Opinion issued March 3, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-01029-CV

DIERDRE ROSENSKY, Appellant

V.

DOUGLAS STEVEN ROSENSKY, Appellee

On Appeal from the 306th District Court
Galveston County, Texas
Trial Court Case No. 08FD1973

MEMORANDUM OPINION

Appellant, Dierdre Rosensky ("Dierdre"), appeals from a final decree of divorce from Douglas Steven Rosensky ("Douglas"). In the decree, the trial court determined that the Rosenskys' marital residence was community property and

ordered the property to be sold and the proceeds to be divided between Dierdre and Douglas. In one issue, Dierdre contends that the trial court erred in not classifying the residence as her separate property because the $72,000 that she used for the down payment was a gift from Douglas.

We affirm.

Background

Dierdre and Douglas married in 2000. No children were born during the marriage. In 2006, the parties purchased a home in League City for their marital residence. In her inventory and appraisal filed in the divorce proceeding, Dierdre listed the house under the section entitled "Community Estate of the Parties" and noted that the current net equity in the property, as of May 21, 2009, was $90,978.49, "less the $72,000 that is Dierdre Rosensky's separate property . . . ." In the "Separate Assets of Wife" section of her inventory, Dierdre stated the following:

Description of asset:	Claim by wife's separate estate
Basis of Claim:	Douglas Steven Rosensky gifted to Dierdre Rosensky $72,000 for a down payment on the [League City] home.
How acquired:	Gifted on April 11, 2006.
Value:	$72,000.

Douglas, in his inventory and appraisal, listed the house as community property, noted that title to the property was in the name of "Doug and Dierdre Rosensky," and did not assert that Dierdre had a separate property interest in the house.

At trial, Douglas testified that he wanted the trial court to order the house to be sold and the proceeds to be divided between Dierdre and him, and he asserted that, if she wished to continue living there, she could buy out his interest in the property. Douglas stated that he did not give Dierdre $72,000 for the down payment on the house. Douglas testified that he wired the money for the down payment directly to the title company approximately two days before the closing. He noted that he did not have any direct dealings with either the title company or the mortgage company and that Dierdre, who is a real estate agent, handled the transaction on their behalf. He stated that, at the closing, he was given a stack of documents to sign and no one explained the documents to him before he signed.

Douglas reiterated several times that he did not believe that he was making a gift to Dierdre when he wired the money and that he did not intend to make a gift to Dierdre. When asked to explain his intent in wiring the $72,000 to the title company, he stated that he received the money through a stock sale, that Dierdre told him to make the down payment for the house, and that he wire-transferred the money to do so. Douglas understood that the house was to be for both Dierdre and him, and he noted that the deed for the property listed both Dierdre and himself as

grantees. The trial court admitted the deed, which reflects a conveyance to both Douglas and Dierdre and does not indicate that a portion of the consideration was to be paid with Dierdre's separate property. Douglas did not believe that the house was a gift to Dierdre—rather, he believed that he was transferring the money "to put a down payment for a married couple's house."

Douglas further testified that after Dierdre placed their bid on the house she went to the mortgage company and gave the company both of their social security numbers. She then informed Douglas that because of his previous bankruptcy his credit score was low, which would make it more difficult to get a mortgage on favorable terms. Dierdre recommended placing the mortgage in her name alone, because with her "great credit score," they could hopefully obtain a much better interest rate. Douglas testified that they paid a large down payment in an additional effort to obtain a low interest rate and to keep their monthly mortgage payments low. Douglas further testified that, if he had intended to give the $72,000 to Dierdre a gift, he would have written her a check from his checking account.

The trial court admitted a document entitled "gift letter," dated April 11, 2006, two days before the closing, which stated the following:

> I, Douglas S. Rosensky . . . do hereby certify that I have given a gift of $72,000 to my wife to be applied toward the purchase of the [League City] property. . . . I further certify that repayment is not

> expected or implied on this gift either in the form of cash or future services.

The document contained a signature by the donor, which Douglas confirmed "look[ed] like" his signature. He testified, however, that he did not remember signing the document and that he "never knew that [he] signed that letter." Douglas stated that the first time that he saw the gift letter was at his deposition for the divorce, and he opined that the only way that he could have signed the document was if it had been placed in the stack of documents awaiting his signature at the closing. When asked about the differing dates on the gift letter and the deed, dated April 13, 2006, Douglas stated that, although he did not remember signing the gift letter, he knew that he did not sign it a few days before the closing and therefore the gift letter was misdated.

