REV. STAT. §§ 76-235 and 76-258 (Reissue 1996). Section 76-235 authorizes the reading of a properly recorded deed into evidence without further proof. Section 76-258 cures any defect, irregularity, or omission regarding execution, attestation, acknowledgment, or recording of a deed after the deed has been recorded for 10 years. Obviously, the 1981 deeds (recorded in 1982) had been filed of record for 10 years by 1992, and could be read in evidence in this case (to the extent relevant) without any testimony whatsoever, even had there been no acknowledgment. The judge’s testimony can hardly be material as to an instrument no one denies and which can be read in evidence (if relevant) without other proof.

10. Moreover, section 64-205 specifically defines “acknowledgment.” NEB. REV. STAT. § 64-205 (Reissue 1996). The definition provides no role for a notary public to make or attempt to make any determination of competency.

11. The plaintiffs also cite Neb. Code of Jud. Con., Canon 3(E)(1)(a) (rev. 1996), which mandates disqualification where “the judge has . . . personal knowledge of disputed evidentiary facts concerning the proceeding; . . .” For essentially the same reasons as discussed above concerning a “material witness,” the record shows nothing to indicate that this judge has any *personal* knowledge of any disputed evidentiary facts. There is nothing to show that the execution, delivery, or recording of the 1981 partition deeds is disputed. There is nothing in the record to show, and this judge disclaims, any personal knowledge of any other facts which might constitute disputed evidentiary facts.

12. The plaintiffs argue that disputed evidentiary facts may include: (1) evidence of James's desire to disinherit Barbara Assarsson because of "items 'stolen by Gary Assarsson from 1970 to 1995,'" (2) evidence of James's desire to disinherit all the Barta brothers' relatives because "their experience had not been good, even seeing land given to relatives, all they did was fight over the loans and they didn't want that to happen," and (3) evidence of James's belief that Barbara Assarsson had received her share of their estate by virtue of her inheritance from Arnold Barta and the deeds of partition. Plaintiffs' Brief in Support of Motion to Disqualify, at 1. The evidence shows absolutely no personal knowledge on the part of the judge as to any of these matters. The brief quotes from the deposition of Donald Shaneyfelt, who acted as James's and Clifford's attorney. Exhibit 13, at 36:5-11. That quotation shows no connection to any knowledge of facts by the judge. The evidence fails to show, and this judge disclaims, any personal knowledge of James's beliefs or desires.

13. Finally, the court considers the plaintiffs' claim that the judge, while acting as a lawyer in the administration of Arnold's estate and the preparation of the partition deeds received privileged communications from Barbara "concerning [her] relationship with James and Clifford Barta and the division of [her and their] respective properties." Exhibit 14, at 217:6-10. Of course, the record does not disclose the content of any such communications.

14. Canon 4, DR 4-102(B)(1), (2), and (3), of the Code of Professional Responsibility prohibit a lawyer from knowingly revealing a client's confidence or secret, using a confidence or secret to the client's disadvantage, or using the confidence or secret for the advantage of a third person. The court assumes that these prohibitions continue during the judge's term of office. NEB. CONST. art. V, § 30(1)(f); *State ex rel. NSBA v. Krepela*, 259 Neb. 395, 610 N.W.2d 1 (2000). The court further assumes that keeping such confidences or secrets extends to disclosure even of the existence or nonexistence of the same. Consequently, nothing in this order shall be construed as any comment upon Barbara's testimony, which for purposes of this order the court accepts, that she had "conversations with [the judge], as [her] attorney, concerning [her] relationship with James and Clifford Barta and the division of [her and their] respective properties." Exhibit 14, at 217:6-10.

15. Thus, in this court's opinion, Canon 4 of the Code of Professional Responsibility requires this court to disregard any client-lawyer conversations Barbara may have had with the judge, which will be no great strain given the expiration of nearly 20 years.

16. Any such communications could not constitute material facts or personal knowledge of disputed evidentiary facts. The issues in this case are claims of lack of mental capacity to execute the 1996 deed and undue influence exercised upon James by Clifford.

17. To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing. *Anderson v. Claussen*, 200 Neb. 74, 262 N.W.2d 438 (1978); *Westerdale v. Johnson*, 191 Neb. 391, 215 N.W.2d 102 (1974).

18. A prima facie case of undue influence is made out in case of a deed where it is shown by clear and satisfactory evidence (1) that the grantor was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; and (4) that the result appears to be the effect of such influence. *Anderson v. Claussen, supra*; *Guill v. Wolpert*, 191 Neb. 805, 218 N.W.2d 224 (1974).

19. It is evident that none of these elements considers the relationship between Barbara and James, or between Barbara and Clifford, or the division of their respective properties in 1981-82. Such communications, if any, are simply immaterial to this case.

20. Although the court has considered the specific references cited by the plaintiffs to the judicial canons and found no support in the record or otherwise for disqualification, that does not end the inquiry. Although not specifically raised by the plaintiffs, the court considers the general admonition of Canon 3(E) that "[a] judge shall not participate in any proceeding in which the judge's impartiality reasonably might be questioned, . . ." Neb. Code of Jud. Con., Canon 3(E) (rev. 1996). The opinion in *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998), *cert. denied*, 525 U.S. 1068, 119 S.Ct. 796, 142 L.Ed.2d 659 (1999), sets forth an interesting discussion of the history and development of the applicable standard. The appropriate test requires the plaintiffs to demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an *objective*

standard of reasonableness, even though no actual bias or prejudice is shown. *Id.* Further, there is a strong presumption of judicial impartiality. *State v. Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997). Thus, the subjective view of one or more of the plaintiffs does not control. The court concludes that this objective test does not require disqualification.

21. This court remains sensitive to the issue raised by this motion. Because of its importance to the proper operation of the judicial system, the court entertained the motion notwithstanding previously established progression deadlines. Because this order is interlocutory in character, it remains subject to being reassessed at any time. This court assures the parties that, if the court subsequently assesses these issues differently, in the light of further proceedings, this court will not hesitate to change its mind.

ORDER: IT IS THEREFORE ORDERED that:

1. The joint motion to disqualify is denied.
2. The final pretrial conference is rescheduled for **Tuesday, January 2, 2001, at 2:05 p.m.**, or as soon thereafter as the same may be heard, in chambers at **O'Neill**, Holt County, Nebraska.
3. This order is interlocutory in character, and remains subject to modification at any time prior to entry of final judgment.

Signed in chambers at Ainsworth, Nebraska, on December 6, 2000.
DEEMED ENTERED upon filing by court clerk.

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 _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed "Order on Motion to Disqualify" entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge