

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF
MARSHALL GOLDMAN.

No. 48728

FILED

JAN 09 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

LOUIS GOLDMAN AND HAROLD J.
GOLDMAN,
Appellants,
vs.
CHANNA O. GOLDMAN,
Respondent.

No. 49482

LOUIS GOLDMAN AND HAROLD J.
GOLDMAN,
Appellants,
vs.
CHANNA O. GOLDMAN,
Respondent.

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

These are consolidated appeals from district court orders distributing the remainder of an estate, awarding costs and attorney fees, and denying a motion for a new trial in a probate matter (Docket No. 48728), and from a district court order dismissing a wrongful death action (Docket No. 49482). Eighth Judicial District Court, Clark County; Kathy A. Hardcastle and Valerie Adair, Judges.¹

Docket No. 48728

In the district court probate proceeding underlying the appeal in Docket No. 48728, appellants asserted claims under NRS Chapter 41B that respondent caused Marshall Goldman's death, that the probate court

¹Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

lacked jurisdiction to consider these Chapter 41B claims, and that the remainder of the property in the estate should not be given to respondent. The appeal as to the disposition of the Chapter 41B claims was dismissed because the notice of appeal was untimely filed. Accordingly, the probate court's ruling regarding appellants' Chapter 41B claims is not properly before this court.

The remaining issues on appeal in Docket No. 48728 concern whether the probate court properly awarded the remainder of the estate to respondent, whether it abused its discretion in denying the new trial motion, and whether it abused its discretion in awarding attorney fees and costs. Each issue will be addressed in turn.

Distribution of remainder of estate

The proper distribution of the estate's remaining property requires a multiple-step analysis of the disposition of the Gardens East proceeds. The first question is whether the proceeds were transferred to the trust. A review of the relevant documents demonstrates that the district court properly determined that the proceeds were transferred to the trust. The next question is whether the trust was revoked by Marshall Goldman. In order to determine whether the trust was revoked, it is necessary to determine whether the Gardens East proceeds were community or separate property because the trust outlines different requirements for revocation depending on the classification of the property. Under the trust, if the Gardens East proceeds are community property, the trust could only be revoked as to this asset by written revocation. However, if the proceeds are separate property, no written revocation is required and Marshall could unilaterally revoke the trust as to this property. The district court failed to make a determination as to whether the Gardens East proceeds were community or separate property.

As this classification is necessary in order to determine whether the trust was revoked, which will then affect how the property should ultimately be distributed, we reverse the district court's order awarding the remainder of the property to respondent and remand this matter to the district court to determine whether the proceeds are community or separate property.

We provide the following discussion for the district court's guidance on remand. If the district court finds that the proceeds are community property, then the trust was not revoked and the remaining proceeds should be distributed to respondent as outlined in the trust. If the district court finds, however, that the proceeds are separate property, the court must then determine whether Marshall sufficiently revoked the trust when he stated to his attorneys that he wished to revoke it and the only reason he did not destroy it was because his attorneys incorrectly told him he had to take further steps to revoke the trust as to this asset. If the district court finds the trust was not revoked, then the proceeds should be distributed to respondent under the terms of the trust. But if the district court finds that the trust was revoked, the court should then determine the proper distribution of the remaining property based on its classification as separate property of Marshall Goldman.

New trial motion

Next, we consider the denial of appellants' new trial motion. We review the denial for an abuse of discretion. Lioce v. Cohen, 124 Nev. ___, ___, 174 P.3d 970, 982 (2008). Appellants argue that a new trial was necessary based on the new autopsy report they obtained and the failure of the district court to allow appellants to introduce certain evidence, that the district court prevented appellants from conducting certain discovery, that the proceedings were unfair, and that the district court improperly denied their new trial motion without requiring respondent to file an

opposition. We conclude that these arguments lack merit and that the district court did not abuse its discretion in denying the new trial motion.

Attorney fees and costs

Appellants also challenge the award of attorney fees and costs awarded by the district court. We review such an award for an abuse of discretion. State, Dep't of Transp. v. Cowan, 120 Nev. 851, 860, 103 P.3d 1, 7 (2004). Based on our reversal of the distribution of the remaining proceeds of the estate, we reverse the award of attorney fees and costs to the extent that they were awarded to respondent as the prevailing party. We affirm, however, the award of attorney fees that were granted under NRS 18.010, as the district court did not abuse its discretion in ruling that appellants maintained their Chapter 41B claims without reasonable grounds.

