Affirmed in Part, Reversed and Remanded in Part, and Memorandum Opinion filed December 30, 2021.

In The

Fourteenth Court of Appeals

NO. 14-20-00113-CV

EARL WELTCH, Appellant

V.

ESTATE OF FUSAKO WELTCH, DECEASED; BARBARA WINGER, INDIVIDUALLY AND IN HER CAPACITY AS INDEPENDENT EXECUTRIX; AND SCOTT WINGER, Appellees

On Appeal from the County Court at Law No. 1
Bell County, Texas
Trial Court Cause No. 32422

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

In this appeal from a probate proceeding, widower Earl Weltch alleged that his late wife Fusako committed constructive fraud on the community, theft, and conversion by making large inter vivos gifts to her daughter Barbara Winger, who later became the independent executrix of Fusako's estate. Earl also alleged Barbara and her husband Scott conspired in these wrongful acts. In addition, Earl claimed

that Fusako, without his knowledge and consent, named Barbara as the payable-on-death beneficiary of an account containing community funds. He further alleged that Barbara breached her fiduciary duties to him, intentionally inflicted emotional distress upon him, and violated a statute giving him the primary right to control the disposition of Fusako's remains. After a bench trial, the trial court ruled against Earl on all of his claims and awarded the estate attorney's fees. Earl challenged each of these rulings on appeal.

We conclude that the evidence was insufficient to support the trial court's findings that the inter vivos cash gifts were Fusako's separate property; thus, we reverse and remand the portions of the judgment denying Earl's claims of constructive fraud on the community, denying his claims that Barbara and Scott conspired in such fraud, and awarding the estate attorney's fees. In all other respects, we affirm the trial court's judgment.[1]

I. BACKGROUND

Earl and Fusako Weltch were married for forty-two years. They had no children together, but each had children predating the marriage. Fusako had a daughter, Barbara Winger, who is married to Scott Winger, and a son, James Hicks. Earl has a daughter, Melissa "Anne" Taylor.

In early October 2016, Fusako was diagnosed with lymphoma. On October 11, 2016, Fusako took Barbara into Barbara's old bedroom and showed Barbara that she, Fusako, had sewn envelopes of money into quilting squares. Fusako and Barbara went through a tub of quilting fabric from which Fusako removed

[1] The case was transferred to this Court from the Third Court of Appeals in Austin pursuant to a docket-equalization order issued by the Supreme Court of Texas. *See* TEX. GOV'T CODE ANN. § 73.001. Because this is a transfer case, we apply the precedent of the Third Court of Appeals to the extent it differs from our own. *See* TEX. R. APP. P. 41.3.

$198,650.00. After piling the money on the bed, Fusako transferred the money to a plastic shopping bag and gave it to Barbara. A few weeks later, Fusako gave Barbara an envelope containing $28,446.00.

Fusako died on December 11, 2016. Fusako was cremated, and Barbara and Scott took Earl to pick up her ashes. When they arrived back at the Weltch home, Earl got out of the car and began walking to the house, then turned back and handed Fusako's remains to Barbara before going inside. Scott later spread half of Fusako's remains on Barbara's burial plot.

In her will, Fusako named Barbara independent executrix of her estate and bequeathed to Barbara "my sewing machines, material, notions, and all other craft supplies, cedar chest, jewelry, and grandfather's clock," and bequeathed her china equally to Barbara and James. Fusako bequeathed her son a chest of drawers and left Earl the home, furnishings, car, and bank accounts. One account, however, was a payable-on-death account (the POD Account) in which Barbara was the named beneficiary. Barbara received $104,597.13 from that account, and in the quilting material bequeathed to her, she found an additional $36,800.00 sewn into the fabric.

In the weeks after Fusako's death, Earl told Scott he intended to move to Oregon. Earl began piling up on tables and counters items such as quilts, photos, framed cross-stitched items Fusako had made, and chopsticks. Earl pointed the items out to Barbara, Scott, and James for them to take. The house also contained old bills and bank statements dating back as much as forty years; Scott brought a shredder to the house and helped Earl shred them. Around January 24, 2017, Earl's daughter Anne arrived to stay with him.

