Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00351-CV

IN THE ESTATE OF JESUS N. NAVARRO, III, Deceased

From the Probate Court No. 2, Bexar County, Texas
Trial Court No. 2015-PC-1902
Honorable Tom Rickhoff, Judge Presiding

Opinion by: Karen Angelini, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: June 7, 2017

AFFIRMED

Following the death of Jesus N. Navarro, III, Navarro's son filed an application to probate his father's will and for issuance of letters testamentary. The probate court ordered the will probated and appointed Navarro's son as independent executor. Navarro's widow, appellee Diane Marie Navarro, filed an application to set aside certain personal property and the couple's homestead as exempt property for her use and benefit. The probate court granted the application, and this appeal by the independent executor ensued. On appeal, appellant asserts the probate court violated his right to due process by denying him the right to cross-examine appellee and he challenges the sufficiency of the evidence to support a finding on whether appellee abandoned the homestead.[1] We affirm.

[1] Appellant does not challenge the probate court's setting aside as exempt certain personal property.

BACKGROUND

Jesus N. Navarro, III, died on March 18, 2015. Prior to his death, Navarro inherited from his father a home located in San Antonio, Texas. Navarro and appellee lived in the house and claimed it as their homestead.[2] However, sometime in 2013, appellee left the homestead and lived apart from her husband until he died. After the probate of Navarro's will, appellee filed an application to set aside as exempt certain personal property that remained in the house and the couple's homestead. On January 29, 2016, the probate court conducted a hearing on the application, at which appellant and appellee testified.

At the start of the hearing, appellant's attorney stated the only issue was whether "there was an effective abandonment of the homestead." Appellee's attorney argued that because appellant had not filed any response to appellee's application, any reason appellant asserted as to why appellee was not entitled to stay in the homestead should not be heard by the court. Without commenting or ruling on either argument, the probate court heard testimony from the witnesses.

Appellee testified she and Navarro had been married for twenty-one years and they had no children.[3] She said she and Navarro paid rent on the house to her father-in-law from 1998 to 2005, and were in the process of buying the house from her father-in-law when he died in 2005. Navarro then inherited his father's house. Appellee said she moved out of the marital home about eighteen months before Navarro died, and at the time of his death, they were "sort of" separated. Appellee said she left because Navarro "ran [her] out the house [and he] was a very abusive husband." After her husband's death, appellee tried to move back into the house, but another member of Navarro's family had already moved into the house.

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[2] On appeal, appellant does not contend the home was not the couple's homestead.

[3] Appellant is Navarro's son from a prior marriage.

Appellee said Navarro was abusive and would run her out of the house throughout their marriage, and she often went to stay with her father or her sons. When she left the house before Navarro died, she left behind all her belongings, taking only the clothes she wore. However, she said she always planned to return to the home. When asked when she planned to return, appellee responded: "Soon as things would work out between me and my husband because he was very abusive like I said and as soon as he would behave." She said that, during their separation, they would talk, meet for meals, and help each other with errands. When asked if she abandoned her husband, she replied, "No . . . never." According to appellee, she gave notice of her intent to live in the homestead by leaving her sisters a "note" to that effect, she still had her house keys, she applied for a life estate in the house, and she obtained a writ of reentry.

Appellant admitted appellee and his father were still married when his father died. He also admitted the couple argued, but he said they argued because appellee's adult sons were jobless and living in the house. Appellant testified appellee moved out of the house she shared with his father in 2013, got her own apartment, and "moved on with her life." Appellant said his father "was sad" and wanted her to come back to him, but she refused. Appellant said appellee was living on her own and had "been seen with other people." According to appellant, appellee told his father, "I will never come back to this life," "meaning that she's not used to being poor because at the time they were running a business." Appellant testified his father was finally happy just before he died, and his father no longer thought about appellee coming back because she had moved on with her life. Appellant said his father characterized himself and his wife as "good friends" who could not afford to get divorced. Appellant did not believe his father was abusive.

At some point, in the midst of appellant's testimony, the probate court asked if either attorney had any case law on abandonment, and appellant's counsel replied that he did not but he could brief the court. The probate judge replied he could look the cases up himself, and appellant's

testimony resumed. It appears from the record that after appellant finished his testimony, appellee's counsel presented the court with case law on abandonment. Appellant's counsel said he had also identified two cases, but the court said it had read those cases and "[i]f you [appellant's attorney] want to put one in, I'm going to give you a little time to put one in." The probate court said it would then review the law, it believed it had enough evidence, and it would rule. On March 7, 2016, the probate court granted appellee's application.

