DIVISION II

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION

CA05-328

April 12, 2006

KATHLEEN PENNINO, Special Administratrix of the Estate of Sam Edward Walthall, and Samuel and Lily Walthall
APPELLANTS

v.

BENNIE WALTHALL, Maryse Walthall, Clayton Land & Timber Enterprises, and Walthall Bros. Investment, Inc.
APPELLEES

AN APPEAL FROM OUACHITA COUNTY CIRCUIT COURT
[NO. P-2001-176]

HONORABLE EDWARD P. JONES, CIRCUIT JUDGE

AFFIRMED

Wendell L. Griffen, Judge

Appellant Kathleen Pennino, special administratrix of the estate of her late romantic companion, Sam Walthall, filed an action to set aside, as fraudulent conveyances, certain transfers of property that Sam had made during his lifetime to his brother, appellee Bennie Walthall, and to a closely held family corporation, appellee Clayton Land and Timber Enterprises. The trial judge found that the transfers were not fraudulent, and Kathleen now appeals that ruling as well as the trial court's refusal to impose discovery sanctions on Bennie. We affirm the trial court's orders in all respects.

Background History

Kathleen Pennino and Sam Walthall began a relationship in 1982 and, although they never married, had two children: Samuel Lackey, born in 1986, and Lily Kathleen, born in 1988. The couple separated in 1992, and the record indicates that Sam began paying child support that year. On May 23, 2000, the State Office of Child Support Enforcement filed a petition against Sam to establish paternity of the two children and to recover unpaid child support. As a result, Kathleen obtained a $73,120.16 judgment against Sam. When Sam died on October 17, 2001, she was therefore positioned as a creditor of his estate.

During probate, it appeared that the assets of Sam's estate would not be sufficient to cover all creditors' claims. Kathleen urged the personal representative, James Landers, to pursue litigation to set aside some of Sam's *inter vivos* property transfers so that the property could be returned to the estate. When Landers declined to do so, Kathleen asked to be, and subsequently was, appointed as special administratrix "for the specific purpose of pursuing litigation to set aside certain conveyances involving the deceased." On November 26, 2003, she and the children filed a complaint asking, in relevant part, that Sam's transfer of 153 acres of real property and various stocks to his brother Bennie and to a closely held corporation, Clayton Land and Timber Enterprises, be set aside as fraudulent. Following a trial on the matter, during which the testimony of several witnesses and well over 100 exhibits were introduced into evidence, the circuit judge issued a letter opinion discussing the transactions in detail and finding them not to be fraudulent. The judge also refused Kathleen's request to impose sanctions against Bennie for a discovery violation. The letter opinion was incorporated into an order, from which Kathleen now appeals. She raises the discovery matter as her first point of error.

The Discovery Sanctions Issue

Prior to being appointed special administratrix and filing her complaint, Kathleen propounded interrogatories to Bennie seeking information about any real estate or corporate stock that Sam had transferred since July 1, 1986. When Bennie submitted answers that she deemed insufficient and did not supplement them at her request, she filed a motion to compel, arguing that complete answers were necessary in order for her and the administrator to decide whether to file suit to set aside any fraudulent transfers. On July 7, 2003, the trial judge signed an order compelling Bennie to fully and completely answer the interrogatories within ten days of the entry of the order. Bennie responded on July 21, 2003, with the same answers he had previously filed. At that, Kathleen filed a motion for sanctions and asked the

court to order Bennie and the family corporations to convey the 153 acres and the stocks at issue to the administrator.

On November 12, 2003, the trial court appointed Kathleen as special administratrix and ruled that the discovery dispute "should be dealt with when and if she pursues" the fraudulent-transfer litigation. Consequently, after Kathleen filed her complaint on November 26, 2003, she renewed her motion for sanctions. However, following a hearing, the court dismissed the motion and ruled that the parties should be allowed additional time to propound and respond to discovery. The court also set a trial date for September 22 and 23, 2004, and set a discovery deadline of August 23, 2004, at 5:00 p.m.