After Anne's arrival, Barbara filed this action to probate Fusako's will, and the trial court ordered the $36,800.00 in cash found in the quilting fabric after Fusako's death to be deposited into an account and "frozen." As independent

executrix of Fusako's estate, Barbara filed a sworn inventory in which she identified the $36,800.00 as community property.

After the probate court approved Barbara's inventory, appraisement, and list of claims, Earl's attorney sent Barbara's probate counsel a demand letter asserting that Barbara or Scott had ransacked the home and taken community property, food, photos, cleaning supplies, Earl's wedding ring, and a pearl tie pin. The demand letter also alleged that Barbara had taken hundreds of dollars from Fusako's purse the day she died, had destroyed documents, and had secretly left the funeral home with Fusako's remains and refused to return them despite Earl's repeated demands.[2] Barbara did not return the items demanded and moved to release estate funds for disbursement. Earl objected, and Barbara moved to deny Earl's claims.

Earl eventually amended his pleadings to assert claims against Barbara and additionally against Scott and the estate. Against Barbara,[3] Earl asserted claims of conversion, theft of property, breach of fiduciary duty, intentional infliction of emotional distress, and violation of Texas Health and Safety Code § 711.002 (concerning the right to control the disposition of remains). Against both Barbara and Scott, he alleged civil conspiracy. In Earl's alternative claims against the estate, he pleaded that Fusako committed conversion, theft, and breach of fiduciary duty. In alternative claims against both Barbara and the estate, Earl alleged constructive

[2] This demand letter of January 2018 was the first time these claims were asserted, and the claims actually were asserted by Anne on Earl's behalf. The preceding summer, Anne had been given Earl's durable power of attorney, and not long after, he was diagnosed with Alzheimer's disease and began living in "memory care facilities." Before the hearing on Earl's claims, he was determined to be incompetent to testify.

[3] In his live pleading, Earl identified Barbara as "Decedent's daughter from a previous marriage as well as Independent Executrix of Decedent's Estate," and thereafter referred to Barbara as "Independent Executrix" even when describing events that occurred during Fusako's lifetime. It therefore is often unclear whether Earl pleaded a particular claim against Barbara in her individual capacity, her capacity as independent executrix, or both.

fraud. Finally, Earl sought declaratory judgment that the estate is liable for half of the expenses and damages Earl incurred in two civil suits, but these suits were not described in the record.

After a bench trial of Earl's claims, the trial court rendered final judgment ordering the release of funds as Barbara requested, denying all of Earl's claims, and ordering him to reimburse the estate for its reasonable attorney's fees and court costs. The trial court issued findings of fact and conclusions of law, and no party requested additional or amended findings. Earl's motion for new trial was overruled by operation of law.

II. ISSUES PRESENTED

In Earl's issues, which we have reordered for clarity, he argues that the judgment must be reversed for the following reasons:

1. The evidence is legally and factually insufficient to establish that Fusako intended to give Barbara cash totaling $227,096.00[4] and transfer it to her;

2. The trial court erred as a matter of law in concluding that Fusako's cash inter vivos gifts to Barbara of $227,096.00 were not composed of community property, or alternatively, the evidence is legally and factually insufficient to support the finding that the money was Fusako's separate property;

3. The trial court erred in ruling that Fusako did not commit constructive fraud on the community, conversion, or theft;

[4] Earl actually uses the term "$250K" in his issues and arguments, but he acknowledges in the facts section of his brief that Barbara left the Weltch home on two occasions with "large sums of cash, totaling approximately $226,000.00." For clarity, we have substituted $227,096.00, this being the sum of the $198,650.00 Barbara received from Fusako on October 11, 2016, and the $28,446.00 Barbara received from Fusako a few weeks later.

