

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-10-00470-CV**

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**IN THE ESTATE OF RUBY GIEBELSTEIN**

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**On Appeal from the County Court at Law No. 2**  
**Montgomery County, Texas**  
**Trial Cause No. 09-25971-P**

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**MEMORANDUM OPINION**

Joseph Giebelstein appeals the trial court's order finding certain property to be the separate property of his deceased wife, Ruby Giebelstein. Because the administrator of the estate demonstrated by clear and convincing evidence the separate nature of the property, we affirm the trial court's order.

**BACKGROUND**

Ruby died intestate. Joseph, Ruby's surviving spouse, did not qualify for letters of administration. Lawrence Parra, Ruby's son, filed an application for letters of administration and determination of heirship. Lawrence was appointed as the administrator of Ruby's estate. The trial court approved the sworn inventory, appraisal, and list of claims filed by Lawrence. Among other things, the inventory

listed the marital residence on Rainfern Drive in Magnolia, Texas as separate property of Ruby's estate. The trial court signed a judgment declaring heirship, which listed Ruby's heirs and their respective shares and interests in her real and personal property.

Joseph filed a motion for a corrected inventory, appraisalment, or list of claims. He asserted that the Rainfern property was community property. The trial court granted the motion. Lawrence filed a motion for rehearing and reconsideration. He argued that the allegations in Joseph's motion were not verified nor sworn, no evidentiary hearing was held on the motion, citation was never issued or served on him, and he was never notified of a hearing.

The trial court signed an order to set aside the order granting Joseph's motion. The trial court set a hearing on Joseph's motion for corrected inventory, appraisalment, or list of claims to determine the characterization of the real property of the estate. After an evidentiary hearing at which the trial court asked the parties to submit briefs, the trial court found that the Rainfern property was Ruby's separate property. The trial court denied Joseph's motion for corrected inventory, appraisalment, or list of claims. In this appeal, Joseph contends the trial court erred in holding that the Rainfern property was Ruby's separate property.

#### APPLICABLE LAW

Generally, the characterization of property as separate or community is determined by its character at inception. *Leax v. Leax*, 305 S.W.3d 22, 33 (Tex. App.—Houston [1st

Dist.] 2009, pet. denied); *McClary v. Thompson*, 65 S.W.3d 829, 834 (Tex. App.—Fort Worth 2002, pet. denied). The Texas Family Code establishes a presumption that property possessed by either spouse during or at the dissolution of marriage is community property. Tex. Fam. Code Ann. § 3.003 (West 2006). This presumption applies against anyone making a claim to a decedent spouse’s property. *See Tarver v. Tarver*, 394 S.W.2d 780, 783-85 (Tex. 1965); *Smith v. Lanier*, 998 S.W.2d 324, 331-32 (Tex. App.—Austin 1999, pet. denied) (citing *George v. Reynolds*, 53 S.W.2d 490, 494 (Tex. Civ. App.—Eastland 1932, writ dism’d)). To overcome the presumption, a party must present clear and convincing evidence that the property is separate. *See* Tex. Fam. Code Ann. § 3.003(b). “‘Clear and convincing’ evidence means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” *See* Tex. Fam. Code Ann. § 101.007 (West 2008).

The party may offer “tracing” evidence showing that the property is separate. *See Leighton v. Leighton*, 921 S.W.2d 365, 367 (Tex. App.—Houston [1st Dist.] 1996, no writ) (citing *Carter v. Carter*, 736 S.W.2d 775, 780 (Tex. App.—Houston [14th Dist.] 1987, no writ)); *see also Bahr v. Kohr*, 980 S.W.2d 723, 728 (Tex. App.—San Antonio 1998, no pet.) (citing *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973)). The statutory presumption that property possessed by either spouse is community property may be rebutted by proof that clearly traces the source of funds used to acquire the

