[Cite as *Estate of Ross*, 2015-Ohio-4030.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ESTATE OF JOSEPH M. ROSS, DECEASED	:	**O P I N I O N**
	:	**CASE NO. 2015-T-0009**
	:	
	:	
	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Probate Division, Case No. 2011 EST 84.

Judgment: Affirmed.

Matthew J. Blair, Blair & Latell Co., L.P.A., 724 Youngstown Road, Suite 12, Niles, OH 44446 and *Kevin P. Murphy,* Harrington, Hoppe & Mitchell, Ltd., 108 Main Avenue, S.W., #500, P.O. Box 1510, Warren, OH 44481(For Appellant Brian G. Ross).

Douglas J. Neuman, Neuman Law Office, LLC, 761 North Cedar Street, #1, Niles, OH 44446 (For Appellee Renee R. Maiorca).

Scott H. Kahn, Kahn Kruse Co., L.P.A., The Galleria & Towers at Erieview, 1301 East Ninth Street, Suite 2200, Cleveland, OH 44114 (For Appellee Joseph J. Ross).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Brian G. Ross, appeals from the January 9, 2015 judgment of the Trumbull County Court of Common Pleas, Probate Division, approving a corrected third amended inventory and appraisal. At issue in this appeal is whether the probate

court erred in deeming a 2009 transaction made between appellant and his father, Joseph M. Ross ("the decedent"), to be a loan rather than a gift and whether the court erred in approving the value of the decedent's interest in the accounting firm of Ross, Maiorca & Associates, Inc. at zero dollars. For the reasons stated, we affirm.

{¶2} The decedent passed away on January 3, 2011. His estate plan required all four of his children to act as co-executors, namely: Dr. Joseph Ross, John Ross II, appellant, and appellee, Renee R. Maiorca. However, Dr. Joseph Ross resigned and the probate court removed John Ross II and appellant for failure to cooperate in the administration of the estate. Thus, appellee is the sole fiduciary of the estate.

{¶3} On September 9, 2011, appellee filed an initial inventory. No hearing was held on that inventory. On May 29, 2012, appellee filed an amended inventory. On June 19, 2012, appellant filed objections, listing the following four exceptions: (1) the inclusion of property located in Westlake, Cuyahoga County, Ohio, at its stated value in the inventory; (2) the failure to include Ross, Maiorca & Associates, Inc. and its value; (3) the 2009 transaction made to appellant from the decedent with a debt due to First Place Bank in the amount of $199,405.47; and (4) the failure to list the decedent's personal property as an asset.

{¶4} On October 10, 2012, a hearing was held on the exceptions to the amended inventory. Appellee claims the decedent utilized his line of credit with First Place Bank and transferred $235,000 to appellant on May 22, 2009. Appellee further claims the transaction was a loan. According to appellee, the $199.405.47 amount is the balance owed by appellant on the line of credit. Appellant, on the other hand, claims the $235,000 transfer was a gift.

{¶5} Specifically, at that hearing, the evidence revealed that appellant made a total of 20 payments on the loan owed to First Place Bank, originally valued at $235,000. Specifically, appellant made 14 payments from the loan's inception up to his father's death.[1] After his father's death, appellant made an additional six payments. Appellant then stopped making payments on the loan. Although appellant claims the transaction was a gift, no written evidence of a gift was found among the decedent's records. Also, no federal gift tax was ever filed. Appellant further claims that he did not know that the payments were on money his father had borrowed and given to him, indicating that he commonly paid bills on behalf of his deceased parents.

{¶6} Appellant did not produce any evaluation of the decedent's interest in the accounting practice. At the hearing, appellee stated there was no value and, thus, valued the practice at zero dollars. As such, it was not included on the original or first amended inventories that were filed.