4. The trial court erred in concluding that Barbara, individually and as independent executrix, did not conspire with Scott or Fusako, and that Scott did not conspire with Barbara or Fusako;

5. The trial court erred in ruling that Barbara did not breach fiduciary duties she owed him in her capacity as independent executrix of Fusako's estate;

6. The evidence is legally and factually sufficient to establish that Earl consented to Barbara's designation as the beneficiary of the POD Account;

7. The trial court erred in denying his claim for intentional infliction of emotional distress;

8. The trial court erred in ruling that Barbara did not violate section 711.002 of the Texas Health and Safety Code; and

9. The trial court erred in awarding attorney's fees to the estate instead of to Earl.

III. PREPONDERANCE-OF-THE-EVIDENCE STANDARD OF REVIEW

Unchallenged findings of fact bind the appellate court unless the contrary is established as a matter of law or no evidence supports the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986). Because findings of fact in a bench trial have the same force and dignity as a jury verdict, we review the challenged findings for legal and factual sufficiency of the evidence under the same standards we apply in reviewing a jury's findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

Earl was required to prove his claims by a preponderance of the evidence, and when this standard applies, we determine if legally sufficient evidence supports the challenged finding by "view[ing] the evidence in the light favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *City of Keller v. Wilson*, 168 S.W.3d

802, 807 (Tex. 2005). Evidence is legally sufficient if it "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). Evidence supporting a finding is legally insufficient if (a) no evidence in the record supports it, (b) rules of law or of evidence bar the court from giving weight to the only evidence offered to prove it, (c) there is no more than a scintilla of supporting evidence, or (d) the evidence conclusively establishes the converse. *See Wilson*, 168 S.W.3d at 810. When the party with the burden of proof attacks the legal sufficiency of the evidence to support a finding, the party must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam). When a finding is attacked by a party without the burden of proof, the party must demonstrate that no more than a scintilla of evidence supports the finding. *See Gardner v. Cummings*, No. 14-04-01074-CV, 2006 WL 2403299, at *2 (Tex. App.—Houston [14th Dist.] Aug. 22, 2006, pet. denied) (mem. op.) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)).

When reviewing for factual sufficiency, we consider and weigh all of the pertinent evidence, and we will set the finding aside only if "the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered." *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016). When a party without the burden of proof challenges the factual sufficiency of an adverse finding, the party must show that the evidence was against the great weight and preponderance of the evidence. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam).

Under any standard of review, the factfinder is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *N. E. Indep. Sch. Dist. v. Riou*, 598 S.W.3d 243, 255 n.50 (Tex. 2020). The reviewing court may not interfere with the factfinder's resolution of conflicts in the evidence. *See Johnson v. Nat'l Oilwell Varco, LP*, 574 S.W.3d 1, 13 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Thus, less evidence is needed to affirm than to reverse a judgment. *Yeng v. Zou*, 407 S.W.3d 485, 489 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

IV. THE INTER VIVOS GIFTS

We begin by addressing the issues concerning Fusako's two inter vivos gifts to Barbara in amounts totaling $227,096.00.

A. Legally and factually sufficient evidence supports the trial court's finding that Fusako intended to give Barbara the money and transfer it to her.

The trial court found that Fusako gifted and transferred $198,650.00 to Barbara on October 11, 2016, and a few weeks later, made Barbara a gift of an additional $28,446.00. Earl asserts that the evidence is legally and factually insufficient that Fusako intended to make a gift to Barbara of this cash, because (1) Barbara and Scott offered conflicting testimony; (2) Barbara claims Fusako expressed the intent to give Barbara the money on two occasions when Fusako was "heavily medicated and disoriented"; and (3) Fusako gave Barbara the money on days when Fusako received medical treatment, or the day after Fusako returned home from a hospital stay.

As for the first contention, Earl does not identify any material conflict in Barbara's and Scott's testimony concerning the transfers. Moreover, it is undisputed that Barbara is the only surviving witness to each transfer, and in any event, we must defer to the factfinder's resolution of conflicts in the evidence, so long as that resolution is not itself unreasonable. *See Austin v. Austin*, No. 03-18-00678-CV,

2019 WL 4309569, at *2 (Tex. App.—Austin Sept. 12, 2019, no pet.) (mem. op.). Regarding the first transfer, Barbara testified that Fusako took Barbara into the latter's old bedroom, where there were tubs of quilting fabric. They two went through one tub and Fusako pulled out packets of quilting fabric sewn on all four sides and piled them on the bed, then put the packets in a plastic bag, handed the bag to Barbara, and told Barbara "to take it and keep it." Sewn into each packet was an envelope of cash. At another time, Barbara testified that Fusako "pulled out money that she had been keeping in there, and piled it on the bed." Any conflict in the evidence as to when the money was removed from the envelopes or the quilting packets was resolved by the trial court, but both versions support the trial court's finding that Fusako intended to, and did, give the money to Barbara.