property in question to separate property. *See, e.g., Tarver*, 394 S.W.2d at 783-84; *Wilson v. Wilson*, 145 Tex. 607, 201 S.W.2d 226, 227 (1947); *Taylor v. Taylor*, 680 S.W.2d 645, 647 (Tex. App.—Beaumont 1984, writ ref’d n.r.e.). Proceeds from the sale of separate property immediately assume the status of separate property. *See Estrada v. Reed*, 98 S.W.2d 1042, 1044 (Tex. Civ. App.—Amarillo 1936, writ ref’d). For example, if property is sold and the proceeds are used to purchase other property, the new purchase may be traced to the original property, thereby taking on the status of the original property. *See Dixon v. Sanderson*, 72 Tex. 359, 10 S.W. 535, 536 (1888); *Frazier Jelke & Co. v. Chapman Minerals Corp.*, 149 S.W.2d 1101, 1104 (Tex. Civ. App.—Galveston 1941, writ dism’d). In other words, where an asset is purchased during marriage with funds traceable solely to a spouse’s separate estate, the asset may be appropriately characterized as separate property. *Phillips v. Phillips*, 296 S.W.3d 656, 674 (Tex. App.—El Paso 2009, pet. denied); *Long v. Long*, 234 S.W.3d 34, 37 (Tex. App.—El Paso 2007, pet. denied).

#### STANDARD OF REVIEW

In conducting a legal sufficiency review under a clear and convincing standard, we “look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.” *In re J.F.C.*, 96 S.W.3d 256, 265-66 (Tex. 2002). We “disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible.” *Id.* at

266. When the trial court has acted as factfinder, the trial court determines the credibility of the witnesses and the weight to be given their testimony. *Woods v. Woods*, 193 S.W.3d 720, 726 (Tex. App.—Beaumont 2006, pet. denied); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). In a factual sufficiency review of a finding subject to a clear and convincing standard of proof, we must give due deference to evidence that a factfinder could reasonably have found clear and convincing. *In re J.F.C.*, 96 S.W.3d at 266. If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not have reasonably formed a firm belief or conviction, then the evidence is factually insufficient. *Id.*

#### THE EVIDENCE

Joseph testified that when he met Ruby, she owned her own house on King's Valley, approximately ten miles from his house. Joseph and Ruby married and he moved into Ruby's house. Joseph stated that while they lived at Ruby's house he was employed as a welder and Ruby worked for the Houston Post. They lived in Ruby's house for several years and then moved to the Rainfern property. He explained that he helped purchase the Rainfern property because he was working. He fixed the house up and received "quite a bit" of money from his parents to improve the house. He explained that the reason Ruby was the only one who signed the contract to purchase the Rainfern property was because Ruby handled the financial affairs. Regarding the documents

related to the purchase of the Rainfern property, Joseph explained that only the septic application was in his name. When asked at the hearing whether that was intentional, he explained he asked Ruby about it and she told him, “you know more about septic than I would[.]”

Parts of Joseph’s testimony were conflicting. He admitted he had been diagnosed with dementia and that his dementia would influence his testimony.

Ruby’s daughter, Debra Parra, testified that Ruby and Joseph each owned houses prior to their marriage in 1995. Debra explained that Ruby sold her house on King’s Valley and the sale proceeds, and no other funds, were used to purchase the Rainfern property. Debra testified that Joseph had a mortgage on his separate property house and that because Joseph was not consistently employed, Ruby sometimes paid the mortgage on his house. Debra stated that Ruby’s income paid for the household needs because “a lot of the time [Joseph] didn’t have much money.” According to Debra, at the time of the purchase of the Rainfern property, Ruby was employed but Joseph was not.

Debra identified the settlement statement from the title company that showed the closing transaction for the purchase of the Rainfern house. Debra found the documents in Ruby’s files. The sales addendum for the contract on the Rainfern property was introduced into evidence. The sales addendum states that the purchase contract was contingent on Ruby’s receipt of the proceeds for the sale of her property on King’s

Valley. Debra testified that the signature of the buyer on the addendum was Ruby's signature.

On January 5, 2000, a deed was issued on the Rainfern property. Debra accompanied Ruby to the closing on the sale of the King's Valley property on January 10, 2000. Debra testified that Ruby received \$72,605 as proceeds from the sale of the house, and that Ruby told her that those proceeds were used to purchase the Rainfern property. The closing on the Rainfern property was January 13, 2000, and the transfer of the funds occurred on January 14, 2000. The HUD-1 statement introduced into evidence showed Ruby as the purchaser of the Rainfern property. Debra also identified the cashier's check from Ruby to the title company in the amount of \$68,966.22 for the purchase of the Rainfern property. The Rainfern property was not subject to a mortgage and was paid for in total. Title to the Rainfern property was in Ruby's name. Debra testified that these documents reflect a tracing of the funds that were sales proceeds from the sale of the King's Valley property. Debra stated Joseph sold his house for \$78,000 in 2002, and that Debra knew about the transaction because Ruby helped Joseph with the transaction and told Debra about it.

