In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00051-CV

IN THE MATTER OF THE MARRIAGE OF
CLINTON BRADLEY AND JENNIE BRADLEY

On Appeal from the 110th District Court
Floyd County, Texas
Trial Court No. 10572, Honorable William P. Smith, Presiding

December 1, 2016

MEMORANDUM OPINION

Before QUINN, C.J., and CAMPBELL and HANCOCK, JJ.

This is an appeal from a final decree of divorce dissolving the marriage of appellant Jennie Bradley n/k/a Jennie Paskos (wife) and Clinton Bradley (husband) and dividing their community property. Wife presents issues challenging the trial court's ruling on her motion for continuance and motion to compel, its characterization of property, and its division of the community estate. Finding no error by the trial court, we will affirm its judgment.

Background

Husband and wife were married in 2003. They had no children. At the time of their marriage husband was an owner of an automobile repair facility in Southlake, Texas. The business was incorporated in 1999 as Texas Auto Service, Inc. ("TAS"), and husband owned half the shares.

In 2002, husband purchased property in Southlake. He paid a sum down and signed a note for the remainder of the purchase price. In addition to TAS's business, three residential rental units were located on the property. Rental income from the property was applied to the monthly payments on the purchase-money note.

Evidence at the final hearing showed in 2010 husband sold his interest in TAS for $199,000 but retained the Southlake property. The buyers paid husband a down payment of $69,000 and paid the remaining $130,000 by December 2012.

When husband sold his interest in TAS, he leased the Southlake property to the corporation. He also granted TAS an option, until May 2016, to purchase the property for $650,000.

After selling his interest in TAS, husband moved to Plainview, Texas, and began work as a farm-equipment salesman. In November 2010, the couple bought eighty acres of property near Lockney, Texas. The purchase was financed with a $16,000 down payment which husband said came from the sale proceeds of his interest in TAS. After they renovated a house on the property, they moved there and built a large metal barn.

During their marriage husband and wife also purchased eleven lots at Lake Brownwood, Texas. Two of the lots were improved with a building containing boat storage and residential quarters.

In 2012, husband obtained a loan from American National Bank, secured by the Southlake property. The loan proceeds were used to repay the existing loan secured by that property, and loans secured by a pickup truck, a travel trailer, the improved Lake Brownwood lots, and the Lockney property including the metal barn.

The remainder of husband and wife's community estate included vehicles, equipment, firearms, tools, bank accounts, and retirement accounts, in addition to household items.

Wife had prior employment with Microsoft and Wayland Baptist University. At the time of hearing she was unemployed. Husband and wife separated in January 2014 and husband filed for divorce in May 2014. Husband testified that in March 2014 he began an intimate relationship with a woman he had known for three or four years.

Husband alleged insupportability as his ground for divorce. Wife filed a counterpetition, alleging insupportability and adultery as grounds. Wife's pleadings sought a disproportionate division of the community estate based on the grounds of "fault in the breakup of the marriage; benefits the innocent spouse may have derived from the continuation of the marriage; increase in value of separate property through community efforts by time, talent, labor, and effort; reimbursement; and creation of community property through the use of a spouse's separate estate."

The case was tried to the bench on August 11, 2015. Before the parties began presenting evidence, the trial court denied wife's motion for continuance. On appeal wife argues her motion for continuance was a "hybrid" motion also containing a motion to compel discovery responses. Husband and wife were the only witnesses but through each the court received a substantial body of documentary evidence. The trial court granted the divorce on the ground of insupportability.[1]

The court signed a decree on October 26, 2015, memorializing the divorce and dividing the couple's community estate. It later signed a decree nunc pro tunc, correcting an erroneous date. At wife's request, findings of fact and conclusions of law were filed in December 2015.

Analysis

Denial of Motion for Continuance and Motion to Compel

Wife first asserts the trial court abused its discretion by failing to grant her motion for continuance and motion to compel. She divides the argument into two sub-issues, asserting she did not receive sufficient notice of the final hearing setting and it was error to proceed with the final hearing on August 11 because husband did not adequately respond to her discovery requests.

On August 11, before the final hearing began, the court conducted an evidentiary hearing to consider wife's motion to compel production of documents and motion for

[1] *See* TEX. FAM. CODE ANN. § 6.001 (West 2006) ("On the petition of either party to a marriage, the court may grant a divorce without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation").

continuance. Counsel for wife stated that the motion to compel was "the reason for the motion" seeking a continuance.