On August 23, 2004, at 2:45 p.m., which was two hours and fifteen minutes before the discovery deadline expired, Kathleen filed another motion for sanctions, stating that she had not received any additional responses from Bennie. However, at about 4:30 p.m. that day, a cardboard box was delivered to Kathleen's counsel containing approximately 800 loose documents. Thirty days later, on the first day of trial, Kathleen's counsel told the court that he had spent three days trying to "figure out what it was" in the "jumbled box of stuff." Counsel also stated: "I know what it is [that is contained in the box] after I read it for three days, but if he'd just answered the interrogatories eighteen months ago, we wouldn't be here. We could have prepared for trial adequately." He asked, as sanctions, that Bennie's answer be stricken and that judgment be entered in Kathleen's favor. The court stated that it "didn't know about this box til this morning" and that, had it been aware sooner that there was a problem, it could have gone through the box and analyzed the situation. The court further declared that sanctions might well be in order but that it could not impose them "because of the timing." The court therefore took the matter under advisement and said it would keep the motion in mind as it listened to the evidence. Kathleen's counsel replied: "That'll be fine."

After the trial, the judge denied Kathleen's motion for sanctions, citing several reasons. First, at a hearing held on March 12, 2003, which was before Kathleen's complaint was filed, Kathleen and her counsel "heard and became knowledgeable about most of the relevant evidence, both oral and documentary, available to Bennie Walthall and pertinent to the conveyances in question."[1] Further, the judge stated, if Kathleen concluded on August 23, 2004, that Bennie had not provided complete discovery, the court should have been contacted to resolve the dispute; additionally, if Kathleen was not able to proceed to trial because of incomplete discovery, a motion for a continuance should have been made. Finally, the judge observed that the case was thoroughly tried on its merits by Kathleen and that she did not indicate that she was surprised or hindered by a lack of discovery. Kathleen appeals from that ruling.

The imposition of sanctions for failure to comply with a discovery order is governed by Rule 37 of the Arkansas Rules of Civil Procedure. That rule provides that a court may "make such orders in regard to the failure [to obey a discovery order] as are just," which may include declaring certain facts as established, prohibiting the offending party from introducing matters into evidence, striking pleadings, staying the proceedings until the order is obeyed, entering a default judgment, dismissing a complaint, or ordering payment of expenses and attorney fees. Ark. R. Civ. P. 37(b)(2) (2005). Imposition of sanctions rests within the trial court's discretion, *S. College of Naturopathy v. State*, ___ Ark. ___, ___ S.W.3d ___ (Feb. 10, 2005), and will not be overturned absent an abuse of discretion. *See Graham v. Sledge*, 28 Ark. App. 122, 771 S.W.2d 296 (1989). This court has stated that a trial court should exercise some restraint in imposing the harshest of sanctions. *See id*. Further, our supreme court has recognized that, with regard to discovery disputes, the trial

[1] According to the trial court, at the March 12, 2003 hearing, Bennie testified about the circumstances involving the alleged fraudulent conveyances, and he was cross-examined by Kathleen's counsel.

court is in a superior position to judge the actions and motives of the parties, and we will be reluctant to second guess the trial court on these matters. *See S. College of Naturopathy*, *supra*.

We do not believe that Kathleen has shown that, under the particular circumstances of this case, the trial court abused its discretion in refusing to impose the sanctions she requested. She stated in her motion to compel that the discovery responses were needed so that she and the personal representative could decide whether to file a fraudulent-transfer complaint. However, she made that decision without benefit of the discovery, and her complaint shows that she was able to successfully plead facts to assert fraudulent transfers. Further, once her complaint was filed and Bennie was actually made a party to the litigation, the court re-set a discovery deadline of August 23, 2004. The record contains no contemporaneous objection by Kathleen to that resolution of the matter.

Additionally, it is undisputed that Bennie provided the documents in the cardboard box prior to the August 23, 2004, 5:00 p.m. deadline; and, although the documents were provided in a "jumble," according to Kathleen's counsel, he was able, after three days, to learn the contents of the box, virtually all of which were later introduced at trial. Yet, Kathleen did not seek attorney fees or a continuance, which would have been more in line with the difficulties allegedly wrought by Bennie's manner of document production; rather, she sought, on the day of trial, the extreme sanction of striking Bennie's answer and the entry of judgment against him. As we have said, restraint should be exercised in imposing the harshest of sanctions. *Graham*, *supra*. In any event, the trial court, which was in a superior position to make such a determination, ruled that Kathleen received all pertinent information and documents at the March 2003 hearing and that Kathleen's presentation of her case did not suffer from a lack of discovery. In light of these factors, we cannot say that the trial court abused its discretion in refusing to impose the discovery sanctions sought by Kathleen.