Debra stated that she knew that the proceeds from the sale of the King's Valley property were used to purchase the Rainfern property. Debra testified that she is familiar with Ruby's banking practices. Ruby kept her funds at Texas Commerce Bank. Debra explained that, as far as she knew, Joseph dealt on a cash basis. Debra stated that prior to

the marriage Ruby had a bank account. Ruby and Joseph opened another account “probably” after 2000. Debra testified that at the time of the purchase of the Rainfern property there was only one account, and it was Ruby’s.

Debra testified that Joseph told her that the Rainfern property was Ruby’s. She testified that all of Joseph’s actions were consistent with Ruby being the exclusive owner of the property. Reviewing a 2007 joint bank account statement for Joseph and Ruby, Debra acknowledged the statement indicated Joseph’s income was seventy-five percent of the couple’s income at that time.

After Ruby’s death, Debra’s sister lived with Joseph at the Rainfern property. Due to problems with her behavior, Joseph gave her an eviction notice that stated he was evicting her from “my home” on Rainfern Drive. The notice was witnessed by five witnesses who, Debra explained, were “owners of the estate of my mom’s house,” and that it was necessary for her to sign it because the house was estate property. Debra interpreted Joseph’s statement in the notice that it was his house to indicate that he was living there and not as an indication that he actually owned the property.

Patti Hoffman, Joseph’s sister who has training as an accountant, testified that she has had Joseph’s power of attorney since January 2009. She said Joseph was working when he married Ruby, he was laid off, and then re-gained employment. When they moved to the Rainfern property he was working as a welder at SPX. She stated that at one



point, Joseph earned about \$60,000 a year at SPX, which was three times the amount of Ruby's income.

According to her records, Ruby and Joseph had joint checking accounts in 2002 and 2004, and nothing reflected that Ruby had a separate account. She admitted she had no records for 1999 and 2000 and that almost all the information she has is from 2002 to the present. However, she testified she saw documentation that her parents wired Joseph and Ruby \$5,000 in December 1999. Patti said that according to her mother, the money was wired because Ruby and Joseph needed money to close on the Rainfern house. Patti was unaware of whether the Rainfern property was subject to a mortgage when it was purchased or whether Joseph's home was subject to a mortgage. Patti stated she did not have any knowledge of what Ruby owned between 1994 and 2000, other than the King's Valley house. Patti had no information regarding what bank accounts Ruby had between 1994 and 2000.

#### CONCLUSION

Joseph argues on appeal that the evidence presented to overcome the community property presumption was not clear and convincing. He contends the purchase contract, addendum, closing documents, and deed on the Rainfern property did not refer to the property as Ruby's separate property. He also maintains no evidence substantiated the claim that the money used to purchase the Rainfern property actually was Ruby's separate funds or came from her separate banking account.

To meet the clear and convincing burden, the evidence need not be unequivocal or undisputed. *Moroch v. Collins*, 174 S.W.3d 849, 857-58 (Tex. App.—Dallas 2005, pet. denied). The administrator of the estate presented documentary and testimonial evidence tracing the money used to purchase the Rainfern property to the proceeds of the sale of Ruby's separate property. *See Phillips*, 296 S.W.3d at 674; *Long*, 234 S.W.3d at 37. The trial court believed Ruby's daughter's testimony regarding the Rainfern property. *See Woods*, 193 S.W.2d at 720; *see also City of Keller*, 168 S.W.3d at 819. On this record, the trial court could reasonably conclude that the administrator of the estate established by clear and convincing evidence that the Rainfern property was Ruby's separate property. The evidence is sufficient to support the trial court's finding. We affirm the trial court's order.

AFFIRMED.

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DAVID GAULTNEY  
Justice

Submitted on June 23, 2011  
Opinion Delivered August 31, 2011

Before McKeithen, C.J., Gaultney and Horton, JJ.