AFFIRMED and Opinion Filed March 21, 2025

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-23-01258-CV

RICKI GRAHAM, Appellant
V.
DONALD PAUL GRAHAM, Appellee

On Appeal from the 86th Judicial District Court
Kaufman County, Texas
Trial Court Cause No. 109427-86

MEMORANDUM OPINION

Before Justices Smith, Garcia, and Clinton
Opinion by Justice Clinton[1]

In this family law case, appellant Ricki Graham complains in one issue on appeal that the trial court abused its discretion in awarding funds contained in a bank account to appellee Donald Paul Graham as his separate property. We affirm the trial court's decree.

[1] The Honorable Bill Pedersen, III was a member of the original panel; however, as of January 1, 2025, he was replaced by Justice Tina Clinton. Justice Clinton has reviewed the appellate record and briefing in this case and has considered the recorded oral argument.

Background

Ricki and Donald each sought divorce and division of their marital estate in the trial court below. The trial court's final decree of divorce awarded ownership of funds in a bank account. The trial court awarded Donald 60% of the funds as his separate property, held the remaining 40% of funds were community property, and awarded Ricki and Donald each one-half of the remaining funds as their separate property.

On October 11, 2023, Ricki filed a "verified motion to establish the application of Texas Rule of Civil Procedure 306a(4), leave to request findings of fact and conclusions of law, and request for findings of fact and conclusions of law." *See* TEX. R. CIV. P. 306a(4). In that motion, Ricki asserted she received late notice of the trial court's decree. Also on October 11, 2023, Ricki filed a consolidated motion to reconsider and motion for new trial. Donald responded to Ricki's motions. The appellate record does not contain a signed order disposing of Ricki's motions or findings of fact and conclusions of law.

Ricki filed a notice of appeal from the decree and its award of 60% of account funds to Donald as his separate property. This appeal followed.

Standard of Review

We review a complaint that the trial court mischaracterized property under an abuse of discretion standard. *See Fitzpatrick v. Fitzpatrick*, No. 05-22-00001-CV, 2023 WL 3300560, at *4 (Tex. App.—Dallas May 8, 2023, pet. denied) (mem. op.)

(citing *Sink v. Sink*, 364 S.W.3d 340, 343–44 (Tex. App.—Dallas 2012, no pet.)). In making this determination, we indulge every reasonable presumption in favor of the trial court's proper exercise of its discretion in dividing marital property. *See id*. (citing *Sink*, 364 S.W.3d at 343). We reverse the trial court's ruling only if the record demonstrates the trial court clearly abused its discretion, and the error materially affected the just and right division of the community estate. *See id*. (citing *Sink*, 364 S.W.3d at 343).

In family law cases, the traditional sufficiency standard of review overlaps with the abuse of discretion standard of review; therefore, legal and factual insufficiency are not independent grounds of error but are relevant factors in our assessment of whether the trial court abused its discretion. *See Sink*, 364 S.W.3d at 344. When the burden of proof at trial is by clear and convincing evidence, we apply a higher standard of legal and factual sufficiency review. *See id*. Clear and convincing evidence is defined as that "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." TEX. FAM. CODE ANN. § 101.007; *Sink*, 364 S.W.3d at 344. In reviewing the evidence for legal sufficiency, we look at all the evidence in the light most favorable to the judgment to determine if the trier of fact could reasonably have formed a firm belief or conviction that its finding was true. *See Sink*, 364 S.W.3d at 344. We must assume that the fact finder resolved disputed facts in favor of its finding if a reasonable fact finder could do so. *See id*. In

reviewing the evidence for factual sufficiency, we must give due consideration to evidence that the fact finder could reasonably have found to be clear and convincing and then determine whether, based on the record, a fact finder could reasonably form a firm conviction or belief that the allegations in the petition were proven. *See id*.

Applicable Law

Community property consists of the property, other than separate property, acquired by either spouse during marriage. *See* FAM. § 3.002. All property possessed at the time of divorce is presumed to be community property. *See id*. § 3.003(a); *Fitzpatrick*, 2023 WL 3300560, at *5. This is a rebuttable presumption and a spouse who claims any asset as separate property must rebut this presumption by clear and convincing evidence. *See* FAM. § 3.003(b); *Fitzpatrick*, 2023 WL 3300560, at *5. Any doubt as to the character of property should be resolved in favor of the community estate. *See Moon v. Scheef*, No. 05-20-00105-CV, 2022 WL 854916, at *3 (Tex. App.—Dallas Mar. 23, 2022, pet. denied) (mem. op.).

The characterization of property as community or separate is determined by the inception of title to the property, i.e., when a party first has a right of claim to the property by virtue of which title is finally vested. *See Sink*, 364 S.W.3d at 344 (citing FAM. § 3.404(a)). Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the community presumption by tracing the assets on hand during the marriage back to the property that, because of its time and manner of acquisition, is separate in

character. *See id*. If the evidence shows that separate and community property have been so commingled as to defy resegregation and identification, the community presumption prevails. *See In re Estate of Hanau*, 730 S.W.2d 663, 667 (Tex. 1987); *Fitzpatrick*, 2023 WL 3300560, at *5.

Analysis

Ricki argues funds in the account are community property because Donald produced insufficient evidence that funds he deposited into the account were his separate property. Ricki also argues that at least $19,658 of the funds are community property. Additionally, she argues separate property and community property in the account were commingled, resulting in the funds being community property. Donald does not contest the trial court's property awards.

Ricki's "mere testimony" argument

Ricki argues Donald offered only—as she characterizes it—"mere testimony" to prove he deposited funds from his own separate-property sources. She argues Donald presented no evidence to corroborate or support his testimony and that the evidence was therefore insufficient to demonstrate the account contained funds that were Donald's separate property.