The Fraudulent Transfer Rulings

We turn now to the subject of fraudulent transfers. Kathleen contended at trial that the transfers at issue in this case were made by Sam to deprive his children of their inheritance and to insulate his assets from child-support claims. Arkansas's fraudulent-transfer statute, Ark. Code Ann. § 4-59-204 (Repl. 2001), provides that a transfer is fraudulent if a debtor makes the transfer 1) with actual intent to hinder, delay, or defraud his creditor, or 2) without receiving a reasonably equivalent value in exchange for the transfer, and he, *inter alia*, reasonably believed he would incur debts beyond his ability to pay as they came due. Among the factors to be considered in determining whether fraudulent intent exists are whether the transfer was to an insider, whether the debtor retained possession or control of the property after transfer, whether the debtor had been threatened with suit, and whether the consideration received was reasonably equivalent to the value of the asset transferred. Ark. Code Ann. § 4-59-204(b). A party seeking to prove a fraudulent transfer has the burden of doing so by a preponderance of the evidence. *See Clark v. Bank of Bentonville*, 308 Ark. 241, 824 S.W.2d 358 (1992). Our standard of review is de novo, as in traditional equity cases, but we will not reverse the trial court's findings of fact unless they are clearly erroneous. *See Tipp v. United Bank of Durango*, 23 Ark. App. 176, 745 S.W.2d 141 (1988). When there is conflicting evidence on whether a person's intent in making a transfer is fraudulent, we generally will defer to the trial court's finding on the matter. *See Scott v. Scott*, 86 Ark. App. 120, 161 S.W.3d 307 (2004).

The Quitclaim Deeds

The first transfer we consider involves two quitclaim deeds from Sam to his brothers, Bennie and Donald, whereby he deeded Bennie a two-thirds interest in 153 acres and deeded Donald a one-sixth interest in the same property, thus retaining a one-sixth interest in himself. The trial court ruled that the conveyances were not fraudulent because they were

made in furtherance of an agreement among the brothers that each would have partial ownership of the property and that it was never intended that Sam be the sole owner. Based upon the evidence adduced at trial, we cannot say that the trial judge's finding was clearly erroneous.

The proof showed that the 153-acre tract was once owned by the brothers' late father. Following the filing of a partition suit in 1986, the property was ordered sold at auction. Sam, Bennie, and Donald agreed to work together at the auction and bid against another brother, B.J. Sam made the winning bid of $200,000, and a commissioner's deed was issued in July 1988 naming him as the sole owner of the property. Four months later, in November 1988, Sam deeded five-sixths of the property to Bennie and Donald.

Kathleen argues that Sam's transfer of the five-sixths interest was fraudulent. However, Donald explained at trial that the issuance of the deed naming Sam as the sole owner of the property was a mistake. He said that he, Sam, and Bennie worked as a team to bid on the property, with Bennie putting up $35,000 toward the purchase price, Donald putting up $9000, and all the three brothers taking out a $156,011 loan to pay the balance. He further explained that their attorney, the late Charles Honey, became ill shortly after the transactions, and the deed was mistakenly prepared listing only Sam as the grantee. Donald stated that, when he pointed out the mistake, his attorneys advised him that the situation could be remedied by having Sam execute deeds to Donald and Bennie. That, according to Donald, was the reason for the November 1988 deeds from Sam to him and Bennie. His testimony is supported by the testimony of certified public accountant (CPA) Shelley Delarosa and by documentary evidence in the record, such as his check to the Ouachita County Clerk for $165,000 ($156,000 in loan proceeds plus his own $9000 contribution); a copy of the $156,011 promissory note executed on June 21, 1988, by all three brothers for the stated purpose of purchasing land and giving the bank a security interest in the 153 acres;

copies of checks written by Bennie and his wife on June 20, 1988, totaling $35,000, which Bennie testified went toward paying for the property; and a July 18, 1988 letter from Donald to Bennie stating that Donald considered himself as owning a one-sixth interest in the property and further stating that there was a misunderstanding with the attorney that resulted in the deed being in Sam's name only.