{¶7} On October 23, 2012, the probate court only came to a conclusion regarding one of the four exceptions to the amended inventory. The court concluded in its judgment entry that appellant treated the transfer of funds as a loan rather than a gift, as evidenced by the fact that he made 20 payments, six of which were made after the decedent's death. Thus, the court found that the transfer of funds from the decedent to appellant constituted a loan and a proper asset of the estate. The court determined that appellant owes the sum of $199,405.47 to the estate. However, the court continued the three other exceptions, including: the inclusion of the Westlake property; the failure to include the accounting firm of Ross, Maiorca & Associates, Inc. as an asset of the

1. On appeal, appellant asserts he made 10 interest only payments, not 14 as found by the probate court.

estate; and the failure to include the decedent's personal property as an asset of the estate.

{¶8} On October 26, 2012, appellee filed a second amended inventory. Although she gave the decedent's interest in the accounting practice a zero dollar value, appellee added it in the second amended inventory. On October 30, 2012, appellant filed a Civ.R. 60(B) motion for relief from the October 23, 2012 judgment. On November 21, 2012, appellant filed exceptions to the second amended inventory. No hearing was set on those exceptions. The probate court denied appellant's Civ.R. 60(B) motion on November 21, 2012.

{¶9} Appellant filed an appeal with this court, Case No. 2012-T-0093, from the October 23, 2012 judgment with respect to the first amended inventory. On June 24, 2013, we dismissed that appeal for lack of a final appealable order. *In re Estate of Ross*, 11th Dist. Trumbull No. 2012-T-0093, 2013-Ohio-2622.

{¶10} On July 5, 2013, the probate court overruled appellant's exceptions to the second amended inventory. On September 18, 2013, appellant filed a new Civ.R. 60(B) motion for relief from the October 23, 2012 judgment. On October 25, 2013, the probate court authorized appellee to pay the balance owed on the First Place Bank loan that was the underlying source for the funds loaned to appellant.

{¶11} Appellee filed a third amended inventory on December 11, 2013. That inventory was corrected by the filing of a corrected third amended inventory on January 23, 2014. Appellant filed objections to the corrected third amended inventory on February 12, 2014. A status conference was held on February 26, 2014 to discuss pending issues in the estate. It was agreed that appellant's attorney would hire a CPA

to value the interest, if any, that the decedent had in Ross, Maiorca & Associates, Inc. at the time of his death. Appellant hired William D. Leicht to conduct the appraisal. In its March 3, 2014 summary of the status conference, the probate court stated that a hearing would be held on the exceptions if necessary.

{¶12} On March 7, 2014, appellant supplemented his second Civ.R. 60(B) motion for relief from judgment. On April 30, 2014, the probate court overruled that motion and reinstated its October 23, 2012 judgment.

{¶13} On June 5, 2014, appellant filed a motion to compel production of documents, including documents relating to the Ross, Maiorca & Associates, Inc. income tax and business returns after 2010. Appellee filed a request for a protective order to limit the production of records from the business to those years immediately prior to the death of the decedent, i.e., calendar years 2009 and 2010 (since the decedent died on January 3, 2011). On July 9, 2014, the probate court granted appellee's protective order to limit the discovery to business records prior to the decedent's death. Nothing happened with respect to the valuation for the accounting practice for over four months.

{¶14} In response to another motion to show cause filed by appellant, on December 4, 2014, the probate court ordered appellant to complete his valuation of Ross, Maiorca & Associates, Inc. within 30 days from the date appellee fully complies with its prior order. The court also ordered appellee to provide the information by no later than 14 days from the date of the entry. On December 11, 2014, appellee gave notice to the court and all interested parties of her compliance with the request for records in accordance with the prior order. Again, nothing was done by appellant.

{¶15} Thirty-six days after the December 4, 2014 order, the probate court approved the corrected third amended inventory and appraisal on January 9, 2015. Appellant filed the instant appeal, raising the following four assignments of error for our review:[2]

{¶16} "[1.] The trial court erred when it determined that Brian G. Ross had the burden to prove by clear and convincing evidence that the $235,000.00 transferred to him by the decedent, Joseph M. Ross, was a gift when, in fact, as a family member and son of the decedent, the transfer is presumed to be a gift.

{¶17} "[2.] The trial court abused its discretion in determining the transfer of funds from the decedent to the Appellant was a loan when no evidence was introduced to establish a loan or to rebut the family gift presumption.