During the motions hearing wife testified there were gaps in the production of documents she requested. She made reference to missing images of checks, apparently spanning several months of bank statements. Counsel for the parties were permitted to argue their positions at length. At a point, however, it developed that wife's motion to compel had not been filed. The court denied the motion for continuance. It explained the ruling by stating there was no motion to compel to rule on and because the motion for continuance was tied to the motion to compel, the motion for continuance would be denied.

"We review a trial court's ruling on a motion to compel discovery for an abuse of discretion." *Wawarosky v. Fast Group Houston, Inc.,* No. 01-13-00466-CV, 2015 Tex. App. LEXIS 1522, at *4 (Tex. App.—Houston [1st Dist.] Feb. 17, 2015, no pet.) (mem. op.) (citing *Austin v. Countrywide Homes Loans,* 261 S.W.3d 68, 75 (Tex. App.—Houston [1st Dist.] 2008, pet. denied)). We likewise apply the abuse of discretion standard when reviewing a trial court's order denying a motion for continuance. *BMC Software Belg., N.V. v. Marchand,* 83 S.W.3d 789, 800 (Tex. 2002). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985).

Motion for Continuance

Wife first argues the trial court abused its discretion by denying her motion for continuance because she did not receive at least forty-five days' notice of the first trial setting. Rule of Civil Procedure 245 provides in part, "the court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial . . . ." TEX. R. CIV. P. 245. It is generally presumed that a trial court hears a case only after notice has been given to the parties, so the obligation to show affirmatively the lack of notice or non-compliance with rule 245 lies with the complainant. *Campsey v. Campsey,* 111 S.W.3d 767, 771 (Tex. App.—Fort Worth 2003, no pet.).

Here, the clerk's record contains a notice from the court coordinator to counsel for wife and husband dated May 28, 2015, setting the final hearing for August 11, 2015. Nothing in the record indicates wife did not receive that notice, and wife did not raise the issue before trial. Wife's obligation to show non-compliance with rule 245 has not been met. The presence of notice of the August 11 final hearing in the record likely explains why wife did not mention an asserted lack of notice in her motion for continuance. It does not explain why, if notice was lacking as wife asserts on appeal, wife did not tell the trial court of the lack of compliance with rule 245. For that reason, even if wife were able now to demonstrate non-compliance with the rule, the rules of error preservation would preclude our consideration of her complaint. *See In re A.H.,* No. 02-06-00211-CV, 2006 Tex. App. LEXIS 10249, at *3-4 (Tex. App.—Fort Worth Nov. 30, 2006, no pet.) (mem. op.) ("A party must timely and specifically object to insufficiency of notice under rule 245, or the error is waived . . . . The objection must be made before trial; a

rule 245 objection made in a motion for new trial is untimely and preserves nothing for review" (citations omitted)); *see generally In re L.M.I.,* 119 S.W.3d 707, 711 (Tex. 2003) (holding preservation of a complaint for appellate review, including constitutional issues, requires presentation of the argument to the trial court by timely request, motion, or objection, stating the specific grounds, and obtaining a ruling); TEX. R. APP. P. 33.1(a).

Motion to Compel

Because a written motion stating the grounds for wife's effort to compel was never filed, she argues on appeal her motion for continuance "was also essentially a hybrid motion to compel." While parties may include more than one motion in a single document, we do not agree wife's motion for continuance also included the otherwise-omitted motion to compel. For one thing, it did not contain the mandatory certificate stating that a reasonable effort was made to resolve the discovery dispute without the necessity of court intervention. TEX. R. CIV. P. 191.2. For another, it did not identify any specific discovery requests with which husband failed to comply. *See In re Harris,* 315 S.W.3d 685, 697 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) (op. on reh'g) (holding trial court abused its discretion by granting motion to compel when, inter alia, movant failed to "identify specific discovery requests with which [nonmovant] had not complied"). Further, during the motions hearing of August 11, wife did not argue that her motion for continuance also sufficed as a motion to compel. As noted, at the beginning of the hearing counsel informed the court the motion to compel was the reason for the motion for continuance.

The trial court did not abuse its discretion by denying wife's motion for continuance after determining it was tied to a motion to compel which was not filed. Wife's first issue is overruled.

Just and Right Division of the Community Estate

The remainder of wife's brief concerns her claim that the trial court abused its discretion in its division of the community estate. She argues property was improperly characterized, the trial court's division of the community estate disproportionately favored husband by a ratio of ten-to-one, and the factors a court may consider in a disproportionate division "weighed heavily" in her favor.