RIGHT TO CROSS-EXAMINE APPELLEE

In his first issue, appellant asserts the probate court erred by denying his attorney the right to cross-examine appellee. Nothing in the record supports this contention, and appellant cites to no place in the record where counsel requested, but was denied, the right to cross-examine appellee. Because appellant did not ask to cross-examine appellee or raise any complaint to the probate court regarding his perceived inability to cross-examine her, appellant did not preserve any error on the issue. *See* TEX. R. APP. P. 33.1 (to preserve a complaint for appellate review, a party must have presented to the trial court a timely request, objection, or motion calling the trial court's attention to the complaint); *see also Matter of D.T.M.*, 932 S.W.2d 647, 652 (Tex. App.—Fort Worth 1996, no writ) (even constitutional arguments are waived at appellate level if issues were not before the trial court).

ABANDONMENT OF HOMESTEAD

On appeal, appellant raises two mirror-image complaints. He asserts there is no evidence to support a finding that appellee did not abandon the homestead and the evidence is sufficient to support a finding that she did abandon the homestead.[4]

[4] On appeal, appellee contends appellant waived both complaints because appellant entitled his two issues, in his brief, as a challenge to a finding of abandonment "prior to marriage." Appellee contends abandonment prior to marriage was not raised before the probate court; therefore, such a complaint is waived on appeal. To determine if an issue is properly raised, we look not to the issue statements in isolation, but also to the substance of the brief's argument

The Texas Constitution provides,

> On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real property of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use and occupy the same.

TEX. CONST. art. XVI, § 52. Under this provision, a surviving spouse retains the right to use and occupy the homestead so long as she elects to do so. *In re Estate of Sheshtawy*, 478 S.W.3d 82, 86 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Even if the property was the deceased spouse's separate property, this right continues as long as the surviving spouse uses or occupies the property, or until she abandons that right. *Id.*; *Majeski v. Estate of Majeski*, 163 S.W.3d 102, 107 (Tex. App.—Austin 2005, no pet.).

Abandonment of a homestead requires both the cessation or discontinuance of use of the property as a homestead, and the intent to permanently abandon the homestead. *Franklin v. Woods*, 598 S.W.2d 946, 949 (Tex. Civ. App.—Corpus Christi 1980, no writ). Merely changing residence is not, alone, an abandonment of the homestead. *Kendall Builders, Inc. v. Chesson*, 149 S.W.3d 796, 808 (Tex. App.—Austin 2004, pet. denied); *see Farrington v. First Nat'l Bank*, 753 S.W.2d 248, 251 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (noting that "mere fact of acquiring and moving" to new property does not show abandonment, absent intent not to return). Proof of intent not to use the property as a home again is required to show abandonment. *Churchill*

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section. *See Perry v. Cohen*, 272 S.W.3d 585, 587-88 (Tex. 2008). Here, the substance of appellant's complaints on appeal regard abandonment prior to Navarro's death, and it is clear from the record of the hearing that the probate court and the parties focused on the issue of abandonment prior to Navarro's death. Appellate briefs are to be construed reasonably, yet liberally, so that the right to appellate review is not lost by waiver. *See El Paso Nat. Gas v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 316 (Tex. 1999). Therefore, we conclude appellant did not waive his complaints on appeal and we consider the merits of his argument.

v. Mayo, 224 S.W.3d 340, 345 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Intent is generally a fact question and may be shown by circumstantial evidence. *Id.*

The question of whether a person abandoned a homestead interest involves factual determinations. *Scott v. Estate of Scott*, 973 S.W.2d 694, 695 (Tex. App.—El Paso 1998, no pet.). In a bench trial such as this one, the trial judge is the fact finder, passing on the credibility of witnesses and the weight to be given their testimony. *Id.* The party asserting abandonment of a homestead bears the burden of proving it by competent evidence. *Sullivan v. Barnett*, 471 S.W.2d 39, 43 (Tex. 1971). The evidence relied on as establishing abandonment of a homestead must make it undeniably clear that there has been a total abandonment with an intention not to return and claim the exemption. *Franklin*, 598 S.W.2d at 946. Thus, the issue of abandonment of the homestead is one upon which appellant bore the burden of proof.

The evidence shows appellee left the homestead about two years before her husband died. She testified she left only because her husband ran her out and he was abusive. She left all of her belongings at the house. Despite her allegations of abuse against her husband, appellee testified the couple remained in contact, they did not divorce, and she hoped they would eventually reconcile. Appellee testified she always intended to return to the homestead. Appellant testified appellee moved out of the house in 2013, got her own apartment, had "moved on with her life," and she did not want to return. Appellant did not believe his father was abusive.

The only evidence the probate court had before it was appellant and appellee's testimony. The court was entitled to believe appellee's testimony that, although appellee had moved out of the homestead, she did not intend to abandon her homestead rights. The court also was entitled to determine the evidence relied on as establishing abandonment of the homestead—appellant's testimony alone—did not make it undeniably clear that there had been a total abandonment with

an intention not to return and claim the exemption. Therefore, on this record, we conclude appellant did not satisfy his burden to establish abandonment.

CONCLUSION

We overrule appellant's issues on appeal and affirm the probate court's Order Setting Apart Exempt Property Before Approval of Inventory.

Karen Angelini, Justice