Dierdre testified that Douglas signed the gift letter on April 11, 2006, two days before the Rosenskys closed on the League City house. Dierdre stated that the gift letter could not have been signed at closing because they needed the document to get approved for the mortgage, which had to occur prior to closing. She testified that she never intended for the $72,000 "to be anything other than a gift from [Douglas.]" She testified that she had a conversation with Douglas about the $72,000 and that he was aware that the money was to be used for the down payment. Dierdre stated that she intended to remain living in the house, and she

was therefore asking the trial court to award her the $72,000 down payment and possession of the house.

On cross-examination, Dierdre agreed that she handled the "back and forth transactions and the daily communications" with the title company and that Douglas was "really not in communication" with the company. Dierdre stated that Douglas signed the gift letter at the loan officer's office at the mortgage company. She further testified that she and Douglas chose to put the mortgage solely in her name because Douglas had a prior bankruptcy. Dierdre agreed with Douglas's counsel that they put the mortgage in her name because (1) they were afraid that they would not be approved for the loan because of Douglas's bankruptcy and (2) they could secure a "much more beneficial interest rate" with Dierdre as the sole mortgagee. Their ultimate goal was to "save as much money [as possible] on the monthly payments."

In the final divorce decree, the trial court ordered the sale of the League City house and awarded forty-eight percent of the net proceeds from the sale to Douglas and fifty-two percent of the net proceeds to Dierdre. The trial court then issued the following findings of fact relating to the alleged gift:

> a. The $72,000.00 down payment that was made on the [League City] house was made from community funds and was not a gift from Douglas Rosensky to Dierdre Rosensky.
>
> b. Douglas Rosensky did not have the requisite donative intent to make a gift to Dierdre Rosensky.

c. Douglas Rosensky did not intend to make a gift to Dierdre Rosensky but intended to make a down payment on the community residence.

The trial court also made the following conclusions of law:

a. The gift letter offered by [Dierdre] is not valid and enforceable.

b. Douglas Rosensky did not have any . . . intent to make a gift to Dierdre Rosensky.

The trial court denied Dierdre's motion for new trial and this appeal followed.

Characterization of Property

In her sole issue, Dierdre contends that the trial court erroneously characterized the real property purchased during the marriage as community property because Douglas gifted the $72,000 for the down payment to Dierdre.

A. Standard of Review

We review the trial court's characterization of property in a divorce under an abuse of discretion standard. *Raymond v. Raymond*, 190 S.W.3d 77, 80 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Robles v. Robles*, 965 S.W.2d 605, 613 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)); *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied) (citing *LaFrensen v. LaFrensen*, 106 S.W.3d 876, 878 (Tex. App.—Dallas 2003, no pet.)). We determine the issue of whether property is separate or community in nature by looking to the facts that, according to rules of law, give character to the property. *Raymond*, 190 S.W.3d at 80 (citing *McElwee v. McElwee*, 911 S.W.2d 182, 188

(Tex. App.—Houston [1st Dist.] 1995, writ denied)). A trial court does not abuse its discretion if there is "some evidence of a substantive and probative character" to support the decision. *Moroch*, 174 S.W.3d at 857; *Raymond*, 190 S.W.3d at 80 ("If there is any evidence to support the finding, the appeals court must uphold the finding.").

A trial court's findings are reviewable for legal and factual sufficiency by the same standards used in reviewing the evidence supporting a jury's verdict. *See Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Moroch*, 174 S.W.3d at 857. In family law cases, however, the abuse of discretion standard overlaps with the traditional sufficiency of evidence standard of review; as such, legal and factual sufficiency are not independent grounds of reversible error, but instead "constitute factors relevant to our assessment of whether the trial court abused its discretion." *Moroch*, 174 S.W.3d at 857 (citing *Boyd v. Boyd*, 131 S.W.3d 605, 611 (Tex. App.—Fort Worth 2004, no pet.)); *Mai v. Mai*, 853 S.W.2d 615, 618 (Tex. App.—Houston [1st Dist.] 1993, no writ). To determine whether the trial court abused its discretion because legally or factually sufficient evidence does not support its decision, we must answer two questions: (1) whether the trial court had sufficient evidence upon which to exercise its discretion, and (2) whether the trial court erred in applying its discretion. *Moroch*, 174 S.W.3d at 857. The sufficiency of evidence review "comes into play with regard to the first question." *Id.* We must

then determine whether, based on the evidence presented at trial, the trial court made a reasonable decision. *Id.* To uphold the trial court's determination, we must conclude that the decision was neither arbitrary nor unreasonable. *Id.*

