**Affirmed and Memorandum Opinion filed January 30, 2018.**


**In The**

# Fourteenth Court of Appeals

**NO. 14-16-00637-CV**

**IN THE MATTER OF THE MARRIAGE OF VICTOR ANTON WALZEL, JR., AND PATRICIA WALZEL**

**On Appeal from the 312th District Court**
**Harris County, Texas**
**Trial Court Cause No. 2014-32643**

## M E M O R A N D U M  O P I N I O N

In this divorce proceeding, appellant Victor Anton Walzel, Jr., appeals the trial court's division of the marital estate. Victor argues that the trial court abused its discretion when it divided the marital estate because legally insufficient evidence supports the trial court's finding that Victor "wasted community assets in the amount of approximately $800,000.00." We overrule this issue because there was evidence that Victor disposed of community funds without Patricia's knowledge creating a presumption of waste and Victor then failed to offer evidence establishing the

fairness of those transactions. We therefore affirm the trial court's judgment.

## BACKGROUND

Victor and appellee, Patricia Walzel, married in 1968. Patricia filed for divorce in June 2014. The question of the property division went to trial before the bench. Victor appeared pro se.

At the time the divorce action was filed, both Victor and Patricia were retired. Victor left the home he shared with Patricia in October 2013. Patricia was disabled at the time Victor left and she could not leave the home. Patricia was also not able to take care of herself.

After separating from Patricia, Victor lived with a girlfriend at a different residence between October 2014 and August 2015. Victor admitted that he spent money while living with his girlfriend, but he was unable to explain how much he had spent. He testified that the money was spent for "regular expenses I had to do to live." Victor also testified that he had household expenses during the period he lived with his girlfriend that he would not have had if he had been living with Patricia.

Patricia called Victor as a witness. Victor testified that he and Patricia bought a vacant lot in a planned development in Belize in 2010. Victor admitted that he had established a bank account in Belize and that he had sent money, separate from homeowners' payments, to that bank account.

Victor also admitted to withdrawals from his retirement account in an approximate amount of $703,000. Victor testified that he also made withdrawals from non-retirement financial accounts. When asked to explain where that money went, or what it was used for, Victor testified that the money was "used for our pleasure, bills. Everything we did was for our estate. Everything we ever did was

for us to live a better life and that's where it all went."

Beverly Ryan, a certified public accountant retained by Patricia, testified regarding her efforts to trace approximately $800,000 in retirement distributions and withdrawals from other financial institutions beginning in 2005. Victor stipulated that Ryan was qualified as an expert and he lodged no objection to the admission of her report and supporting documents, including summaries. Ryan reviewed Internal Revenue Service documents, bank account statements, and real estate documents in her effort to trace the community estate's funds. Ryan believed that the financial documents she had received and reviewed were deficient. She asked to meet with Victor in an effort to fill in the gaps, but he refused to meet or to provide her with additional documents. Ultimately, Ryan testified that based on the documents she had reviewed, she could not account for $703,589 withdrawn from retirement funds and $41,165 in cash withdrawals, mostly through ATM machines, from other financial institutions.

Deborah Whitley, Patricia's sister-in-law, also testified during the trial. Whitley testified that Victor left his wife because he "didn't love her," "couldn't stand being around her," and he "wanted to have sex still." Whitley also testified that Victor had not been fair and honest with Patricia because Patricia "had no idea what he was doing to her." Whitley also recounted Victor's effort to have himself declared Patricia's guardian after Patricia filed for divorce. According to Whitley, Patricia had to spend thousands of dollars opposing Victor's effort. Whitley explained that the probate court determined that Patricia was able to make her own decisions.

Victor called two fact witnesses during his case. Neither witness testified regarding the retirement account distributions or financial account withdrawals. Victor did not testify during his case, nor did he call a financial expert witness.

At the conclusion of the bench trial, the trial court signed a Final Decree of Divorce. It dissolved the marriage on the grounds of insupportability and adultery. It assigned the Belize property, a bank account with an approximate balance of $130, ownership of an inactive trucking business, a 2000 Toyota Sienna, and miscellaneous personal property to Victor. The trial court assigned two real properties, a bank account with an approximate balance of $22,000, an annuity account with an approximate balance of $220, several older motor vehicles, an old trailer, and miscellaneous personal property to Patricia. In addition, the trial court included a finding in the divorce decree that Victor had "wasted community assets in the amount of approximately $800,000." It then charged the wasted funds against Victor "as part of the marital property division as if the estate was reconstituted to include the funds that were wasted." This appeal followed.