The date of the second transfer is unknown; Barbara testified only that Fusako gave her a brown envelope of cash a few weeks after the first gift. Again, the only evidence is that this was an intentional gift.

As for the remaining contentions, there is no evidence that Fusako was "heavily medicated and disoriented" when she made these gifts; to the contrary, Barbara testified that Fusako was lucid every time they saw one another and that Fusako was not taking any oral medications that would have impaired her cognitive abilities. There also is no evidence that Fusako had received medical treatment on the dates of the gifts and no evidence that any medication prescribed for or taken by Fusako was capable of influencing her ability to make financial decisions. Barbara's brother James Hicks testified that from mid-October 2016 until Fusako's death, Fusako's mental state declined and she often acted out of character, being openly affectionate when she had not previously been an affectionate person, but he later clarified that Fusako was fine in October and that it was "closer to the end of November" that Fusako "wasn't making a whole lot of sense" most of the time. But

again, the trial court reasonably could, and presumably did, resolve any conflicts in the evidence in Barbara's favor.

We overrule this issue.

B. The evidence is legally insufficient to rebut the presumption that the cash Barbara received during Fusako's lifetime was community property.

All property possessed by either spouse during their marriage is presumed to be community property. TEX. FAM. CODE ANN. § 3.003(a). A party claiming that property is the separate property of one spouse bears the burden to rebut this presumption. *Pearson v. Fillingim*, 332 S.W.3d 361, 363 (Tex. 2011) (per curiam). "To do so, they must trace and clearly identify the property in question as separate by clear and convincing evidence." *Id.* "'Clear and convincing evidence' means the 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.

"When tracing separate property, it is not enough to show that separate funds could have been the source of a subsequent deposit of funds." *Boyd v. Boyd*, 131 S.W.3d 605, 612 (Tex. App.—Fort Worth 2004, no pet.) (citing *Latham v. Allison*, 560 S.W.2d 481, 485 (Tex. App.—Fort Worth 1977, writ ref'd n.r.e.)). Rather, "[t]racing 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." *Ganesan v. Vallabhaneni*, 96 S.W.3d 345, 354 (Tex. App.—Austin 2002, pet. denied). "As a general rule, mere testimony that funds came from a separate source, without any tracing of the funds, will not constitute the clear and convincing evidence necessary to rebut the community presumption." *Cobb v. Cobb*, No. 03-14-00325-CV, 2016 WL 3136886, at *3 (Tex. App.—Austin June 3, 2016, pet. denied) (mem. op.) (citing *Boyd*, 131 S.W.3d at 612).

Because a separate-property finding requires proof by clear and convincing evidence, we review the legal sufficiency of the evidence to support such a finding by considering all of the evidence in the light most favorable to the finding to determine whether a reasonable factfinder "could have formed a firm belief or conviction that its finding was true." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We review the factual sufficiency of the evidence by considering whether all of the evidence is such that a factfinder could reasonably form a firm belief or conviction that the separate-property allegation was proven. *Id.*; *Goyal v. Hora*, No. 03-19-00868-CV, 2021 WL 2149628, at *5 (Tex. App.—Austin May 27, 2021, no pet.) (mem. op.).

Here, Barbara failed to adequately trace the cash Fusako gave her. Barbara testified,

> [Fusako] said that—she would tell me periodically over many years, that she was, her words, hiding money from Earl. She was putting it away from the money that she—he gave her every month for—to do with as she pleased. That she had been putting that money away and that she did not want Earl to have it.

Barbara said that Fusako said this to her five to ten times during the Weltches' 42-year marriage.

Barbara further testified that when she and Fusako were in Fusako's room in the last week of Fusako's life, the following occurred: "[Fusako] asked me to count some money that was on her night stand. She said look at that, count that. And it was $100 bills. So I counted it, and I said it's $500, and she said he used to give me $2,000."

The trial court found that "[d]uring the marriage, Earl Weltch gave Fusako Weltch money in cash each month for her use up to an amount of $2,000 a month." The trial court further concluded that the money Fusako received from Earl was a

gift, and therefore, Fusako's separate property. *See* TEX. FAM. CODE ANN. § 3.001(2) (property a spouse acquires by gift is the spouse's separate property). But, no evidence shows the period of time during which Earl gave Fusako $2,000 per month. Moreover, evidence about the amount Fusako received could indicate only whether the total amount of cash separate property Fusako received over the course of her marriage was at least $227,096.00, so that the money she gave to Barbara *could* have been Fusako's separate property. But, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993).