We disagree with Ricki's argument. The record demonstrates Donald did not simply present what Ricki describes as "mere testimony." Rather, the appellate record contains ample corroborating and supporting evidence produced by Donald to demonstrate the separate-property source and separate-property character of funds

in the account. The parties referred to this testimony and other evidence in the trial court and do so in this Court. Accordingly, we do not describe that evidence in detail in this memorandum opinion. *See* TEX. R. APP. P. 47.4 ("If the issues are settled, the court should write a brief memorandum opinion no longer than necessary to advise the parties of the court's decision and the basic reasons for it."). We conclude the appellate record refutes Ricki's argument that Donald presented only "mere testimony"—without corroborating or supporting evidence—to establish the account contained his separate-property funds.

However, even if Ricki were correct that Donald produced only testimony to overcome the presumption of community property by clear and convincing evidence—an assertion we rejected above—this Court has held such testimony, when not contradicted, is sufficient to overcome the community-property presumption. *See, e.g., Pace v. Pace*, 160 S.W.3d 706, 714 (Tex. App.—Dallas 2005, pet. denied). Donald testified the sources of deposits were funds from his father's estate or accounts. The appellate record does not reflect Ricki contradicted Donald's evidence, and Ricki fails to cite or distinguish *Pace.* For this additional reason, we reject Ricki's argument based on Donald's so-called "mere testimony" and conclude the trial court did not abuse its discretion in characterizing account funds as Donald's separate property. *See id.*

Further, Ricki's testimony and the assertions of her counsel at oral argument corroborate Donald's testimony concerning the separate-property source of his

deposits. Ricki's counsel argued in oral argument that a spouse's testimony could corroborate another spouse's testimony that the source of property is separate property. Counsel argued, "If the testimony matches, that is one way that it could be . . . it would be corroborated at that point."

Ricki's testimony did just that. Ricki testified (1) Donald had separate "inheritance money" in the account, (2) Ricki did not ask the court to award her any part of Donald's inheritance funds, (3) Donald inherited a substantial sum of money from his father, (4) substantial funds from the sale of Donald's father's house were deposited into the account, (5) she did not dispute that the funds from the sale of the house were Donald's separate property, (6) Donald had a substantial inheritance account, and (7) the account was Donald's separate property. Moreover, in oral argument, Ricki's counsel addressed non-testimonial evidence. Counsel did not dispute that Ricki's exhibit stating her requested relief identified all funds in the account as Donald's separate property. Ricki's counsel conceded at oral argument that Ricki's sworn inventory and appraisement identified the funds in the account as Donald's separate property. For this additional reason, we conclude Donald did not present uncorroborated and unsupported "mere testimony" concerning the source of the deposited funds and that the record contains sufficient evidence to demonstrate the account contained Donald's separate property funds.

The tax return

Ricki identified a single specified amount—$19,658—in the account as being community property and testified she sought an award of part of it. She testified the $19,658 deposit was from an income-tax refund. Ricki argues Donald improperly filed and paid the tax as being single but should have done so as being married. Donald testified the tax refund was for taxes he paid when he withdrew a distribution from his father's account and that the funds he used to pay the taxes were from his father's account. The bank-account statement indicates a $19,658 deposit for "PPD IRS TREAS 310 TAX REF." Donald testified he had unique knowledge of transactions involving his father's estate because he was the estate's executor. Because the issue of the source of the $19,658 hinged on the credibility of the witnesses, we defer to the trial court's determination that the source of the funds was, as Donald testified, a refund of money paid from his father's estate. *See In re B.P.*, No. 05-22-00040-CV, 2023 WL 3735237, at *4 (Tex. App.—Dallas May 31, 2023, no pet.) (mem. op.).

In any event, Ricki acknowledges the trial court awarded her $58,408.31 from the account as her share of community property contained therein. Accordingly, the trial court's $58,408.31 award to Ricki as her share of community property in the account exceeded the $19,658 Ricki specifically identified as community property in the account. Consequently, Ricki has no complaint that the trial court did not award her the property she sought.

Commingling

Ricki briefly asserts, "[W]here, as here, the evidence shows that the community and arguably-separate funds have been so commingled as to defy resegregation and identification, the statutory presumption of community property prevails." *See In re Marriage of Nash*, 644 S.W.3d 683, 696 (Tex. App.—Texarkana 2022, no pet.). However, Donald offered testimony and documentary evidence that funds in the account were his separate property pursuant to the "community out first" rule. *See Zagorski v. Zagorski*, 116 S.W.3d 309, 319–20 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("[W]hen separate and community property are commingled in a single bank account, we presume the community funds are drawn out first, before separate funds are withdrawn."). Donald testified—referring to account statements—about deposits, interest payments, and withdrawals from the account. He testified his withdrawals from the account totaled more than the $19,658 deposit from the tax refund—the only amount in the account Ricki specifically claimed as community property. Donald testified deposits into the account exceeded the amount of funds withdrawn. Ricki does not present specific argument that Donald's community-out-first evidence failed to demonstrate funds in the account were his separate property. The appellate record does not support Ricki's commingled-funds argument.

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We overrule Ricki's sole issue on appeal.

Conclusion

We affirm the trial court's decree.

/Tina Clinton/
TINA CLINTON
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RICKI GRAHAM, Appellant No. 05-23-01258-CV V. DONALD PAUL GRAHAM, Appellee	On Appeal from the 86th Judicial District Court, Kaufman County, Texas Trial Court Cause No. 109427-86. Opinion delivered by Justice Clinton. Justices Smith and Garcia participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee DONALD PAUL GRAHAM recover his costs of this appeal from appellant RICKI GRAHAM.

Judgment entered this 21st day of March 2025.