We apply the abuse of discretion standard in determining whether the trial court properly divided the community estate. *Murff v. Murff,* 615 S.W.2d 696, 698 (Tex. 1981); *Boyd v. Boyd,* 131 S.W.3d 605, 617 (Tex. App.—Fort Worth 2004, no pet.). We presume the trial court properly exercised that discretion. *Murff,* 615 S.W.2d at 698. Under the abuse of discretion standard applied in family law cases, legal and factual sufficiency of the evidence are not independent grounds of error, but are relevant factors for determining whether the trial court abused its discretion. *Boyd,* 131 S.W.3d at 611; *Moroch v. Collins,* 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied); *see Beaumont Bank, N.A. v. Buller,* 806 S.W.2d 223, 226 (Tex. 1991) (turnover order). In a bench trial, the court, as fact finder, is the exclusive judge of the witnesses' credibility and the weight given their testimony, and is free to resolve any inconsistencies in the evidence. *Iliff v. Iliff,* 339 S.W.3d 74, 83 (Tex. 2011). It is free to believe some, all, or none of a witness's testimony. *Rivas v. Rivas,* No. 01-10-00585-

CV, 2012 Tex. App. LEXIS 412, at *5 (Tex. App.—Houston [1st Dist.] Jan. 19, 2012, no pet.) (mem. op.).

In a decree of divorce, a trial court must order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party. TEX. FAM. CODE ANN. § 7.001 (West 2006). The court may divide only the spouses' community property. *Jacobs v. Jacobs,* 687 S.W.2d 731, 733 (Tex. 1985). Community property is property, other than separate property, acquired by either spouse during marriage. TEX. FAM. CODE ANN. § 3.002 (West 2006). Property of a spouse owned before marriage as well as property acquired during marriage by gift, devise, or descent, is the separate property of that spouse. TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 3.001(2) (West 2006). It is presumed that property possessed by either spouse during or on dissolution of marriage is community property rather than separate property. TEX. FAM. CODE ANN. § 3.003(a) (West 2006). A party claiming that property is separate property must prove the necessary facts by clear and convincing evidence. TEX. FAM. CODE ANN. § 3.003(b) (West 2006).

Characterization of Southlake property

The primary issue at trial was the characterization of the Southlake property. The property was conveyed to the husband in 2002 before the couple's 2003 marriage. Two factors complicate the analysis: the wife, before their marriage, loaned the husband some $15,000, which he used as part of the down payment he made on the property; and payments on the purchase-money note were made during the marriage,

with community property funds. Testimony showed the husband repaid the $15,000 to the wife, but that repayment also may have been made with community funds.

Under the inception-of-title doctrine, neither of the complicating factors changes the proper characterization of the property as the husband's separate property, and the wife concedes as much on appeal. *See Garza,* 217 S.W.3d at 550-51 (citing *Boyd,* 131 S.W.3d at 612) (stating "[i]nception of title occurs when a party first has a right to claim the property by virtue of which title is finally vested"). Her appellate brief acknowledges the trial court correctly characterized the Southlake property as the husband's separate property.[2]

Characterization of Lake Brownwood and Lockney properties

With respect to the Lake Brownwood and Lockney properties, wife asserts the deeds show her and husband as grantees thus giving rise to a presumption, which she apparently also contends was not rebutted, of a gift to her. If one spouse uses separate

[2] At a point before his sale of his interest in TAS, husband organized a limited liability company and conveyed the Southlake property to the LLC as its only asset. Husband apparently is the LLC's sole member, and the parties effectively have ignored it, treating the Southlake property rather than the membership interest in the LLC as the asset to be characterized as separate or community. Wife did not at trial, and has not on appeal, clearly developed a contention that conveyance of the property to the company affected the issues in dispute at trial. Nor do we find husband's conveyance of the property to the LLC to be significant to our resolution of the appeal. *See Horlock v. Horlock,* 533 S.W.2d 52, 60 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dismissed) ("Mutations and changes in the character of property do not affect the property's nature as separate or community, where it can be definitely traced and identified by clear and satisfactory proof"). *Cf. Smoot v. Smoot,* 568 S.W.2d 177, 178 (Tex. Civ. App.—Dallas 1978, no writ) (when separate property was conveyed to a partnership having no assets, the partner's interest in the partnership was separate property and error of the court in treating separate property conveyed to partnership as separate property of the partner rather than an asset of the partnership was not harmful since it did not affect the division of the community estate).