What is lacking is tracing evidence establishing that the two inter vivos gifts consisted solely of Fusako's separate property.

1. Money in the "quilting packets"

Barbara testified that she had been aware since the 1990s that her mother sewed envelopes of cash into packets made out of quilting fabric. But to overcome the presumption of community property, "the party asserting separate ownership must clearly trace the original separate property into the particular assets on hand during the marriage." *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975). If separate and community property have been so commingled as to defy resegregation and identification, the burden is not discharged and the statutory presumption prevails. *Estate of Hanau v. Hanau*, 730 S.W.2d 663, 667 (Tex. 1987); *Zagorski v. Zagorski*, 116 S.W.3d 309, 316 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

Although Barbara maintained that the money Fusako gave her that had been sewn into quilting packets was Fusako's separate property, money was actually found in quilting packets on two occasions. In addition to the $198,650.00 in cash that was removed from quilting packets and given to Barbara, an additional

$36,800.00 was found in quilting packets after Fusako's death. Before Earl submitted any claims against Barbara, Scott, or the estate, Barbara, as independent executrix of Fusako's estate, filed in the probate court a notarized inventory, appraisement, and list of claims in which she stated under oath that the $36,800.00 in cash was community property. No evidence differentiates the quilting packets containing the cash Barbara swore was Fusako's separate property from the quilting packets containing the cash Barbara swore was community property.

Barbara's characterization of the $36,800.00 in her sworn inventory is a judicial admission, that is, it is statement that was "(1) made in the course of a judicial proceeding; (2) contrary to a fact essential for the party's recovery or defense; (3) deliberate, clear, and unequivocal; (4) in accordance with public policy if given conclusive effect; and (5) consistent with the opposing party's theory of recovery." *Harrison v. Reiner*, 607 S.W.3d 450, 459 (Tex. App.—Houston [14th Dist.] 2020, pet. denied); *accord*, *Catherman v. First State Bank of Smithville*, 796 S.W.2d 299, 302 (Tex. App.—Austin 1990, no writ). A judicial admission both relieves an adversary of the burden to prove the fact admitted and bars the party who made the admission from disputing it. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 905 (Tex. 2000). Thus, at a minimum, the evidence establishes that the cash Fusako sewed into the quilting packets consisted of commingled community and separate property. We accordingly conclude that Barbara failed to overcome the presumption that Fusako's gift to Barbara of $198,650.00 sewn into quilting packets was community property.

2. Money in a brown envelope

Barbara testified that a few weeks after Fusako gave her $198,650.00 that had been sewn into quilting fabric, Fusako made a second gift of cash. This time, the cash was not sewn into packets; Fusako simply handed Barbara a brown envelope

containing $28,446.00, and Barbara left the house with it. Because there is no evidence tracing the source of the funds, it is presumed to be community property.

We accordingly conclude there is legally insufficient evidence that either of Fusako's two inter vivos gifts were Fusako's separate property.

3. Barbara's Alternative Theory

Barbara argues on appeal that even if the cash gifts Fusako gave Barbara were community property, we should overrule this issue because Earl did not establish that the gifts were made without his knowledge or consent. There is, however, no finding that the gifts of community property were made with or without Earl's consent; to the contrary, the trial court did not reach any such question because it erroneously found that the cash was Fusako's separate property, which would have made Earl's consent or lack of consent to the gifts immaterial.[5]

We accordingly sustain Earl's challenges to the trial court's separate-property findings and conclusions of law. As discussed below, our disposition of this issue affects Earl's claims that were based on the premise that the cash Fusako gave Barbara was community property.

V. CLAIMS AGAINST THE ESTATE AND CONSPIRACY CLAIMS

Earl next maintains that because Barbara failed to establish that the $227,096.00 Fusako gave to Barbara was Fusako's separate property or that the alleged gift was fair, Fusako committed constructive fraud on the community, conversion, and theft.

[5] The trial court may, of course, consider such arguments on remand.