{¶18} "[3.] The trial court erred in ruling that even absent the family gift presumption that Appellant/Movant, Brian G. Ross, failed to prove by clear and convincing evidence that a valid gift had occurred.

{¶19} "[4.] The trial court erred in approving the value of decedent's interest in the accounting practice of Ross, Maiorca & Associates, Inc as submitted by the Appellee."

{¶20} In his first assignment of error, appellant argues the probate court erred in determining that he had the burden to prove by clear and convincing evidence that the

2. Prior to filing this appeal, appellant filed a motion for reconsideration with the probate court on January 15, 2015. On February 4, 2015, the probate court issued an order in which it deferred ruling on appellant's motion. Appellant filed his notice of appeal on February 9, 2015. On March 10, 2015, the probate court reconsidered and vacated its January 9, 2015 judgment approving the corrected third amended inventory and appraisal. However, due to the filing of the notice of appeal, the probate court's March 10, 2015 judgment is null and void. *See Bullock v. Bullock*, 8th Dist. Cuyahoga No. 47901, 1984 Ohio App. LEXIS 12076, *4-5 (Dec. 20, 1984) (If a timely notice of appeal is filed from a final judgment, the trial court does not have authority to act on a motion to reconsider its action during the pendency of the appeal. If the motion was ruled on after the filing of the notice of appeal, it is null and void.) Appellant did not file a request for remand.

$235,000 transfer was a gift. Appellant alleges that because he is the son of the decedent, the transfer is presumed to be a gift.

{¶21} In his second assignment of error, appellant alleges the probate court abused its discretion in determining the transfer was a loan because there was no evidence to establish a loan or to rebut the family gift presumption.

{¶22} In his third assignment of error, appellant contends the probate court erred in ruling that he failed to prove that a valid gift had occurred.

{¶23} Appellant's first, second, and third assignments of error all deal with whether the probate court erred in finding that the $235,000 transfer from the decedent to appellant was a loan rather than a gift. Thus, because these three assignments are interrelated, we will address them together.

{¶24} An appellate court reviews a probate court's decision under an abuse of discretion standard of review. *Estate of Barry*, 11th Dist. Geauga No. 2013-G-3147, 2015-Ohio-1203, ¶15. The term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶25} Whether or not the $235,000 transaction in this case was an inter vivos gift is a question of fact. *Filkins v. Schwartz*, 3rd Dist. Allen No. 1-07-73, 2008-Ohio-1340, ¶14, citing *Wheeler v. Martin,* 4th Dist. Washington No. 04CA15, 2004-Ohio-6936. "The essential elements of an inter vivos gift are (1) an intention on the part of

the donor to transfer the title and right of possession to the donee, (2) delivery by the donor to the donee, (3) relinquishment of ownership, dominion, and control over the gift by the donor, and (4) acceptance by the donee." *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, ¶20, citing *Bolles v. Toledo Trust Co.,* 132 Ohio St. 21, 26-27 (1936).

{¶26} Generally, when a gift is alleged, the burden is on the one claiming the gift to prove it by clear and convincing evidence. *Havel v. Havel*, 11th Dist. Lake No. 89-L-14-093, 1990 Ohio App. LEXIS 5673, *7 (Dec. 21, 1990). "In order to establish that an item was received as a gift, actual delivery and an intent to give must be proven by clear and convincing evidence." *Id. "*However, when it is a family member who claims to be the recipient, the burden is reversed, as there is a rebuttable presumption of a gift." *Id.*, citing *Creed v. Lancaster Bank*, 1 Ohio St. 1 (1852); *In Re Clemens*, 472 F.2d 939 (6th Cir. 1972).

{¶27} However, "[t]he family gift presumption may be rebutted by 'circumstances or evidence going to show a different intention, and each case has to be determined by the reasonable presumptions arising from all the acts and circumstances connected with it(.)'" *Filkins, supra,* at ¶15, quoting *Wertz ex rel. Estate of Jurkoshek v. Tomasik*, 9th Dist. Summit No. 20209, 2001 Ohio App. LEXIS 426 (Feb. 7, 2001), citing *Creed, supra* at 10.