funds to purchase property during marriage and title to the property is taken jointly, a rebuttable presumption arises that a gift to the other spouse was intended. *Harrison v. Harrison,* 321 S.W.3d 899, 902-904 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Cockerham v. Cockerham,* 527 S.W.2d 162, 168 (Tex. 1975)). The trial court characterized the Lake Brownwood and Lockney properties as community property. It awarded husband $16,000 as reimbursement for separate property funds invested in the Lockney property, and awarded wife reimbursement of $23,466.77 for her separate property funds invested in the Lake Brownwood property. Deeds showing husband and wife as grantees of these properties were not in evidence nor did wife argue in the trial court that she owned an undivided half interest in them as a gift from husband. Because the claim of gift was not presented to the trial court, it was not preserved for our review and we will not consider it as a ground for reversal of the judgment. TEX. R. APP. P. 33.1(a); *see Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 446 S.W.3d 58, 86 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (similarly applying error preservation rule).[3]

On appeal, wife applies the same gift theory to the $16,000 reimbursement awarded husband with respect to the Lockney property. She argues the reimbursement claim "fails as a matter of law because both parties were named on the deed." Elsewhere she argues that husband "lost any claimed separate monies invested in" the

[3] We note also that wife's inventory and appraisement, which is contained in the clerk's record although not admitted at trial, lists the Lockney and Lake Brownwood properties as community property, thus affording some indication why she did not raise her gift claim in the trial court. Even had the issue been preserved, in the absence of sufficient evidence, the trial court would not have abused its discretion by failing to find wife possessed a separate property interest in the properties because of a gift from husband.

Lockney property "by the irrebuttable presumption of gift." Here again, the gift theory was not raised with the trial court, and we will not address it further.

Division of Marital Estate

Wife challenges the sufficiency of the evidence supporting what she characterizes as a disproportionate division of the community estate in favor of husband. She contends husband was allocated property worth ten times that she received. We disagree the court so divided the property.

During their trial testimony, husband and wife expressed differing opinions of the value of some items of their community property. From our review of the entire record, however, it is clear wife is including the Southlake property when she argues husband was allocated ten times the property she received. Husband's inventory listed the $650,000 option price in his contract with TAS as the property's fair market value. But the Southlake property was not a part of the just-and-right division. *Jacobs,* 687 S.W.2d at 733.

The court's findings of fact identify the parties' community property, its valuation, and division. Husband was awarded both the Lockney and Lake Brownwood properties, but he also assumed all the couple's debt. And the court ordered husband to pay wife a one-time cash payment of $102,295. According to husband's valuation evidence, the cash payment would equalize the values of community property awarded the parties, and we can see no abuse of discretion in the trial court's apparent acceptance of that evidence.

Despite her pleading asking for a disproportionate share of community property, wife correctly states in her brief that she argued in the trial court for a "50/50 split" of the community property. As we understand the evidence and the court's findings, its division substantially accomplished that result.[4]

Disproportionate Division

Wife next argues that equitable factors supported a disproportionate division of the community estate in her favor. An equal division of the property is not required, provided the division is equitable. *Marin v. Marin,* No. 14-13-00749-CV, 2016 Tex. App. LEXIS, at *3 (Tex. App.—Houston [14th Dist.] Mar. 29, 2016, no pet.) (mem. op.); *Hooper v. Hooper,* 403 S.W.2d 215 (Tex. Civ. App.—Amarillo 1966, writ dismissed). In deciding whether to make a disproportionate division of the community estate a trial court may consider "such factors as the spouses' capacities and abilities, benefits which the party not at fault would have derived from continuation of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature of the property." *Murff,* 615 S.W.2d at 699. To effectively challenge on appeal a trial court's division of community property, a party must be able to demonstrate from the record that the division was so unjust and unfair that it constituted an abuse of discretion. *Zieba v. Martin,* 928 S.W.2d 782, 790 (Tex. App.—Houston [14th Dist.] 1996, no writ) (op. on reh'g); *Boyd,* 131 S.W.3d at 610 (same). "An abuse of discretion does not occur where

[4] In fact, from our review of husband's valuation evidence, considering husband's assumption of the debt, and with credit for reimbursements and the cash payment to wife, the net value of community property she received appears to be slightly greater than that husband was allocated.

the trial court bases its decision on conflicting evidence or where some evidence of a substantial and probative character exists to support the trial court's division." *Zieba,* 928 S.W.2d at 787.