Kathleen questions the veracity of some of the above mentioned documentary evidence. However, the evidence was authenticated by Donald and Bennie, whom the trial court, in its position as fact-finder, was entitled to believe. *See generally Rogers v. Rogers*, 80 Ark. App. 430, 97 S.W.3d 429 (2003). Kathleen also argues that Sam must have thought that he owned the entire 153-acre tract because he executed a will on July 29, 1988, devising the 153 acres to Donald and Bennie. However, the trial court might well have concluded that, because Sam's will was executed prior to the brothers' being able to correct the deeds (Bennie was overseas during some of this time), it was simply a precaution to ensure that the brothers retained ownership as originally agreed.

Kathleen further contends that, at the time Sam made the November 1988 conveyances, he had a motivation to divest himself of assets because "he had recently separated from the mother of his new baby [Lilly had been born in September 1988] whom he had an obligation to support." However, Kathleen testified that she and Sam separated in 1992, which is borne out by records that show child support being paid beginning in that year. Therefore, despite Bennie's testimony that he believed that Kathleen and Sam had separated "that fall," meaning the fall of 1988, there was also testimony that the separation did not occur until 1992, well after this transfer was made.[2]

[2] Bennie also acknowledged, in other testimony, that Sam had given 1992 as the year of separation when he testified at the child-support hearing.

Finally, Kathleen notes that Sam lived on the property rent-free after he made the transfer. Retention of the property by the transferor may be considered evidence of fraudulent intent. Ark. Code Ann. § 4-59-204(b)(2). However, there was considerable evidence in this case that Sam suffered from numerous health and employment problems and that Bennie financially supported Sam in many respects, including living expenses. The record therefore provides an explanation for Sam's staying on the property. Accordingly, we find no error on this point.

The Clayton Land and Timber Enterprises Transfers

The next transfer at issue occurred in 1995, when Bennie and Sam "went into business together" and formed Clayton Land and Timber Enterprises. To form the company, Sam conveyed his one-sixth interest in the 153 acres to the corporation in exchange for 200 shares of stock, and Bennie, having bought out Donald's interest, conveyed his five-sixths ownership in the 153 acres to the company in exchange for 1000 shares. Upon the company's initial formation, the land was its only asset; later, however, the company would later make investment purchases.

Kathleen argues on appeal that this transfer was fraudulent. However, our reading of the trial court's order and letter opinion does not indicate that the court ruled on whether this transaction was fraudulent. We do not address issues on which an appellant fails to obtain a ruling. *Israel v. Oskey*, ___ Ark. App. __, __ S.W.3d __ (Sept. 7, 2005). In any event, we do not believe that Kathleen's argument on this point is well taken. As evidence of fraudulent intent, she relies primarily on Bennie's testimony that he suspected that, at some point, Kathleen would file a lawsuit against Sam. However, Bennie said that he did not think Kathleen would sue Sam for child support but for something else because she was

"litigious."[3] Further, Bennie did not state that his suspicions were the reason for his and Sam's transferring the land to the corporation. Rather, there was evidence that the corporation was a legitimately formed enterprise, operated with an eye toward making money and that, at one point in 2001, Sam's equity in the company was worth more than the base value of his one-sixth interest in the 153 acres. We therefore decline to reverse on this point.

The next transaction occurred in May 2001, when Sam transferred his 200 shares in Clayton Land and Timber to Bennie. The evidence at trial showed that, in February 2001, Clayton Land and Timber bought $208,000 worth of stock in Sun Microsystems on the margin from AG Edwards. The stock took a sudden and drastic downturn shortly thereafter, and margin calls were made. Bennie infused $105,000 into Clayton between February and May 2001, along with approximately $80,000 at a later date, to pay the margin calls. Sam could not make any payments toward the margin calls and, according to CPA Delarosa, signed his stock over to Bennie. There was also testimony from Bennie that Sam owed him money for expenses, legal fees, and child support that he had paid on Sam's behalf. The trial court relied on this evidence in finding that Sam's transfer of the stock to Bennie was not fraudulent but was instead a repayment of money owed.