{¶28} The probate court has the advantage of hearing the witnesses and judging their credibility. The court correctly disregarded appellant's unsupported testimony. He provided no evidence that the $235,000 was a gift, other than his own self-serving testimony. Such testimony does not rise to the level of clear and convincing evidence.

Contrary to appellant's position, not all transfers between a father and a son are deemed to be gifts rather than loans. Based upon the facts presented, the probate court correctly determined that the transaction at issue was not a gift.

{¶29} There is no question that the decedent issued a check to appellant on May 22, 2009 in the amount of $235,000. This check was an advance against the decedent's home equity line of credit. At the time of the decedent's death, the balance owed on the account was $199,405.47. This sum is claimed as an asset of the decedent's estate based upon a debt owed to the decedent by appellant as set forth in the inventory of the estate.

{¶30} Appellant relied only on his personal testimony to support his claim of a gift. However, appellant fails to establish a pattern of gift-giving between himself and the decedent. Also, no written evidence of a gift was found among the decedent's records. As stated, no federal gift tax was ever filed.

{¶31} Appellee overcame the presumption of an inter vivos gift. Appellee presented certified copies of all payment records. Appellee demonstrated by clear and convincing evidence that the transaction was not a gift.

{¶32} In support of his position that the transaction was a gift, appellant stresses he did not sign any repayment agreement and that the decedent made a principal payment on the loan to First Place Bank. However, the record also establishes that appellant made at least 10 interest only payments on decedent's loan beginning in June 2009.[3] Following the decedent's death on January 3, 2011, appellant made six additional interest only payments from January 26, 2011 to July 6, 2011. Appellant

3. Again, appellant indicates on appeal that he made 10 interest only payments, not 14 as found by the probate court.

admitted that he made the foregoing payments. Appellant was unable to explain why he made payments for over two years on the decedent's loan if it was intended to be a gift. Also, appellant had no credible explanation for why he made payments after the decedent's death.

{¶33} The fact that appellant made all the interest payments on the decedent's loan both before and after the decedent's death evidences that the decedent never gave up ownership, dominion or control over the loan proceeds. In addition, appellant made no claim against the estate for reimbursement of the loan proceeds that he had made on the decedent's loan at First Place Bank. The probate court correctly noted that "[i]t is incongruous for a person who receives a cash gift from another to make regular interest payments on the donor's source of funds."

{¶34} Accordingly, based on the evidence presented, the probate court did not abuse its discretion in finding the $235,000 at issue was not a gift.

{¶35} Appellant's first, second, and third assignments of error are without merit.

{¶36} In his fourth assignment of error, appellant asserts the probate court erred in approving the value of the decedent's interest in Ross, Maiorca & Associates, Inc. at zero dollars, as submitted by appellee.

{¶37} As stated, an appellate court reviews a probate court's decision under an abuse of discretion standard of review. *Estate of Barry*, *supra*, at ¶15. The burden of proof as to the value of any estate asset lies with the exceptor who must prove the value by clear and convincing evidence. *See generally Estate of Luoma*, 11th Dist. Lake No. 2011-L-006, 2011-Ohio-4701; *In re Estate of Thatcher*, 6th Dist. Fulton No. F-07-004, 2008-Ohio-473.

{¶38} The Supreme Court of Ohio has held that there is a societal interest in efficient administration of estates. *See In re Estate of Centorbi*, 129 Ohio St.3d 78, 2011-Ohio-2267, ¶33.

{¶39} This estate has languished in litigation for over four years. The heirs of this estate deserve finality.

{¶40} The record establishes the probate court issued an order with a time limit which was not followed by appellant. Specifically, as stated, a status conference was held on February 26, 2014 to discuss pending issues in the estate. It was agreed that appellant's attorney would hire a CPA to value the interest, if any, that the decedent had in Ross, Maiorca & Associates, Inc. at the time of his death. The court gave appellant ample time to hire a CPA. In its March 3, 2014 summary of the status conference, the probate court stated that a hearing would be held on the exceptions *if necessary*. However, a hearing had already been held on the exceptions and nothing had changed as far as the procedural status of the case was concerned.