Wife includes reimbursement of the community estate in her discussion of grounds supporting a disproportionate division of the community estate. Permissible claims for reimbursement include those arising from a reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage. TEX. FAM. CODE ANN. § 3.402(a)(3) (West Supp. 2016). A claim for reimbursement is to be resolved through application of equitable principles and through exercise of the trial court's discretion. TEX. FAM. CODE ANN. § 7.007 (West Supp. 2016); *see Zeptner v. Zeptner,* 111 S.W.3d 727, 735 (Tex. App.—Fort Worth 2003, no pet.) (op. on reh'g) (citing *Vallone v. Vallone,* 644 S.W.2d 455, 459 (Tex. 1982)). The trial court's discretion when deciding a claim for reimbursement is as broad as its discretion when dividing the community estate. *Penick v. Penick,* 783 S.W.2d 194, 198 (Tex. 1988).

The Southlake property produced rental income which the couple applied to the purchase-money note. Rental income generated by separate property during marriage is normally community property. *See In re Marriage of Cigainero,* 305 S.W.3d 798, 800 (Tex. App.—Texarkana 2010, no pet.) (rental income from separate property duplexes was community property). As indicated, in 2012 the purchase-money note, along with obligations secured by community property, was paid with the proceeds of a new indebtedness secured only by the Southlake property. That income from the Southlake property was used to reduce the purchase-money note hints at the prospect the

community estate benefitted husband's separate estate. We conclude, however, that no abuse of discretion is shown merely because the court failed to require reimbursement. The specific, relevant evidence that would have positioned the court to make a discretionary reimbursement determination was not presented. The amount of the reduction in principal accomplished with community income is unknown. And the picture becomes even less clear after 2012 when the indebtedness secured by the Southlake property and other debt, then secured by community assets, were consolidated into a single note.

Wife also asserts husband's admitted adultery and fault in the breakup of the marriage and his dissipation of community funds through gifts to his paramour and parents should have led the court to award wife a disproportionate share of the marital estate. As we have stated, our review of the record leaves us with a much different view of the court's division of the property than is reflected in wife's argument on appeal. Wife has not demonstrated that the court's failure to make a disproportionate division in her favor constituted an abuse of its discretion.

Adequacy of Findings of Fact and Conclusions of Law

Wife requested findings of fact and conclusions of law and gave notice of past due findings. TEX. R. CIV. P. 296, 297. After the court filed its original findings and conclusions, wife requested additional or amended findings and conclusions. TEX. R. CIV. P. 298. The court made no additional findings or conclusions. On appeal, wife argues the court's findings and conclusions are inadequate because they merely reiterate portions of the decree. They do not, she continues, explain why she received

a tenth of what husband received. She asserts the error is not harmless and seeks reversal and remand or, alternatively, abatement of the appeal and remand for preparation of adequate findings and conclusions.

On proper request, in a suit for divorce in which the court divided the parties' community property, a trial court must make findings of fact and conclusions of law concerning "the characterization of each party's assets, liabilities, claims, and offsets on which disputed evidence has been presented; and the value or amount of the community estate's assets, liabilities, claims, and offsets on which disputed evidence has been presented." TEX. FAM. CODE ANN. § 6.711(a) (West 2006).

We have expressed our disagreement with wife's claim she received only a tenth of the community property husband was awarded. In its findings the trial court stated the ground for divorce. It identified and valued the community assets in dispute and designated the recipient of each. It recognized the Southlake property and two bank accounts as husband's separate property. The court did not, nor was it required to, make findings of fact regarding the factors it considered in dividing the community estate. *In re Marriage of C.A.S. & D.P.S.,* 405 S.W.3d 373, 384 (Tex. App.—Dallas 2013, no pet.) (citing *Wallace v. Wallace,* 623 S.W.2d 723, 726 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ dismissed)). The court's findings sufficiently met the requirements of section 6.711(a). Wife correctly points out that in the proper case abatement and remand for error correction is required. TEX. R. APP. P. 44.4. We, however, find no remediable error warranting that action here.

We overrule each of wife's issues challenging the trial court's characterization of assets and division of the community estate and the issue challenging the sufficiency of its findings and conclusions.

Conclusion

Having overruled each of wife's issues, we affirm the judgment of the trial court.

James T. Campbell
Justice