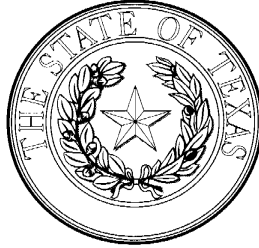


Opinion issued November 14, 2019



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00449-CV

KAMRON KIRKCONNELL, Appellant
V.
GAIL MARIE KIRKCONNELL, Appellee

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Case No. 2018-19630

MEMORANDUM OPINION

Appellant, Kamron Kirkconnell, proceeding pro se, appeals from the trial court's final decree of divorce. In his sole issue, appellant asserts that the trial court's division of the community estate fails to take into account that appellee, Gail Marie

Kirkconnell, breached her fiduciary duty to him, committed fraud on the community, and committed waste of the community property.

We affirm.

Background

In 2018, after 33 years of marriage, appellant and appellee each filed a petition for divorce. On July 26, 2018, the trial court issued a temporary order, granting appellee the exclusive use and possession of the marital home, with the exception that appellant, after written notice and agreement with appellee as to the dates and times, was to have access to the house to remove and return equipment that appellant used in his business. The trial court further ordered that neither party was to sell community property without the other's written consent. In the event of such sale, the parties were to agree on the sales price and to divide the proceeds within three days.

At trial on March 22, 2019, appellee testified that she and appellant had arrived at an agreed distribution of their estate. Their agreement included that appellant was to be awarded the house and that appellee was to be awarded the furniture and contents, with certain exceptions. One exception was that appellant was to be awarded "some of his tools that [were] in the garage" and a "container in the backyard that ha[d] some more of his work paraphernalia." Appellee agreed to vacate the house by April 8, 2019.

Appellant testified at trial that appellee’s testimony accurately represented the terms of their agreement and that their agreement represented a fair and equitable division of their estate.

At the close of trial, the trial court orally granted the parties a divorce and found that, based on the testimony provided, their agreement represented a just and right division of the property and debt that they acquired during their marriage. The trial court set the matter for entry of judgment on April 12, 2019, noting, “Neither of you will need to appear for that hearing date and your attorneys will circulate an order that reflects the terms of the agreement here. And if it bears all signatures, this Court will sign the order on that day.”

On May 17, 2019, the trial court signed a final decree. In the decree, the trial court ordered that appellee deliver to appellant the “[t]ools remaining in the garage as of March 23, 2019.” The copy of the decree in the record before us does not contain appellant’s signature or that of his counsel.

Breach of Fiduciary Duty, Fraud, and Waste

On appeal, appellant asserts that, “on the day of trial when the agreement was reached it was assumed that all [of his] business and personal property [was] preserved” by the July 2018 temporary order. Once appellant regained possession of the house on April 8, 2019, however, he discovered that his business equipment and tools were missing. He asserts that appellee sold them, in violation of the trial

court's temporary order. In his sole issue, appellant argues that the trial court's division of property in the final decree fails to take into account that appellee violated her fiduciary duty to him to preserve the estate, that she committed fraud on the community, and that she committed waste of the community property.

A. *Standard of Review and Legal Principles*

A trial court has broad discretion in dividing a marital estate. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981). We presume that the trial court exercised its discretion properly, and we will not overturn its property division on appeal unless an abuse of discretion is shown. *Id.*; *Puntarelli v. Peterson*, 405 S.W.3d 131, 136 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

In a divorce decree, the trial court “shall 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 § 7.001. In making a just and right division of property, a trial court may take into consideration a variety of factors, including wasting of community assets. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). A claim that a spouse committed waste, fraud, or other damage to the community estate may not be brought as an independent cause of action against the spouse in a suit for divorce; rather, such claim must be asserted for consideration in the trial court's just-and-right division of the community estate. *Chu v. Hong*, 249 S.W.3d 441, 444–45 (Tex. 2008) (“[T]he just-and-right division is the sole method

for adjudicating such claims, and no independent cause of action exists in Texas . . . when the wrongful act defrauded the community estate.” (internal quotations omitted)).