{¶41} On June 5, 2014, appellant filed a motion to compel production of documents, including documents relating to the Ross, Maiorca & Associates, Inc. income tax and business returns after 2010, so that his hired CPA could conduct the appraisal. On June 9, 2014, appellee filed a request for a protective order to limit the production of records from the business to those years immediately prior to the death of the decedent, i.e., calendar years 2009 and 2010 (since the decedent died on January 3, 2011). Appellee outlined all of the items that had been previously presented to the CPA hired by appellant. Appellant requested additional information involving the operation of the accounting firm after the date of the decedent's death. However, the

purpose of the inventory is to value what the decedent owned at the time of his death. Thus, on July 9, 2014, the probate court granted appellee's protective order to limit the discovery to business records to calendar years 2009 and 2010.

{¶42} The record reveals that nothing happened with respect to the valuation for over four months until appellant filed another motion to show cause on November 21, 2014. In response, appellee filed a memorandum in opposition three days later indicating she had met all the requirements placed upon her by the July 2014 protective order. In fact, appellee indicated she had fully complied with all discovery requests, including documents concerning the appraisal, in April 2014.

{¶43} Nevertheless, on December 4, 2014, the probate court gave appellant 30 days from the date appellee fully complies with its prior order to complete his valuation of Ross, Maiorca & Associates, Inc. The court also ordered appellee to provide the information by no later than 14 days from the date of the entry.

{¶44} On December 11, 2014, appellee complied and filed her notice of completion of discovery, supplementing her prior response with additional documents. Again, nothing was done by appellant. Thirty-six days after the December 4, 2014 order, the probate court approved the corrected third amended inventory and appraisal on January 9, 2015.

{¶45} Appellant alleges the probate court abused its discretion in issuing its order on January 9, 2015, a day prematurely. Appellant points out that on December 4, 2014, the court gave appellant 30 days from the date appellee fully complies with its prior order. Thus, appellant stresses that because appellee filed her last compliance notice on December 11, 2014, only 29 days had elapsed. Although appellant accurately

describes the foregoing timeline of events, any "error" made by the probate court in issuing its judgment on January 9, 2015 is harmless, based on the facts in this case.

{¶46} Appellant had ample time throughout these proceedings to comply with various court orders. Again, litigation concerning this estate has been ongoing for over four years. A hearing was had and testimony was taken on October 10, 2012. A status conference was held on February 26, 2014. As stated, in its March 3, 2014 summary of the status conference, the probate court stated that another hearing would be held on the exceptions *if necessary*. However, as a hearing had already been held on the exceptions, and nothing had changed as far as the procedural status of the case was concerned, the court, within its discretion, determined that another hearing was not necessary before issuing its latest ruling.

{¶47} Upon consideration, appellant has failed to carry his burden of proof regarding the valuation of the decedent's interest in Ross, Maiorca & Associates, Inc. from the stated value of zero dollars. The probate court did not abuse its discretion in approving such valuation as submitted by appellee.

{¶48} Appellant's fourth assignment of error is without merit.

{¶49} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas, Probate Division, is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in judgment only with a Concurring Opinion.

TIMOTHY P. CANNON, P.J., concurring in judgment only.

{¶50} I respectfully concur in judgment only.

{¶51} The majority states that we review "a probate court's decision under an abuse of discretion standard of review." However, not every decision of the probate court is reviewed for an abuse of discretion. In a situation such as this, where the probate court has taken evidence with regard to exceptions to an inventory, I believe appellate review presents a mixed question of law and fact. Similar to a criminal suppression hearing, the probate court "assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. We should therefore defer to the factual findings of the trier of fact and review the proper application of the law to those facts de novo. *See id*. As a result, I agree that based on the factual findings of the trial court, the decision that the $235,000 transfer was a loan as opposed to a gift should be affirmed.

{¶52} It is also noted that, while this appeal was pending, the trial court reconsidered and vacated a portion of the judgment that is the subject of this appeal. The court was without jurisdiction to grant that motion while the appeal was pending. It would have been prudent for the parties to request a remand from this court while the appeal was pending. This would have allowed the probate court to rule on the motion properly and possibly avoid an additional appeal.