

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Estate of: Shane A. Humphrey, Deceased, :  
(Herbert Humphrey, : No. 14AP-233  
Appellant). : (Prob. No. 560129)  
(REGULAR CALENDAR)

---

D E C I S I O N

Rendered on December 9, 2014

---

*Keith A. Yeazel*, for appellant.

*Sherrille D. Akin*, for appellee.

---

APPEAL from the Franklin County Court of Common Pleas,  
Probate Division

SADLER, P.J.

{¶ 1} Appellant, Herbert Humphrey, appeals from a judgment of the Franklin County Court of Common Pleas, Probate Division, which overruled his objections and adopted and approved the magistrate's decision denying his motion to reopen the estate of his deceased son, Shane A. Humphrey. For the following reasons, we reverse.

**I. BACKGROUND**

{¶ 2} Shane and Tamara Humphrey were married on September 27, 2003. The couple had two children during their marriage, both born April 5, 2009. On December 12, 2012, Tamara and Shane, along with their attorneys, signed a "Divorce Settlement Memorandum" as part of negotiations in their divorce action in the Franklin County Court of Common Pleas, Division of Domestic Relations. The settlement memorandum stated the parties "appeared this date for trial \* \* \* and reached \* \* \* agreement as to all matters of parental rights and responsibilities, child support, spousal support and

property division [and] hereby request the court to include the same in the final court order." The settlement memorandum indicated the effective date of the divorce decree was December 12, 2012, and directed Tamara to prepare the final divorce decree. The settlement memorandum also indicated the parties waived signatures on the final divorce decree and agreed to be bound by the terms and conditions set forth in the settlement memorandum.

{¶ 3} Shane died intestate on January 20, 2013. There is no indication in the record that Tamara filed a motion to abate the divorce action or otherwise informed the domestic court of Shane's death.

{¶ 4} On January 23, 2013, the domestic court issued an "Agreed Judgment Entry Decree of Divorce," presumably prepared by Tamara pursuant to the direction in the settlement memorandum. The agreed entry decree of divorce indicated in part, "[t]his day, the 12th day of DECEMBER, 2012, this cause came on for hearing," and the parties' agreement regarding their rights and obligations "has been memorialized in this Agreed Judgment Entry Decree of Divorce." The agreed entry decree of divorce also indicated its effective date was the "final hearing date, to wit: 12/12/12." Shane and Tamara waived signatures on the divorce decree "per Settlement Memorandum." The agreed entry decree of divorce was not reopened, vacated, modified or appealed.

{¶ 5} On April 26, 2013, Tamara applied to the probate court for an entry relieving Shane's estate from administration. Tamara listed herself as Shane's surviving spouse and disclosed Shane's two minor children as additional next-of-kin. On the same day, the probate court issued an entry relieving the estate from administration and transferring Shane's probate assets, valued at under \$5,000, to Tamara.

{¶ 6} On July 31, 2013, Herbert filed an application in the probate court to reopen the estate and qualify him as fiduciary, arguing Tamara was not Shane's surviving spouse at the time she filed the application to relieve Shane's estate from administration. Specifically, Herbert asserted Tamara and Shane were divorced at the time of Shane's death, pursuant to the settlement memorandum and divorce decree, which both indicated the effective date of the divorce decree was December 12, 2012. Herbert asserted the probate court had the inherent power to vacate its judgment relieving Shane's estate from

administration, as said judgment had been fraudulently procured pursuant to Tamara's misrepresentation that she was Shane's surviving spouse.

{¶ 7} On August 13, 2013, Tamara filed a memorandum in opposition to Herbert's application. Tamara averred she and Shane were still married at the time of Shane's death on January 20, 2013 because the domestic relations court did not issue its judgment entry decree of divorce until January 23, 2013. Thus, according to Tamara, she properly asserted she was Shane's surviving spouse at the time she filed the application to relieve the estate from administration.

{¶ 8} On August 20, 2013, Herbert filed a reply memorandum in support of his application. Herbert asserted the domestic court's January 23, 2013 agreed entry divorce decree was entered nunc pro tunc, making the effective date of the divorce December 12, 2012, prior to Shane's death. Herbert further argued the domestic court's valid judgment could not be collaterally attacked through probate court proceedings.