When the burden of proof at trial is clear and convincing evidence, as when a party attempts to rebut the "community presumption," we apply a higher standard of legal and factual sufficiency review. *See In re J.F.C.*, 96 S.W.3d 256, 265–66 (Tex. 2002); *In re C.H.*, 89 S.W.3d 17, 25–26 (Tex. 2002); *Moroch*, 174 S.W.3d at 857. Clear and convincing evidence is defined as "that measure or degree of proof which 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." *Moroch*, 174 S.W.3d at 857; *see also* TEX. FAM. CODE ANN. § 101.007 (Vernon 2008). To meet the clear and convincing burden, the proof must "weigh more heavily than merely the greater weight of the credible evidence, but the evidence need not be unequivocal or undisputed." *Moroch*, 174 S.W.3d at 857–58.

B. Evidence of Gift

In a divorce, the trial court must divide the community estate in a "just and right" manner. *See* TEX. FAM. CODE ANN. § 7.001 (Vernon 2006). Only community property is subject to the trial court's division. *Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985) (holding that, while trial court has "wide discretion" in dividing estate of parties, it must "confine itself to the community property");

Osborn v. Osborn, 961 S.W.2d 408, 413–14 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). Property possessed by either spouse during or on dissolution of the marriage is presumed to be community property. TEX. FAM. CODE ANN. § 3.003(a) (Vernon 2006). The party asserting that a certain piece of property is actually separate property must establish the separate character of the property by clear and convincing evidence. *Id.* § 3.003(b); *see also Moroch*, 174 S.W.3d at 856 ("The statutory presumption that property possessed by either spouse upon dissolution of the marriage is community is a rebuttable presumption and is overcome by evidence that a specified item of property is the separate property of one spouse or the other."). To satisfy this burden, the spouse must "trace and clearly identify property claimed as separate property." *Moroch*, 174 S.W.3d at 856; *see also Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975) ("[T]he party asserting separate ownership must clearly trace the original separate property into the particular assets on hand during the marriage."). Tracing involves "establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property." *Moroch*, 174 S.W.3d at 856–57 (citing *Boyd*, 131 S.W.3d at 612). Any doubt as to the character of the property should be resolved in favor of the community estate. *Garza v. Garza*, 217 S.W.3d 538, 548 (Tex. App.—San Antonio 2006, no pet.) (citing *Boyd*, 131 S.W.3d at 612).

Separate property includes, among other things, property acquired by gift after marriage. *See* TEX. CONST. art. XVI, § 15 ("All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse . . . ."); TEX. FAM. CODE ANN. § 3.001(2) (Vernon 2006) (defining separate property as including property "acquired by the spouse during marriage by gift"). A gift is a "voluntary transfer of property to another made gratuitously and without consideration." *Magness v. Magness*, 241 S.W.3d 910, 912 (Tex. App.—Dallas 2007, pet. denied) (citing *Hilley v. Hilley*, 342 S.W.2d 565, 569 (Tex. 1961)); *In re L.R.P.*, 98 S.W.3d 312, 314 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd) ("By definition, a gift is the voluntary transfer of property without consideration or compensation."). To establish the existence of a gift, the party must prove three elements: (1) intent to make a gift; (2) delivery of the property; and (3) acceptance of the property. *Magness*, 241 S.W.3d at 912 (citing *Panhandle Baptist Found., Inc. v. Clodfelter*, 54 S.W.3d 66, 72 (Tex. App.—Amarillo 2001, no pet.)). A party establishes the requisite donative intent by, among other things, presenting "evidence that the donor intended an *immediate and unconditional* divestiture of his or her ownership interests and an immediate and unconditional vesting of such interests in the donee." *Nipp v. Broumley*, 285 S.W.3d 552, 559 (Tex. App.—Waco 2009, no pet.) (emphasis in original).

Here, the trial court characterized the League City property as entirely community in nature, ordered the sale of the property, and awarded forty-eight percent of the net proceeds to Douglas and fifty-two percent of the net proceeds to Dierdre. In its findings of fact, the trial court found that the $72,000 down payment was made from community funds and was not a gift from Douglas to Dierdre. The court also found that Douglas did not have the necessary donative intent to make a gift to Dierdre—rather, Douglas intended "to make a down payment on the community residence." The trial court further concluded that the gift letter, offered by Dierdre as evidence of a gift, was neither valid nor enforceable.

