Affirmed and Memorandum Opinion filed October 26, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00798-CV

MIKE VANCE, Appellant

V.

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

On Appeal from the Probate Court No 2
Harris County, Texas
Trial Court Cause No. 376,481-401

M E M O R A N D U M O P I N I O N

In this appeal, Mike Vance challenges the declaratory judgment ordering the method of distribution of the personal property of the estate of Robert Vance, appellant's father. In a single issue, appellant argues he did not receive notice of the trial at which appellee Gus Tamborello's petition for declaratory judgment was heard. We affirm.

I

Robert and Ruby Vance had three children, Mike, Mark, and Joe. Ruby died on December 27, 2006, leaving all her personal property to Robert and the remainder of her estate in trust to Robert for life. Robert died on November 20, 2007. Mike, Mark, and Joe were the beneficiaries of Robert's will, which was admitted to probate on December 11, 2007. Appellee, Gus Tamborello, was appointed as independent administrator of Robert's estate.

Robert executed a codicil to his will, which provides that he may leave a memorandum to his executor expressing his wishes regarding the distribution of personal property, which the executor may, but is not required, to follow. The codicil further provides that if the executor is unable to find the memorandum, Robert's personal property should be distributed to Ruby. If Ruby predeceases Robert, his personal property is to be distributed to the children (Mike, Mark, and Joe) in equal shares with particular items to be allotted as they may agree. If the children are unable to agree, the executor shall decide the distribution of personal property.

Because the sons were unable to agree on the distribution of personal property, Tamborello filed a petition for declaratory judgment on April 9, 2009. In the petition, Tamborello sought a declaration and instruction from the probate court as to the manner in which the items of personal property should be distributed or otherwise disposed. On June 22, 2009, Tamborello sent a notice of trial setting via certified mail, return receipt requested, to Mike, Mark, and Joe. The notice stated that the trial on the petition for declaratory judgment was set for August 10, 2009, at 9:00 a.m. The record contains a return receipt showing an envelope addressed to appellant was delivered on June 29, 2009. The signature box for "agent" is checked, but the signature is illegible. An amended notice of trial setting was sent July 30, 2009, stating that the trial setting had been moved from 9:00 a.m. to 1:30 p.m. on August 10, 2009. A return receipt signed by J. Smythe, as agent for Mike, is also in the record. Finally, the record contains a hard copy of an email sent from Mike to Tamborello at 10:44 a.m., on August 10, 2009, in

which Mike states, "Gus, I will not be able to attend this afternoon's hearing. I have a prior commitment."

At the beginning of the trial on August 10, 2009, the trial court asked whether Mike would be attending. Tamborello responded that he received an email from Mike at 10:44 that morning stating he would not be able to attend. The trial court entered a declaratory judgment in which it appointed William M. Perlmutter to oversee the distribution of Robert's personal property. Perlmutter was instructed to facilitate the random selection of order in which the three brothers would choose the desired items of personal property. The court ordered the selection process to be completed no later than August 28, 2009. This appeal followed.

II

In a single issue, Mike contends he did not receive proper notice of trial. The trial court's judgment states that Mike, Mark, and Joe all appeared for trial. Mike does not challenge this part of the judgment. Mike's appearance at trial renders moot his complaint about inadequate or improper notice of the trial setting and, for this reason alone, he cannot prevail on appeal. But even if we presume Mike did not appear for trial, for reasons explained below, we find no merit in his argument.

Mike contends Tamborello violated section 297 of the Probate Code. However, section 297 refers to notice to holders of secured claims and does not apply in this instance. Tex. Prob. Code Ann. § 297. In addressing whether Mike received notice of the trial on the petition for declaratory judgment, we look to the standard for notice set out in the Texas Rules of Civil Procedure.

The law presumes that a trial court will hear a case only after giving proper notice to the parties. *Tex. Dep't of Pub. Safety v. Mendoza*, 956 S.W.2d 808, 812–13 (Tex. App.—Houston [14th Dist.] 1997, no pet.). Under Texas Rule of Civil Procedure 21a, all notices other than citation—including notification of trial settings—may be served by delivering a copy to the party (1) in person, (2) by agent, (3) by courier-receipted

delivery, or (4) by certified or registered mail, properly addressed with prepaid postage, to the party's last known address. *See* Tex. R. Civ. P. 21a; *Osborn v. Osborn*, 961 S.W.2d 408, 411 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). If notice of a trial setting is delivered by one of these four authorized methods, Rule 21a creates a presumption that the notice was received by the addressee. *See* Tex. R. Civ. P. 21a; *Mathis v. Lockwood*, 166 S.W.3d 743, 745 (Tex. 2005).

Due process requires "notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84 (1988). A certificate by a party or an attorney of record is prima facie evidence of the fact of service. *Mathis*, 166 S.W.3d at 745. However, the opposing party may rebut this presumption by offering proof that the notice or document was not received. *Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex. 1987); Tex. R. Civ. P. 21a. If this presumption is not rebutted, then the trial court does not abuse its discretion. Tex. R. Civ. P. 21a.

A

In this case, Tamborello presented a copy of his notice of trial setting filed June 22, 2009, more than 45 days prior to the trial scheduled for August 10, 2009. *See* Tex. R. Civ. P. 245. He also produced copies of return receipt "green cards" showing Mike received the notices including the notice sent July 30, 2009, informing the parties of the change in time for the trial. Not only did Mike fail to rebut Tamborello's evidence, but Tamborello introduced a hard copy of an email he received from Mike at 10:44 on the morning of the trial. In the email, Mike explained that he would be unable to attend that afternoon. Based on the unchallenged recitation in the trial court's judgment that Mike appeared for trial, we presume he was present but, in any event, the record reflects that Mike received notice of the trial setting. Mike's sole issue is overruled.

B

By cross-issue, Tamborello argues Mike should be sanctioned for filing a frivolous

appeal and failing to satisfy the briefing rules. Specifically, Tamborello requests that the appeal be dismissed and Mike 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.).

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

* * *

Having overruled appellant's single issue, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Frost, and Brown.