{¶ 9} On October 11, 2013, a magistrate held a hearing on Herbert's application to reopen Shane's estate. On October 15, 2013, the magistrate issued a decision denying Herbert's application. The magistrate found Shane's death, which occurred prior to the issuance of the agreed entry decree of divorce, abated the divorce action such that Tamara and Shane were still married at the time of Shane's death; accordingly, Tamara, as Shane's surviving spouse, was the proper person to administer Shane's estate. Having so found, the magistrate recommended the probate court deny Herbert's application to reopen.

{¶ 10} On October 24, 2013, Herbert filed objections to the magistrate's decision. Herbert argued the magistrate erred in finding the divorce action abated upon Shane's death, as Tamara and Shane were already divorced at the time of Shane's death pursuant to the settlement memorandum and divorce decree which both indicated the effective date of the divorce decree was December 12, 2012. Herbert reasserted his argument that the domestic court's January 23, 2013 divorce decree was entered nunc pro tunc, making the effective date of the divorce December 12, 2012, prior to Shane's death, and the domestic court's judgment entry decree of divorce could not be collaterally attacked through probate court proceedings.

{¶ 11} On November 11, 2013, Tamara filed a memorandum contra Herbert's objections. Tamara maintained Shane's death abated the divorce action and the domestic

court's January 23, 2013 judgment entry decree of divorce was not entered nunc pro tunc. Tamara further argued the probate court proceedings did not constitute an impermissible collateral attack on the domestic court's judgment, as said judgment had not yet been entered at the time of Shane's death.

{¶ 12} On February 24, 2014, the probate court issued a judgment entry which overruled Herbert's objections and approved and adopted the magistrate's decision. The probate court determined the magistrate properly found Shane's death abated the divorce action, and the domestic court's January 23, 2013 judgment entry decree of divorce was not entered nunc pro tunc. The court further determined the magistrate properly found a decision by the probate court determining the divorce action abated at Shane's death did not constitute an impermissible collateral attack on a valid judgment because there was not a valid journalized divorce decree before the date of Shane's death.

## **II. ASSIGNMENTS OF ERROR**

{¶ 13} In a timely appeal, Herbert sets forth the following two assignments of error:

[I.] The Probate Court Erred in Finding the Divorce Action Abated upon the Death of Shane Humphrey.

[II.] The Probate Court's Decision That the Divorce Action Abated upon the Death of Shane Humphrey Constitutes an Impermissible Collateral Attack on a Valid Judgment.

## **III. DISCUSSION**

{¶ 14} Herbert's assignments of error challenge the probate court's judgment which overruled his objections and approved and adopted the magistrate's decision denying his motion to reopen Shane's estate. Accordingly, we set forth the standard of review applicable to a trial court's review of a magistrate's decision.

{¶ 15} In accordance with Civ.R. 53, the trial court reviews a magistrate's decision de novo. *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶ 15. In reviewing objections to a magistrate's decision, the trial court must make an independent review of the matters objected to in order "to ascertain [whether] the magistrate has properly determined the factual issues and appropriately applied the law." Civ.R. 53(D)(4)(d). An appellate court, by contrast, applies an abuse-of-discretion

standard when reviewing a trial court's adoption of a magistrate's decision. *Id.* An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Claims of error by the trial court must be based on the trial court's actions, rather than on the magistrate's findings. *Mayle* at ¶ 15. Therefore, we may reverse the trial court's adoption of the magistrate's decision only if the trial court acted unreasonably, arbitrarily or unconscionably. *Id.*

{¶ 16} Herbert's assignments of error are interrelated and, thus, will be considered together. Herbert contends the probate court erred in finding the divorce action abated upon Shane's death and that such finding constituted an impermissible collateral attack on the domestic court's judgment.

{¶ 17} R.C. 2311.21 governs the abatement of actions due to the death of a party and provides, "[u]nless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a county court for misconduct in office, which shall abate by the death of either party."