There is ample evidence in the record to support the trial court's findings that Douglas did not intend to give the $72,000 to Dierdre as a gift. Douglas repeatedly testified that he did not intend for the $72,000 to be a gift to Dierdre, but that, instead, he wire-transferred the money to the title company "to put a down payment for a married couple's home." Douglas stated that he obtained the $72,000 from a stock sale and, upon Dierdre's instruction to make the down payment, he transferred the money to the title company. Douglas understood that title to the house was to be in both his and Dierdre's names—and, indeed, the deed lists both Douglas and Dierdre as grantees—and he did not intend for the house to be a gift to Dierdre. Both Douglas and Dierdre agreed that they structured the

transaction in this particular manner to achieve the best possible interest rate and lowest possible monthly payments on the mortgage. Placing a large down payment on the house and putting the mortgage documents solely in Dierdre's name allowed the parties to take advantage of her "great credit score" and to avoid the negative impact of Douglas's previous bankruptcy.

On appeal, Dierdre acknowledges that she had the burden to establish that the $72,000 was her separate property by clear and convincing evidence. She contends that the evidence regarding the property "was substantially not disputed," that Douglas "acknowledges the gift and did not dispute the authenticity of the gift document," and that "the fact of the gift was not contested." Dierdre offered the gift letter as evidence that Douglas intended the $72,000 to be a gift to Dierdre and she testified that he signed the letter on April 11, 2006, two days before closing on the house. Contrary to Dierdre's assertions on appeal, Douglas vigorously disputed the authenticity of the gift letter and repeatedly testified that he did not intend for the $72,000 to be a gift to Dierdre.[1]

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[1] On appeal, Dierdre argues that the trial court "found a meaning to the [gift letter] contrary to the plain meaning" of the document, and because the letter was unambiguous, the trial court abused its discretion in finding that Douglas did not intend for the $72,000 to be a gift to Dierdre. In its conclusions of law, the trial court concluded that the gift letter offered by Dierdre was not valid and enforceable and thus implicitly concluded that the document was not credible evidence of Douglas's intent. Dierdre does not challenge this conclusion on appeal and she makes no attempt to argue the validity of the letter. Furthermore, to the extent Dierdre contends that Douglas's testimony regarding his donative intent, or lack thereof, is parol evidence and inadmissible to vary the terms of the

According to the gift letter, Douglas "certif[ied] that [he has] given a gift of $72,000 to [Dierdre] to be applied toward the purchase of the [League City] property." This gift letter was dated April 11, 2006, two days before closing, and Dierdre testified that Douglas signed the letter before the closing because the mortgage company needed the document before approving Dierdre for the loan. Dierdre stated that she discussed the transaction with Douglas and he knew that the $72,000 was to be used for the down payment and that *she* did not intend for the $72,000 "to be anything other than a gift" from Douglas. Dierdre's intent regarding this transaction is irrelevant. In determining whether a transaction constitutes a gift, we look to whether the *donor*—here, Douglas—intended to make a gift. *See Nipp*, 285 S.W.3d at 559. Douglas acknowledged that the donor's signature on the gift letter "look[ed] like" his signature, but he repeatedly testified that he did not remember signing a gift letter, that he first saw the gift letter at his deposition during the divorce proceedings, that he was handed a stack of documents at the closing and, therefore, if he did sign the letter, it must have occurred at the closing, and that if the letter reflected that he signed it before the closing, it was misdated.

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gift letter, we note that Dierdre never objected to any of this testimony at trial. *See* TEX. R. APP. P. 33.1(a)(1)(A) (providing that, to preserve error, appellant must make timely request, objection, or motion stating grounds for ruling with sufficient specificity to make trial court aware of complaint).

As the fact-finder, the trial court alone determines the credibility of the evidence and the witnesses, the weight to give their testimony, and whether to accept or reject all or any part of that testimony. *See Nordstrom v. Nordstrom*, 965 S.W.2d 575, 580–81 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). In determining that the $72,000 was not a gift, the trial court implicitly concluded that Dierdre failed to rebut the community presumption and establish the separate property character of the funds by clear and convincing evidence. We conclude that, based upon this record, the trial court reasonably could have concluded that Dierdre failed to establish by clear and convincing evidence that Douglas intended the $72,000 down payment to be a gift. We hold that legally and factually sufficient evidence supports the trial court's findings, and, therefore, Dierdre has not established that the trial court abused its discretion in characterizing the $72,000 used for the down payment on the League City house as community property. *See Scott v. Scott*, 805 S.W.2d 835, 840 (Tex. App.—Waco 1991, writ denied) ("Betty testified that she never intended to make a gift of the certificate of deposit [held in her husband's name]; Herbert claimed just the opposite. The jury resolved the conflicting evidence on intent by finding that Betty did not give the certificate of deposit to Herbert. Legally and factually sufficient evidence supported that finding.").

We overrule Dierdre's sole issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.