A. The trial court erred in failing to reach Earl's claim that Fusako's inter vivos gifts constituted constructive fraud on the community and that Barbara and Scott conspired in the alleged fraud.

The trial court did not reach Earl's complaint that Fusako's inter vivos gifts to Barbara constituted constructive fraud on the community, instead addressing Earl's constructive-fraud complaint only with respect to the POD account, discussed *infra*.

Although a spouse may make gifts of community funds to persons outside the community, a gift that is capricious, excessive, or arbitrary may be set aside as a constructive fraud on the other spouse. *Wright v. Wright*, 280 S.W.3d 901, 910 (Tex. App.—Eastland 2009, no pet.). Indeed, a presumption of constructive fraud arises when a spouse unfairly disposes of the other spouse's one-half interest in community property. *See Carnes v. Meador*, 533 S.W.2d 365, 370–72 (Tex. App.—Dallas 1975, writ ref'd n.r.e.). The disposing spouse, or that spouse's donee, then bears the burden to prove the fairness of the transaction. *Id.* at 370. The evidence presented at trial established that Fusako gave Barbara the majority of the Weltches' community funds; thus, Earl is entitled on remand to litigate his complaint that the cash gifts constituted constructive fraud.

Regarding Earl's claims that Barbara and Scott conspired in Fusako's alleged fraud, Barbara and Scott argue that, as a matter of law, a third party cannot conspire with a spouse to defraud the community. They assert that a defrauded spouse's sole remedy is for the trial court to take the fraud into consideration in making a "just and right" division of property upon divorce. In support of this proposition, they cite *Chu v. Hong*, 249 S.W.3d 441, 445 (Tex. 2008) and *Cohrs v. Scott*, 338 S.W.2d 127, 133 (Tex. 1960).

Because those cases arose in the divorce context, they address the remedies available to divorcing spouses. Thus, the *Chu* court explained that claims of "waste,

fraudulent transfer or other damage to community property are claims belonging to the community itself," so that upon divorce, "they must be included in the trial court's just-and-right division of property." *Chu*, 249 S.W.3d at 444–45. Moreover, the court went on to explain that because the liability of the spouse who committed the wrongful act "is limited to returning the property or adjusting the community division, the liability *of co-conspirators* should be as well." *Id.* at 445–46 (emphasis added). The court added that a suit against the relatives of the wrongdoing spouse "may be necessary when relatives have community property in their hands. *Id.* at 446.

Similarly, the *Cohrs* court noted that there are cases holding "that where a husband perpetrates a fraud upon the wife by the making of excessive gifts of community property to third persons with a fraudulent intent, she is entitled to recover against the property of the husband *and against third[-party] possessors*." *Cohrs*, 338 S.W.2d at 133 (emphasis added). The *Cohrs* court distinguished such cases because the divorced parties to the case before it had previously reached a settlement of the community-property division. *See id.* ("The trial court here, in dividing the community property, and the parties in agreeing to such settlement, presumably compensated Mrs. Scott for any loss she may have suffered . . . .")

In the probate context, on the other hand, the trial court does not make a "just and right" division of property. Instead, the aggrieved spouse has recourse first against the property or estate of the disposing spouse, but if that is insufficient to fully reimburse the aggrieved spouse, the aggrieved spouse "may pursue the proceeds to the extent of [that spouse's] community interest into the hands of the party to whom the funds have been conveyed." *Carnes*, 533 S.W.2d at 371. A conspiracy claim is an available means of recovering the funds improperly removed

from the community; thus, we conclude that, on remand, Earl may litigate his claims that Barbara and Scott conspired in Fusako's alleged fraud.[6]

B. The trial court did not err in rejecting Earl's claims that Fusako committed theft or conversion and that Barbara and Scott conspired in Fusako's alleged theft or conversion.

The trial court found that Earl presented insufficient evidence that Fusako committed theft or conversion. But the bigger problem with these claims is that, as Barbara correctly points out on appeal, the only action that will lie for *a spouse's* depletion of the community estate is an action for fraud on the community. *See Schlueter v. Schlueter*, 975 S.W.2d 584, 589 (Tex. 1998). As a matter of law, no conversion or theft claim will lie against a spouse for the gift of community funds, and thus, derivative conspiracy claims are likewise unavailable. Because Earl instead must pursue these claims as causes of action for constructive fraud on the community and in conspiring in such fraud, we overrule this sub-issue and exclude his claims of theft and conversion, and conspiring in theft and conversion, from the scope of remand.