A person who controls her spouse’s interest in community property owes a fiduciary duty to her spouse. *Puntarelli*, 405 S.W.3d at 137. The breach of a legal or equitable duty that violates this fiduciary relationship is termed a “fraud on the community,” a judicially-created concept based on the theory of constructive fraud. *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.—Houston [14th Dist.] 1996, no writ). A presumption of constructive fraud, i.e., waste, arises if the person disposes of her spouse’s property interest without his knowledge or consent. *Id.* A finding of constructive fraud can be supported not only by evidence of specific transfers or gifts of community assets outside the community, but also by evidence that community funds are unaccounted for by the spouse in control of those funds. *Miller v. Miller*, No. 14-17-00293-CV, 2018 WL 3151241, at *6 (Tex. App.—Houston [14th Dist.] June 28, 2018, no pet.) (mem. op.). A claim of improper depletion of the community estate may be resolved through an unequal division of the community estate to achieve an equitable division. *See* TEX. FAM. CODE § 7.009 (“Fraud on the Community; Division and Disposition of Reconstituted Estate”); *Schlueter*, 975 S.W.2d at 588 (holding claim of fraud on community may be used to recover specific property or to obtain greater share of community estate on divorce).

B. Analysis

Here, the record reflects that, on July 26, 2018, the trial court signed a temporary order, granting appellee exclusive possession of the house, directing both parties to maintain the community estate, and ordering that any sale of community assets be agreed upon and the proceeds split within three days. At trial, appellant and appellee each stated on the record that they had arrived at an agreement as to the division of their property and debts. Their agreement included that appellant was to be awarded the house and that appellee was to be awarded the furniture and contents. One exception was that appellant was to be awarded “some of his tools that [were] in the garage” and a “container in the backyard that ha[d] some more of his work paraphernalia.” Appellee agreed to vacate the house by April 8, 2019. On May 17, 2019, the trial court signed a final decree, ordering that the parties’ property and debts be divided in accordance with the terms presented at trial. In the decree, the trial court ordered that appellee deliver to appellant the “[t]ools remaining in the garage as of March 23, 2019.”

We note that the record does not show that appellant raised any issue of fraud, waste, or breach of fiduciary duty in the trial court. *See, e.g., Miller*, 2018 WL 3151241, at *7–9 (holding that trial court reasonably could have found that husband disposed of community funds without wife’s knowledge or consent, or that he failed to account for community property over which he had control, or both, causing

presumption of fraud on community to arise); *Puntarelli*, 405 S.W.3d at 140 (holding that husband’s failure to disclose at least one bank account containing community funds and failure to account for or explain depletion of community funds in his control during pendency of divorce was sufficient to shift burden to him to establish fairness); *Hancock v. Hancock*, No. 2-06-376-CV, 2008 WL 2930586, at *6–8 (Tex. App.—Fort Worth July 31, 2008, no pet.) (mem. op.) (affirming trial court’s finding that husband committed fraud on community by “improperly disposing of certain community property during the pendency of the divorce”). Appellant does not direct us to any place in the record in which he objected to the entry of the final decree or in which he filed any post-judgment motions raising any newly discovered evidence of waste affecting the decree. *See, e.g., Strong v. Strong*, 350 S.W.3d 759, 771–72 (Tex. App.—Dallas 2011, pet. denied).

As a prerequisite to presenting a complaint for appellate review, the record must show that:

- (1) the complaint was made to the trial court by a timely request, objection, or motion that:
 - (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and
 - (B) complied with the requirements of the Texas Rules of Evidence or the Texas Rules of Civil or Appellate Procedure; and
- (2) the trial court:

- (A) ruled on the request, objection, or motion, either expressly or implicitly; or
- (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TEX. R. APP. P. 33.1(a). Because the record does not show that appellant presented his complaint to the trial court, nothing is presented for our review. *See id.*

We overrule appellant's sole issue.

Conclusion

We affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Landau and Hightower.