

FILED-DISTRICT & COUNTY
COURTS-EL PASO CO., CO

MAR 22 2007
DIVISION 18

In re Marriage of Schwartz

COLORADO COURT OF APPEALS

Court of Appeals No.: 05CA2213
El Paso County District Court No. 04DR2324
Honorable Rebecca S. Bromley, Judge

Case 04 DR 2324

In re the Marriage of

MM

Madeline Busby Schwartz, deceased, by and through the Estate of Madeline
Busby Schwartz,

Appellant,

and

Norman Schwartz,

Appellee.

APPEAL DISMISSED

Division III
Opinion by: JUDGE TAUBMAN
Webb and Román, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)

Announced: March 22, 2007

Sherrets & Boecker, LLC, James D. Sherrets, Omaha, Nebraska, for Appellant

Joe Orell, Colorado Springs, Colorado, for Appellee

Madeline Busby Schwartz (wife), by her estate, appeals from the order declaring the antenuptial agreement executed between her and Norman Schwartz (husband) invalid. We dismiss the appeal.

Wife commenced a dissolution of marriage action by filing a petition in June 2004. In October 2004, wife filed a motion for declaratory judgment, seeking a determination of the validity of the antenuptial agreement. The trial court conducted a hearing and entered a written order on May 9, 2005. In October 2005, the trial court granted wife's motion for entry of a final order pursuant to C.R.C.P. 54(b), finding that its May 2005 order invalidating the antenuptial agreement "affected a substantive right" of wife, "warranting an immediate appeal."

On appeal, an order was directed to wife to show cause why the trial court's C.R.C.P. 54(b) certification of the May 2005 order was proper, despite the fact that permanent orders had not yet been entered, and why the appeal should not be dismissed for lack of a final, appealable order. The motions division deferred that decision and ordered that the parties brief the issue.

While the appeal was pending, we received notification that wife passed away on November 25, 2006. Accordingly, we ordered wife's representatives to show cause why this appeal should not be dismissed with prejudice for lack of jurisdiction due to wife's death. Wife's estate responded to the order to show cause, agreeing that wife's death abated and rendered moot the dissolution. However, wife's estate contends that we should nevertheless address the merits of the appeal, or in the alternative, declare that all the trial court's orders, including its ruling invalidating the antenuptial agreement, are null and void.

We dismiss the appeal without addressing its merits or declaring that the order regarding the antenuptial agreement is null and void.

I. Effect of Death

When a party dies before the entry of a decree of dissolution, the general rule is that the dissolution action immediately abates. Estate of Burford v. Burford, 935 P.2d 943, 952 (Colo. 1997). The objects sought to be obtained by the final decree have been accomplished by the death of one of the parties, and there remains

no status of marriage upon which a final decree of dissolution may operate. Estate of Burford v. Burford, supra. In contrast, if a final dissolution decree affecting property rights was entered, a spouse's subsequent death during the pendency of the appeal does not abate the appeal, and the appellate court may properly review the propriety of the distribution. See In re Marriage of Piper, 820 P.2d 1198 (Colo. App. 1991); see also In re Marriage of Heil, 33 P.3d 1270 (Colo. App. 2001) (death of spouse divests trial court of authority to resolve matters pertaining to the dissolution itself).

Here, it is undisputed that no decree of dissolution entered in the trial court. Accordingly, the appeal is abated and must be dismissed.

II. Effect of Trial Court's Order on Antenuptial Agreement

Wife's estate maintains that even though wife's death abates and moots the dissolution, we should address the merits of her contention on appeal that the trial court erred in declaring invalid the antenuptial agreement. To do so, however, would be inconsistent with abating the appeal. We may not take such inconsistent action. See Estate of Burford v. Burford, supra.

In the alternative, wife's estate contends that we should declare that the trial court's order invalidating the antenuptial agreement is null and void. Wife's estate maintains that, if we do not follow this course, husband will argue that the trial court's order is binding in related probate proceedings.

Wife's estate has cited no case to support this contention, and we have not discovered any Colorado precedent to support the estate's position. However, decisions from other jurisdictions support the conclusion that we may not declare that the trial court's order regarding the antenuptial agreement is null and void.

In In re Marriage of Ignatius, 788 N.E.2d 794 (Ill. App. Ct. 2003), the wife, as here, died before the entry of the decree of dissolution. The appellate court held that the appeal abated on that basis. The court also rejected the contention of the intervenor, the executor of the wife's estate, that the trial court had continuing jurisdiction to enforce a preliminary injunction enjoining the husband from transferring marital property.

In so doing, the court did not vacate the preliminary injunction. Indeed, it concluded, "although the dissolution action

abated, it is possible that the issue of respondent's alleged violation of the preliminary injunction remains viable for resolution in a probate action." In re Marriage of Ignatius, *supra*, 788 N.E.2d at 802.

The Ignatius court distinguished New York Life Insurance Co. v. Sogol, 724 N.E.2d 105 (Ill. App. Ct. 1999), in which the court held that an action to modify a preliminary injunction entered pursuant to the Illinois Marriage and Dissolution of Marriage Act survived the husband's death. There, however, the litigation was an independent lawsuit to enforce the terms of the preliminary injunction entered during the dissolution proceedings.

Taken together, these cases stand for the proposition that, when a predecree appeal abates because of the death of a spouse in a dissolution of marriage action, the court may not address property issues in the context of the dissolution action, although it may do so in related litigation. See also Northwestern Mut. Life Ins. Co. v. Hahn, 713 N.W.2d 709 (Iowa Ct. App. 2006)(even though dissolution of marriage abated after husband's death, court, under its general equity jurisdiction in interpleader action, could

determine whether husband had violated temporary restraining order).

Accordingly, we conclude that there is no basis for us to declare null and void the trial court's order invalidating the antenuptial agreement.

III. Effect of Trial Court's Ruling in Probate Proceeding

As noted, wife's estate contends that the trial court in the probate proceeding will necessarily follow the trial court's order here declaring the antenuptial agreement invalid and that we must thus review it. We conclude that this determination must be made, not by us, but in the probate proceeding. We express no view whether, in the unusual circumstances presented here, the doctrines of issue preclusion, claim preclusion, or law of the case would apply in the probate action.

As the court stated in In re Marriage of Ignatius, supra, "[t]he validity of the court orders, and therefore any arguments respecting their validity or violation, does not end with closure of the dissolution case in which the orders were entered." In re Marriage of Ignatius, 788 N.E.2d at 802. In the probate action, the court

should address whether the trial court's ruling here declaring the antenuptial agreement invalid is binding under the doctrines of claim and issue preclusion, or otherwise. In so doing the probate court should take into account that, although wife, and then her estate, appealed the correctness of the trial court's ruling regarding the antenuptial agreement, we have declined to address the correctness of that ruling on appeal.

Accordingly, the appeal is dismissed.

JUDGE WEBB and JUDGE ROMÁN concur.