Kathleen takes issue with the court's finding and points to the circumstances surrounding a 2001 shareholders' meeting. In March 20, 2001, a notice of a special shareholders' meeting was issued, and it listed among the items to be discussed the transfer of Sam's shares with the understanding that he could repurchase them at a future date and the right of present shareholders to purchase additional stock in the event that "an outsider" acquired any shares. The minutes of the meeting, held on March 31, 2001, reflect that Bennie was paying for all of the margin calls and that Sam was unable to contribute; that Sam was

[3] The record is replete with evidence of numerous lawsuits to which Kathleen was a party.

to forfeit his shares of stock to Bennie to settle debts; that, if Sam's financial condition changed, he could repurchase the stock for $30,000 or market value, whichever was less; and that, if the child-support judge "overrules" the transfer, the original investors could buy four additional shares at the price of one cent per share for each share owned at the time of formation of the corporation.

Kathleen insists that the above evidence shows that Sam transferred his stock to Bennie to keep it from falling into her hands. The minutes clearly indicate that the child-support lawsuit was a consideration in structuring the terms under which Sam could re-acquire his shares and under which the current investors could buy future shares. However, the minutes also support the trial court's finding that Sam's 200 shares were transferred because he was unable to pay his part of the margin calls or his own personal expenses and, thus, the stock transfer was initiated for that purpose rather than a fraudulent purpose. Moreover, Bennie testified that his intent in allowing the original owners to purchase stock at one cent per share was not to dilute Kathleen's interest, should she obtain some stock in the child-support suit, but to "keep someone else from outside the family from getting involved in buying it ... I don't know who [Kathleen] might sell it to." Thus, there was conflicting evidence of fraudulent intent, and, in such cases, we defer to the trial court's finding. *See Scott*, *supra*. Further, it is the province of the trier of fact to resolve any conflicts or inconsistencies in the evidence. *See, e.g., Nationsbanc Mtg. Corp. v. Hopkins*, 82 Ark. App. 91, 114 S.W.3d 757 (2003). In light of these considerations, we decline to hold that the trial court clearly erred on this point.

The Walthall Bros. Investment, Inc. Transfer

The final transaction at issue occurred in early 2001 when Bennie either purchased or repossessed approximately 128 of the 175 shares that Sam owned in another family corporation, Walthall Bros. Investment, Inc. According to Bennie, he made this purchase so

that Sam could enroll his oldest son (not one of Kathleen's children) in college. The trial court found that no fraudulent transfer occurred because Sam had owned this stock in trust for his eldest son since 1983, and it became a testamentary trust when Sam died.

The trial court's finding is supported by evidence at trial that, before either of Kathleen's children were born, Sam established a trust for his eldest son containing the Walthall stock. Kathleen does not attack the fact that a trust existed, other than to make accusations that the stock certificates may have been tampered with to reflect a trust. However, the question of whether the certificates were authentic was a matter of credibility, to which we defer to the trial court. *See Nationsbanc Mtg. Corp.*, *supra*. We also note that there was virtually irrefutable documentary and testimonial evidence that the trust containing the Walthall stock was indeed established in 1983.

Kathleen also questions Bennie's testimony that he purchased the stock in order to send Sam's son to school, arguing:

> This was a transfer of almost all of Sam's stock in a wealthy family corporation and the only consideration is a vague promise to send money to Sam's child at some point in the future. Bennie testified that the total amount of money that he had sent [Sam's son] was $1000 by the time of trial.

Kathleen mis-characterizes Bennie's testimony. He in fact said that he paid Sam $1000 at the time of the transfer and had paid him $11,000 at the time of trial out of approximately $18,000, which he considered the value of the stock.

Conclusion

Kathleen concludes by arguing that, in addition to the above transfers, other fraudulent transfers occurred when Sam conveyed his life insurance to Bennie and when Bennie filed "friendly lawsuits" over some of Sam's promissory notes. However, she acknowledges in her brief that the friendly lawsuits were not part of this proceeding because those transactions were set aside. Further, regarding the insurance policy, the trial court noted in its letter

opinion that matter had been settled. We therefore see no reason to reverse on the basis of these transactions.

Affirmed.

PITTMAN, C.J., and ROAF, J., agree.