Affirmed and Memorandum Opinion filed April 27, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00231-CV

MARK VANCE, Appellant

V.

GUS G. TAMBORELLO, INDEPENDENT ADMINISTRATOR WITH WILL AND CODICIL ANNEXED OF THE ESTATE OF ROBERT WESLEY VANCE, DECEASED, Appellee

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On Appeal from the Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 376,481

NO. 14-09-00315-CV

MARK VANCE, Appellant

V.

CAMERON MCCULLOCH, INDEPENDENT ADMINISTRATOR WITH WILL AND CODICIL ANNEXED OF THE ESTATE OF RUBY LEE VANCE, DECEASED, Appellee

On Appeal from the Probate Court No. 1
Harris County, Texas
Trial Court Cause No. 369,088

MEMORANDUM OPINION

In these consolidated appeals appellant Mark Vance challenges the probate courts' orders overruling Mark's[1] objections to the inventories filed by appellees Gus G. Tamborello and Cameron McCulloch, independent administrators of the estates of Robert Wesley Vance and Ruby Lee Vance, respectively. In both causes, Mark's objections are based on the treatment of an individual-retirement account (IRA) in Robert's name. For the reasons below, we conclude Mark has not established that the probate courts abused their discretion in overruling Mark's objections. Accordingly, we affirm in both causes.

I

Robert and Ruby were husband and wife. They had three children—Mark, Michael, and Joe.

During their marriage, both Robert and Ruby had IRA accounts, in their respective names, with Merrill Lynch.[2] Each designated the other as the primary beneficiary.[3] Robert did not name a contingent beneficiary. Robert's IRA agreement included the following provision: "If you have not designated a beneficiary, or if no beneficiary survives you, your IRA balance will be paid to your surviving spouse, or, if you are not survived by your spouse, to your estate."

[1] For simplicity and clarity, subsequent references to family members will use first names only.

[2] Although Robert and Ruby had other accounts, Robert's account giving rise to the present controversy ended in 701. Ruby's account,—which, as discussed below, was rolled over along with Robert's into IRA accounts for Mark, Michael, and Joe—ended in 702. References to Robert's and Ruby's IRAs are to these two accounts.

[3] Many, if not most, of the "facts" are taken from the representations of the parties in their motions and at argument. Mark does not dispute the appellees' factual representations.

On December 27, 2006, Ruby died. By her will, she gave her personal property to Robert and the remainder of her estate in trust to Robert for life. On termination of the trust by Robert's death, the remaining property was to be distributed per stirpes to Ruby's then-living descendants.

On November 9, 2007, Probate Court No. 1 approved the inventory for Ruby's estate. The inventory did not include either Robert's or Ruby's IRA.

On November 20, 2007, Robert died. Given Ruby's prior death, Mark, Michael, and Joe were the beneficiaries of Robert's will. Ruby's IRA was still in her name, and administration of the trust for Robert's benefit, set forth in Ruby's will, had not been completed.

Robert's will was admitted to probate on December 11, 2007. On June 6, 2008, Probate Court No. 2 granted administrator Tamborello's motion for an order transferring the funds in Robert's and Ruby's IRA accounts in three equal shares into inherited IRA accounts for Mark, Michael, and Joe. In its order the court stated that the following facts, among others, were undisputed: (1) the beneficiaries had appeared in the action and were properly before the court; and (2) Mark and Michael objected to transfer of the IRA assets into new accounts at Merrill Lynch, but desired their shares of the IRA accounts to be transferred directly to accounts in their names at other investment firms. Accordingly, the court ordered Merrill Lynch to

> divide the assets held in [Robert's and Ruby's] IRA Accounts, to the extent practicable, into one-third portions of equal value. In the case of Beneficiaries Mark Vance and Mike Vance, Merrill Lynch shall transfer their portion of the IRA Accounts pursuant to their D.T.C. transfer instructions to IRA accounts opened by them at other investment firms.

On January 7, 2009, Probate Court No. 2 approved the inventory for Robert's estate. The inventory listed both Ruby's and Robert's IRAs. Mark and Michael objected to inclusion of Robert's IRA, contending that "one-half of this account is comprised of community property funds that belong to the estate of Decedent's wife, Ruby Vance."

Tamborello responded, in part, by observing that Mark and Michael had "fully supported [Tamborello's] effort to have Merrill Lynch transfer Robert's IRA directly to [them] and their brother into three inherited IRA's so that they would receive very favorable tax treatment." On February 6, 2009, Probate Court No. 2 heard the objection and overruled it.

In the meantime, administrator Cameron McCulloch filed a first amended inventory for Ruby's estate. On January 20, 2009, Probate Court No. 1 approved that inventory. The inventory again included neither Robert's nor Ruby's IRA. Mark and Michael objected to the inventory on the ground that it failed to list Ruby's fifty-percent community-property interest in Robert's IRA.[4] McCulloch then filed a second amended inventory. Mark, at this point proceeding pro se, filed handwritten objections to the second amended inventory, arguing the second amended inventory was the same as the first amended inventory and his objections were the same as those he had raised to the first. McCulloch responded, arguing (1) Mark's objection was barred by the doctrine of collateral estoppel based on the proceeding in Probate Court No. 2; (2) the IRA was "intact" when Robert died; and (3) Robert's IRA was listed in his name only and Merrill Lynch, pursuant to plan documents, treated the entirety of the account as belonging to Robert.

On March 5, 2009, Probate Court No. 1 heard and denied the objections and, on March 9, approved the second amended inventory. The court appears to have based its ruling largely on the doctrine of collateral estoppel.