VI. BREACH OF FIDUCIARY DUTY

Earl argues on appeal that Barbara, in her capacity as independent executrix of Fusako's estate, breached her fiduciary duty to him by depositing into bank accounts owned by Barbara or Scott the $227,096.00 that Fusako gave Barbara, thereby rendering these community funds inaccessible to Earl. But Barbara became the independent executrix of Fusako's estate only after Fusako's death; while Fusako lived, Barbara owed no fiduciary duties to Earl. Barbara received the $227,096.00

[6] Although the trial court found that Barbara and Scott did not conspire with Fusako "to commit an unlawful act," the gift of separate property is not an unlawful act. The trial court's erroneous finding that the cash gifts consisted of Fusako's separate property not only precluded a finding that Fusako committed constructive fraud; it also precluded a finding that Barbara and Scott conspired in the alleged fraud.

through inter vivos gifts, and to the extent the record shows the dates on which Barbara or Scott deposited any of the cash, the dates of those deposits were all within Fusako's lifetime. Because she owed Earl no fiduciary duty at that time, this conduct could not have breached such a duty. We accordingly overrule this issue.

VII. THE POD ACCOUNT

Regarding the POD Account, the trial court found that Earl's daughter Anne recommended that Earl and Fusako name Barbara as the payable-on-death beneficiary. Thus, the trial court found that Earl "was aware of the POD account and agreed to have Barbara Winger as the POD beneficiary, as advised by [Anne]." Earl argues that the evidence is legally and factually insufficient to establish that he consented to Barbara's designation as the beneficiary of the POD Account.[7] He points out that he was not present when Barbara wrote her name and identifying information on the form used in adding her as a beneficiary on the POD Account, and he asserts that the evidence is insufficient to establish that he "consented to the monies in the POD Account being a gift of community property."

Although the account contained funds that were community property, there is ample evidence that Earl knew and consented to the beneficiary designation. Anne testified, "I advised them [i.e., Earl and Fusako] to put Barbara on that account as POD," and she confirmed that she understood that "once somebody is Payable-on-Death Beneficiary that, that money goes to them." Anne explained, "I had knowledge of how [Fusako] wanted money put away for Barbara and the girls,[8] and

[7] Earl initially argued that the evidence is legally and factually insufficient to establish that the POD account was Fusako's separate property, but the trial court made no such finding. Barbara and Scott responded to Earl's opening argument as though there were a separate-property finding concerning the POD account, but they also addressed the finding that the trial court actually made, and Earl challenged that finding in his reply brief.

[8] "The girls" appears to be a reference to Barbara's daughters.

I've known that for over 20 years, in the event Scott ever left her and the girls homeless and penniless in a divorce, which is what happened to Fusako" in Fusako's first marriage. Moreover, Anne testified that Earl deferred to Fusako, and Earl's niece Rebecca Moorehead similarly testified that Earl catered to Fusako's desires "[i]n everything." Anne agreed that Fusako named Barbara as the POD beneficiary at her, Anne's, suggestion. Further, Scott testified that Earl telephoned to tell him he was going to name Barbara as the beneficiary on a bank account, and Barbara similarly testified that Fusako told her that Earl recommended putting Barbara's name on the account. Despite his knowledge that Barbara was the POD beneficiary, Earl deposited community funds in the account, as Anne testified.

Because this evidence is legally and factually sufficient to support the trial court's finding, we overrule this issue.

VIII. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To prevail on his claim against Barbara for intentional infliction of emotional distress, Earl was required to prove that (a) Barbara acted intentionally or recklessly, (b) her conduct was extreme and outrageous, (c) her actions caused Earl emotional distress, and (d) his emotional distress was severe. *See Kroger Tex. Ltd. P'ship v. Suberu*, 216 S.W.3d 788, 796 (Tex. 2006). Earl argues on appeal that he proved his claim because Barbara and Scott "ransacked" the Weltch home after Fusako's death and Scott shredded trashcans full of documents, which cannot now be reliably identified.