Finally, based on the above, we reject as meritless appellants' claim that their due process rights were violated or that the district court judge should be removed on remand from this case.

Docket No. 49482

Although appellants' appeal from the disposition of the Chapter 41B claims was dismissed in Docket No. 48728, we must nevertheless resolve the issue of whether the probate court lacked jurisdiction to consider these claims because the district court dismissed appellants' lawsuit in Docket No. 49482 based on claim preclusion. While a party cannot generally collaterally attack a court order, it may do so if the prior court lacked jurisdiction over the matter. State Engineer v. Sustacha, 108 Nev. 223, 226 n.3, 826 P.2d 959, 961 n.3 (1992); Searchlight Dev., Inc. v. Martello, 84 Nev. 102, 107, 437 P.2d 86, 89 (1968). Thus, the issue of whether the district court properly dismissed appellants' lawsuit

in Docket No. 49482 depends on whether the probate court had jurisdiction to determine the Chapter 41B claims.

Probate matters are “in the nature of an ‘in rem’ proceeding” and therefore “the court acquires jurisdiction over the estate and all persons for the purpose of determining their rights to any portion of the estate.” Bergeron v. Loeb, 100 Nev. 54, 58, 675 P.2d 397, 400 (1984). As a result, we conclude that the probate court had jurisdiction to resolve the Chapter 41B claims, as they involved determining the rights of all persons to the estate. Therefore, the probate court’s judgment is not void.² Based on this determination, we affirm the district court’s dismissal of appellants’ lawsuit in Docket No. 49482 based on claim preclusion, as the claims were previously addressed by the probate court or should have been raised in that action, and therefore appellants were precluded from bringing a second action on the same claims. Five Star Capital Corp. v. Ruby, 124 Nev. ___, 194 P.3d 709 (2008).

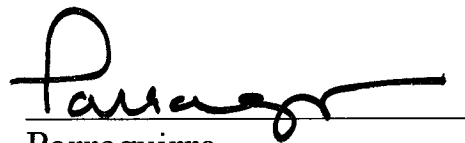
We reject appellants’ alternative argument that claim preclusion does not apply because they had new evidence not considered by the probate court. The new evidence claimed by appellants was a second autopsy report that they obtained following the probate court’s determination. This autopsy report, however, is not properly considered as new evidence because appellants could reasonably have obtained this

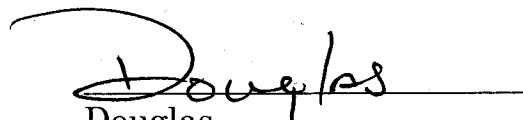
²This conclusion is further supported by the fact that NRS 41B.260(2) provides for interested persons to bring “civil actions” to determine whether someone caused the decedent’s death. This court has previously held that “probate matters are considered to be civil actions.” Peters v. Peters, 92 Nev. 687, 689, 557 P.2d 713, 715 (1976) (quotations omitted). Thus, nothing in Chapter 41B precludes the probate court from having jurisdiction to consider claims under the chapter.

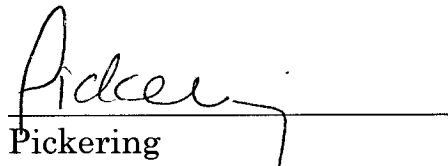
second autopsy well before the probate court action. See, e.g., NRCP 59(a)(4) (stating that a new trial is only proper based on new evidence if the evidence could not reasonably have been discovered or produced at the initial trial). Appellants cannot avoid the preclusive effect of a prior judgment by attempting to introduce new evidence that could have been obtained in the prior matter. See In Re Estate of MacPherson, 92 Cal. Rptr. 574, 578 (Ct. App. 1970); Wolfe v. Farm Bureau Ins. Co., 913 P.2d 1168, 1173 (Idaho 1996). We likewise reject appellants' contention that claim preclusion did not apply because the probate court did not allow certain evidence to be introduced. Appellants failed to provide any legal support for this argument, and we therefore need not consider it. Mainor v. Nault, 120 Nev. 750, 777, 101 P.3d 308, 326 (2004). Accordingly, we affirm the district court's judgment in Docket No. 49482.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

 _____, J.
Parraguirre

 _____, J.
Douglas

 _____, J.
Pickering

cc: Hon. Kathy A. Hardcastle, District Judge
Hon. Valerie Adair, District Judge
Craig A. Hoppe, Settlement Judge
Law Offices of John A. Curtas
Cary Colt Payne
Jolley Urga Wirth Woodbury & Standish
Eighth District Court Clerk