II

In both causes, Mark, pro se, appeals the trial court's orders overruling his objections to, and approving, the inventories. *See* Tex. Prob. Code Ann. § 250 (Vernon 2003) (describing property to be included in inventory and stating "inventory shall specify

[4] Mark and Michael also objected to the omission of another alleged claim against Robert's estate. Mark does not renew that objection on appeal.

what portion of the property, if any, is separate property and what portion, if any, is community property"). Under Texas Probate Code section 258,

> Any person interested in an estate who deems an inventory, appraisement, or list of claims returned therein erroneous or unjust in any particular may file a complaint in writing setting forth and pointing out the alleged erroneous or unjust items, and cause the representative to be cited to appear before the court and show cause why such errors should not be corrected. If, upon the hearing of such complaint, the court be satisfied from the evidence that the inventory, appraisement, or list of claims is erroneous or unjust in any particular as alleged in the complaint, an order shall be entered specifying the erroneous or unjust items and the corrections to be made, and appointing appraisers to make a new appraisement correcting such erroneous or unjust items and requiring the return of said new appraisement within twenty days from the date of the order. The court may also, on its own motion or that of the personal representative of the estate, have a new appraisal made for the purposes above set out.

Id. § 258 (Vernon 2003).

We apply an abuse-of-discretion standard in reviewing a probate court's decision under this section. *In re Estate of Walker*, 250 S.W.3d 212, 214 (Tex. App.—Dallas 2008, pet. denied). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *In re Estate of Gaines*, 262 S.W.3d 50, 55 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Cire v. Cummings*, 134 S.W.3d 835, 838–39 (Tex. 2004)). The mere fact a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate an abuse of discretion has occurred. *Id.* (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985)).

In the following discussion, we analyze the courts' actions in the order in which they occurred. We therefore first consider Probate Court No. 2's denial of the objection to Robert's inventory and then turn to Probate Court No. 1's denial of the objection to Ruby's.

III

In appellate cause number 14-09-00213-CV, Mark argues Tomberello erroneously included one hundred percent of Robert's IRA as an asset of Robert's estate.[5] Mark contends half the IRA was Ruby's community property and should not have been included in Robert's estate inventory.

The community estate, however, terminated on Ruby's death. *Burton v. Bell*, 380 S.W.2d 561, 565 (Tex. 1964). Therefore, when Robert died, all of his property, including what he may have inherited from Ruby, was his separate property.

Additionally, Ruby was the sole beneficiary of Robert's IRA. There were no contingent beneficiaries. Robert's IRA plan agreement provided, "If you have not designated a beneficiary, or if no beneficiary survives you, your IRA balance will be paid to your surviving spouse, or, if you are not survived by your spouse, to your estate." Under that provision, Robert's entire IRA balance was payable to his estate.

For the foregoing reasons, we conclude Probate Court No. 2 did not abuse its discretion in denying Mark's objection and in approving the inventory for Robert's estate. Accordingly, we overrule Mark's sole issue in appellate cause number 14-09-00213-CV.

IV

In appellate cause number 14-09-00315-CV, Mark argues administrator McCulloch erroneously omitted fifty percent of Robert's IRA as an asset of Ruby's estate. In response, McCulloch argues, inter alia, the appeal is moot because Mark received his full one-third share of the proceeds of Robert's IRA.

Under Probate Court No. 2's order transferring Ruby's and Robert's IRAs, Mark received, "as successor beneficiary of Robert Vance, Deceased," an IRA comprising one

[5] We have so divided the issues. In his briefs in both causes, Mark states the "issues presented" as follows: "Both estate inventories are incorrect. Robert Vance [sic] estate is overstated. Ruby Vance [sic] estate is understated. Neither estate inventory reflects the community property portion of Robert Vance's IRA."

third of the total amounts in Ruby's and Robert's IRAs. Mark does not explain how an order requiring a correction of Ruby's inventory, even if justified, would have any practical legal effect on the administration of Ruby's estate insofar as it relates to Mark.[6] *Cf. In re H & R Block Fin. Advisors, Inc.*, 262 S.W.3d 896, 900 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) (explaining mootness doctrine).

For the foregoing reasons, we overrule Mark's sole issue in appellate cause number 14-09-00315-CV.

V

By cross-issue, administrator Tamborello argues Mark should be sanctioned for filing a frivolous appeal and failing to satisfy the briefing rules. Specifically Tamborello requests that the appeal from Probate Court No. 2 be dismissed and Mark be assessed at least $15,000 payable to Robert's estate.

If this court determines an appeal is frivolous, it may, on its own initiative or on motion of any party and after notice and a reasonable opportunity for response, award each prevailing party just damages. Tex. R. App. P. 45. In determining whether to award damages, we must not consider any matter not appearing in the record, briefs, or other papers filed in this court. *Id.*

"Whether to grant sanctions for a frivolous appeal is a matter of discretion that this court exercises with prudence and caution and only after careful deliberation in truly egregious circumstances." *Goss v. Houston Cmty. Newspapers*, 252 S.W.3d 652, 657 (Tex. App.—Houston [14th Dist] 2008, no pet.). This court currently requires the appeal to be both objectively frivolous and subjectively brought in bad faith or for the purpose of delay. *See Azubuike v. Fiesta Mart, Inc.*, 970 S.W.2d 60, 66 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

[6] Mark did not file a reply brief in either cause and thus did not respond to Tamborello's or McCulloch's arguments supporting the probate courts' exercise of discretion.

Although Tamborello reiterates his arguments on the merits of Vance's issue, Tamborello does not argue Vance brought the appeal in bad faith or for the purpose of delay. We have reviewed the documents before this court and find no evidence Vance did so. We therefore overrule Tamborello's cross-issue.

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Having overruled Mark's single issue in cause numbers 14-09-00231-CV and 14-09-315-CV, we affirm the respective orders in both causes.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Yates, Seymore, and Brown.