{¶ 18} Although divorce actions are not referenced in R.C. 2311.21 as actions requiring abatement upon the death of one or both of the parties, Ohio law provides "the death of a party *prior* to adjudication of the issues in a pending divorce case causes the action to abate and ends any jurisdiction that a judge has over the case except to dismiss it." (Emphasis sic.) *Concepcion v. Concepcion*, 131 Ohio App.3d 271, 276 (3d Dist.1999). As the Supreme Court of Ohio observed in *Porter v. Lerch*, 129 Ohio St. 47, 56 (1934), where one or both parties to a divorce action die before a final decree of divorce, the action abates because "[c]ircumstances have accomplished the primary object sought."

{¶ 19} However, an action for a divorce and a division of property does not automatically abate at the death of a party. *Caprita v. Caprita*, 145 Ohio St. 5 (1945), paragraph three of the syllabus. If the domestic court has not yet decided any of the issues prior to the death of one or more of the parties, the action abates as a matter of law and the court lacks jurisdiction to proceed. *State ex rel. Litty v. Leskovyansky*, 77 Ohio St.3d 97, 99 (1996); *Gregg v. Gregg*, 145 Ohio App.3d 218 (12th Dist.2001); *Ramminger v. Ramminger*, 12th Dist. No. CA2000-07-132 (June 11, 2001). However, if the court

adjudicated the facts during the lifetime of the parties, but had not yet reduced its decision to judgment or its judgment had not yet been journalized prior to the death of the party, the domestic court has the discretion to either dismiss the action or enter a judgment nunc pro tunc relating to the time of announcement of the decision. *Caprita* at paragraphs four and six of the syllabus; *Miller v. Trapp*, 20 Ohio App.3d 191 (2d Dist.1984); *Ramminger*.

{¶ 20} In the present case, the domestic court was not required to adjudicate the facts at a hearing, as the parties, during their lifetimes, entered into a written settlement memorandum which resolved all issues in the action, including the division of property and which the parties presented to the court. See *Brooks v. Brook*, 6th Dist. No. L-02-1286, 2003-Ohio-5177, ¶ 13 (court not required to adjudicate facts where parties reached agreement which was presented to court). In accordance with the settlement memorandum, Tamara prepared an agreed entry decree of divorce. However, before the domestic court journalized the agreed entry, Shane died. Had Tamara filed a motion to abate the action following Shane's death or otherwise informed the court of Shane's death, the domestic court, in the exercise of its discretion, could have either dismissed the action or entered a judgment nunc pro tunc relating to the date of the settlement memorandum, i.e., December 12, 2012. *Caprita*; *Miller*. Tamara did not take such action, and the record is void of any indication the trial court was aware of Shane's death. Therefore, the trial court proceeded in its normal course and filed the agreed entry decree of divorce. That judgment terminated the parties' marriage and established that Tamara was no longer Shane's spouse. Tamara could have, but did not, appeal that judgment.

{¶ 21} Tamara's subsequent filing of the application in the probate court to relieve the estate from administration, listing herself as Shane's "surviving spouse," and the probate court's decision that the divorce action abated upon Shane's death constituted collateral attacks on the domestic court's valid judgment entry decree of divorce. A probate proceeding is not the proper means to attack a facially valid judgment from a domestic relations court. See *Davis v. Davis*, 24 Ohio Misc. 17, 22 (1970); *Morrow v. Morrow*, 2d Dist. No. 2225 (Mar. 31, 1987).

{¶ 22} For the foregoing reasons, we conclude the trial court did not abuse its discretion in adopting the magistrate's findings of fact, but did so in adopting the

magistrate's erroneous legal conclusions and in denying Herbert's application to reopen Shane's estate. We thus sustain Herbert's two assignments of error.

#### **IV. CONCLUSION**

{¶ 23} Having sustained Herbert's two assignments of error, we reverse the judgment of the Franklin County Court of Common Pleas, Probate Division, and remand this matter to that court for further proceedings in accordance with law and consistent with this decision.

*Judgment reversed;  
cause remanded.*

BROWN and LUPER SCHUSTER, JJ., concur.

---