## ANALYSIS

Victor's single argument on appeal is that the trial court abused its discretion when it divided the community estate because legally insufficient evidence supports the trial court's waste finding.[1]

### I. Standard of review

We review a trial court's division of community property for an abuse of discretion. *Knight v. Knight*, 301 S.W.3d 723, 728 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981)). The test for an abuse of discretion is whether the trial court acted arbitrarily or unreasonably, or whether it acted without reference to any guiding rules or

[1] Victor listed four issues in his brief, all of which contend that the trial court abused its discretion. Because all four issues deal collectively with the trial court's waste finding and its impact on the property division, we address them together.

principles. *Id.* A trial court's division need not be equal and may take into consideration many factors, such as the spouses' capacities and abilities, benefits that the party not at fault would have derived from a continuation of the marriage, business opportunities, education, relative physical conditions, relative financial conditions and obligations, disparity in age, size of separate estates, the nature of the property, and disparity in income and earning capacity. *Id.*

A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the division. *Id.* Because a trial court's discretion is not unlimited, there must be some reasonable basis for an unequal division of the property. *Id.* Under an abuse-of-discretion standard, the legal and factual sufficiency of the evidence are not independent grounds of error; instead, they are considered in assessing whether an abuse of discretion has occurred. *Id.* In other words, Victor must not only show that there is insufficient evidence to support the trial court's waste finding, but also that the erroneous finding caused the trial court to abuse its discretion in the overall division of the community estate. *See Wheeling v. Wheeling*, No. 08-15-00064-CV, 2017 WL 192912, at *5 (Tex. App.—Fort Worth Jan. 18, 2017, no pet.) ("Accordingly, we must also determine whether the errors of which Wife complains of on appeal, if established, caused the trial court to abuse its discretion."); *Matter of Marriage of McCoy & Els*, 488 S.W.3d 430, 433 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("We make a two-pronged inquiry: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial court err in its application of discretion?" (internal quotation marks omitted)).

When, as here, the trial court does not sign findings of fact, we presume the trial court made all necessary findings to support its judgment if those findings are supported by the evidence. *McCoy*, 488 S.W.3d at 433–34. When evaluating the

legal sufficiency of the evidence, we review the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it, crediting favorable evidence if a reasonable fact finder could, and disregarding contrary evidence unless a reasonable fact finder could not. *Id.*

## II. The trial court did not abuse its discretion when it divided the community estate.

A fiduciary duty exists between a husband and a wife as to the community property controlled by each spouse. *Zieba v. Martin*, 928 S.W.2d 782, 789 (Tex. App.—Houston [14th Dist.] 1996, no pet.). The breach of a legal or equitable duty that violates this fiduciary relationship is called a fraud on the community, a judicially-created concept based on the theory of constructive fraud. *Wheeling*, 2017 WL 192912, at *6. Fraud on the community, although not actually fraudulent, has all of the consequences and legal effects of actual fraud because it tends to deceive the other spouse or violates confidences that exist as a result of the marriage. *Id.* Waste is one form of fraud on the community. Waste occurs when a spouse, without the other spouse's knowledge or consent, wrongfully depletes the marital estate of community assets. *Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). The Supreme Court of Texas has recognized waste of community assets as a factor a trial court should consider when dividing a community estate. *Wheeling*, 2017 WL 192912, at *6 (citing *Schlueter*, 975 S.W.2d at 589); *Langan v. Langan*, No. 14-12-01134-CV, 2014 WL 3051216, at *9 (Tex. App.—Houston [14th Dist.] July 3, 2014, no pet.) (mem. op.).

A presumption of waste arises when one spouse disposes of the other's interest in community property without the other spouse's knowledge or consent. *Puntarelli v. Peterson*, 405 S.W.3d 131, 137–38 (Tex. App.—Houston [1st Dist.] 2013, no pet.). In that circumstance, the burden of proof to show fairness in

disposing of the community asset is placed on the disposing spouse. *Zieba*, 928 S.W.2d at 789. A waste finding can be supported by evidence that a spouse used excessive funds without the other spouse's consent. *Wheeling*, 2017 WL 192912, at *6 (citing *Graves v. Tomlinson*, 329 S.W.3d 128, 151 (Tex. App.—Houston [14th Dist.] 2010, pet. denied)). Expenditures for the benefit of a paramour also establish waste. *Id.* (citing *Loaiza v. Loaiza*, 130 S.W.3d 894, 902 (Tex. App.—Fort Worth 2004, no pet.); *Zieba*, 928 S.W.2d at 790. Waste claims can be premised not only on specific transfers or gifts of community assets to a third party, but also on evidence of community funds unaccounted for by the spouse in control of those funds. *Wheeling*, 2017 WL 192912, at *6–7.