The record does not support these arguments. According to the uncontroverted evidence, Earl gave Barbara and Scott items of personal property such as quilts, cross-stitched or embroidered pictures, and photographs. There is no evidence that Barbara and Scott "ransacked" the home, and Anne admitted that although she knew Scott removed items from the Weltch home, she did not know whether Earl had

given Scott items or Scott had simply taken them. As for the documents Scott shredded, he testified without contradiction that the documents were old bills and bank statements dating back decades. Anne similarly testified that the Weltch home contained stacks of bills dating back to the 1970s and bank statements as far back as the 1980s. Finally, the trial court properly could have concluded that any emotional distress Earl experienced was due to the loss of his wife rather than to any conduct by Barbara and Scott. We overrule this issue.

IX. CONTROL OF THE DISPOSITION OF FUSAKO'S REMAINS

Earl next contends that the trial court erred in finding that Barbara did not violate section 711.002 of the Texas Health and Safety Code, which sets out a prioritized list of those with the right to control the disposition of human remains. *See* TEX. HEALTH & SAFETY CODE ANN. § 711.002(a). Unless the decedent provided otherwise in writing, the person with the highest priority is the decedent's surviving spouse, followed by any of the decedent's adult children. *Id.*

There is no evidence that Barbara violated this statute. Barbara testified that after Fusako was cremated, she and Scott took Earl to pick up her remains. Earl signed for the remains and held them on the way back to the Weltch home. Once there, Earl exited the car and started walking toward the house, then turned back, handed the remains to Barbara, and went inside. In his testimony, Scott described the events occurring just as Barbara had said. No evidence controverts their testimony that Earl voluntarily gave Fusako's remains to Barbara, as the trial court found. Thus, we overrule this issue.

X. ATTORNEY'S FEES

In his final issue, Earl contends that because the trial court erred in denying his claims, the trial court also erred awarding the estate attorney's fees. Earl had

asked the trial court for declarations that the estate was responsible for half of the expenses and damages he incurred in two suits against third parties. In connection with those claims, he sought attorneys' fees under the Uniform Declaratory Judgments Act, which provides that in any proceeding for declaratory judgment, "the court may award costs and reasonable attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE ANN. § 37.009. The trial court denied the claims. Although there are no findings of fact regarding Earl's claims for declaratory relief, the trial court found that the estate expended $14,445.98 in attorney's fees "to defend the claims against the estate," and Earl did not argue, in the trial court on appeal, that the estate was required to segregate attorney's fees incurred in connection with claims for which fees are recoverable from fees incurred in connection with claims for which fees are not recoverable. Earl argues on appeal only that, because the trial court erred in denying his claims, the trial court abused its discretion in awarding the estate attorney's fees.

Because the attorney's fees were awarded in connection with all of Earl's claims against the estate and we have reversed and remanded one such claim, the parties must be permitted to address on remand the extent to which either side should recover attorney's fees under the Uniform Declaratory Judgments Act. We therefore sustain this issue.

XI. CONCLUSION

We find no error in the parts of the judgment rejecting Earl's claims that (1) Fusako committed theft or conversion; (2) Barbara and Scott conspired in Fusako's theft or conversion; (3) Barbara, in her capacity as independent executrix of Fusako's estate, breached fiduciary duties to Earl; (4) Fusako named Barbara as the beneficiary of the POD account without his knowledge and consent; (5) Barbara

committed intentional infliction of emotional distress; and (6) Barbara violated his statutory right to control the disposition of Fusako's remains.

Although the evidence is legally and factually sufficient to support the trial court's finding that Fusako made two inter vivos gifts of cash totaling $227,096.00 to Barbara, the evidence was legally insufficient to overcome the presumption of community property. We accordingly conclude that the trial court erred in (1) finding that these were gifts of Fusako's separate property, (2) failing to reach Earl's claims that the gifts constituted constructive fraud on the community and that Barbara and Scott conspired in the constructive fraud, and (3) awarding attorney's fees to the estate.

We reverse the portions of the judgment denying Earl's constructive-fraud claim against Fusako's estate, denying his claims that Barbara and Scott conspired in such fraud, and awarding the estate attorney's fees. We remand these claims, and we affirm the remainder of the judgment.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Jewell and Poissant.