Victor argues that the evidence is legally insufficient to support the trial court's finding that he wasted community assets in the amount of $800,000 because Ryan, who Victor contends was the only witness to testify on this subject, based her opinion on several assumptions unsupported by evidence. Because no evidence supported Ryan's expert opinion, Victor contends that the trial court abused its discretion when it charged the wasted funds against Victor as part of its overall division of the community estate.

We turn first to Victor's assertion that legally insufficient evidence supports several of Ryan's assumptions. Ryan testified that she made eight assumptions in rendering her opinion. Victor specifically challenges only three: (1) Victor directed the withdrawal and subsequent disposition of funds from each retirement and annuity account; (2) Patricia had sole access to limited funds, for which an accounting was not necessary; and (3) Victor is accountable for the retirement account and annuity distributions as well as the cash withdrawals from other financial accounts.

We need not decide whether sufficient evidence supports the challenged

assumptions because we conclude they had no impact on Ryan's ultimate opinion that, based on the financial documentation that she was provided and reviewed, she could not account for (1) $703,589 in gross distributions from Victor and Patricia's retirement accounts; and (2) $41,165 in withdrawals from other financial institutions. As explained below, sufficient evidence supports Ryan's opinion that she could not account for these distributions and withdrawals.

We begin by observing that Ryan was not the only witness who testified regarding Patricia's waste claim. Victor admitted withdrawing approximately $703,000 from retirement accounts. He also admitted making withdrawals from other financial institutions. Victor testified that he opened a bank account in Belize and transferred money into that account. Finally, Victor admitted that he spent money while living with his girlfriend that he would not have spent if he had continued living with Patricia. Patricia testified that she was disabled and unable to leave her home as a result.[2] Whitley confirmed that Patricia was disabled. Although Victor testified otherwise, the trial court, as the fact finder, was entitled to disbelieve his testimony and believe the testimony of Patricia and Whitley instead. *See In re Estate of Parrimore*, No. 14-14-00820-CV, 2016 WL 750293, at *8 (Tex. App.—Houston [14th Dist.] Feb. 25, 2016, no pet.) (mem. op.) ("When presented with conflicting evidence, the trial court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given to their testimony."). Whitley also testified that Victor had not been fair and honest with Patricia because Patricia "had no idea what he was doing to her." Finally, Whitley testified about Victor's effort to have himself declared Patricia's guardian and the financial cost of defeating

[2] Victor cross-examined Patricia during the trial. He did not, however, question her about the retirement account and other financial institution withdrawals. Victor instead focused his questions on the reasons behind their separation and filing for divorce.

that effort.

This evidence supports an implied finding that Victor disposed of community funds without Patricia's knowledge, creating a presumption that waste occurred. *See Wheeling*, 2017 WL 192912, at *6–7 (stating that waste claim need not be based on specific transfers of community funds, but can instead be based on evidence of community funds unaccounted for by spouse in control of those funds); *Puntarelli*, 405 S.W.3d at 137–38 (stating that presumption of constructive fraud or waste arises when there is evidence that a spouse disposed of community assets without other spouse's knowledge). The burden of proof therefore shifted to Victor to establish the fairness of his use of community funds. *See Zieba*, 928 S.W.2d at 789 (explaining that when presumption of waste arises, burden of proof to show fairness in disposition of community assets is placed on disposing spouse).

We conclude Victor failed to meet that burden, and that legally sufficient evidence supports the trial court's waste finding. This evidence includes the previously mentioned testimony that Victor withdrew large sums from their accounts and that Patricia did not know what Victor was doing. *See Wheeling*, 2017 WL 192912, at *6 (stating that waste finding can be supported by evidence that spouse used excessive funds without other spouse's consent). Victor sent an unknown amount of community funds to a Belize bank account. *See id.* at *6–7 (evidence of community funds unaccounted for by spouse in control of funds supports waste finding). There was also evidence that Victor spent an unknown amount of community funds for the benefit of his girlfriend. *See id.* at *6 (explaining that expenditures for benefit of spouse's paramour can establish waste). Finally, the record contains evidence that Victor's effort to have himself declared Patricia's guardian needlessly used up thousands of dollars of community funds. *See Graves*, 329 S.W.3d at 151 (waste found where excessive attorney's fees were incurred

during divorce proceedings).

Because there is sufficient evidence supporting the trial court's waste finding, and that is the only basis on which Victor argues the trial court abused its discretion when it divided the community's property, we overrule his issues on appeal.

## CONCLUSION

Having overruled Victor's issues on appeal, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Christopher, Busby, and Jewell.