Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00132-CV

Louise **JENSCHKE**,
Appellant

v.

Elaine **CLAUSSEN**,
Appellee

From the 218th Judicial District Court, Karnes County, Texas
Trial Court No. 16-01-00008-CVK-A
Honorable Russell Wilson, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: February 7, 2018

AFFIRMED

In the underlying lawsuit, Louise Jenschke sued her half-sister, Elaine Claussen, seeking a declaration that two royalty deeds conveying royalty interests to their mother were gift deeds despite the deeds' recitals of cash consideration. On appeal, Jenschke challenges a final judgment which incorporates an order granting a partial summary judgment and an order awarding attorney's fees to Claussen based on a bench trial. Jenschke contends the trial court erred by (1) granting the partial summary judgment because Claussen did not conclusively establish Jenschke's claim was barred by limitations, (2) declaring the royalty interests conveyed by the royalty deeds were

community property, and (3) awarding Claussen attorney's fees. We affirm the trial court's judgment.

BACKGROUND

On December 6, 1961, John L. and Theresa Dragon executed two deeds. The first deed conveyed 194 acres of land to their son Fabian, and the second deed conveyed approximately 300 acres of land to their other son Joseph. Both deeds reserved a life estate in the property.

On April 3, 1965, Fabian executed a royalty deed conveying one-half of his royalty interest in the 194 acres of land to his three siblings—Joseph, Mathylda D. Dziuk, and Magdalen D. Mzyk.[1] On the same day, Joseph also executed a royalty deed conveying one-half of his royalty interest in the 300 acres of land to his three siblings—Fabian, Mathylda, and Magdalen. Both deeds recited the conveyance was "for and in consideration of the sum of Ten and no/100 ($10.00) Dollars, cash in hand paid by [the three siblings], hereinafter called Grantees, the receipt of which is hereby acknowledged." Both deeds also recited that the undivided one-half royalty interest was "granted, sold, conveyed, assigned and delivered" to the Grantees.

On January 11, 2016, Jenschke sued Claussen and others alleging the royalty deeds were gift deeds and no monetary consideration was paid for the royalty interests. Jenschke alleged that because the royalty deeds were gift deeds, the royalty interests conveyed to Magdalen were not part of Magdalen's community estate with her second husband, Louis Mzyk.[2] Finally, Jenschke alleged Magdalen's separate property passed to her under Magdalen's will. Based on these allegations, Jenschke sought a declaration that she owned the undivided royalty interests conveyed by Joseph and Fabian to Magdalen.

[1] Magdalen was the mother of both Jenschke and Claussen. An affidavit of heirship indicates that on the date the deeds were executed, Magdalen was married to Louis Mzyk.
[2] Louis Mzyk was Elaine Mzyk Claussen's father.

In her answer, Claussen asserted the affirmative defense of limitations, contending Jenschke's declaratory judgment claim was a disguised deed reformation claim. Claussen also asserted a counterclaim against Jenschke seeking a declaration that the royalty deeds were cash purchase deeds and her father owned a community property interest in the royalty interests conveyed to Magdalen.

Claussen subsequently moved for a traditional partial summary judgment asserting (1) the royalty deeds contain unambiguous recitations of a cash transaction and parol evidence was not admissible to vary or contradict the terms of the deeds, and (2) Jenschke's claim was barred by limitations. Claussen attached the 1961 and 1965 deeds to her motion as evidence. Claussen also attached an affidavit of heirship which was executed on July 16, 1991, and recorded in the deed records. The affidavit states Louis married Magdalen on July 13, 1948, and they had one daughter who later married. The affidavit further states, "Louis Mzyk died intestate on or about February 20, 1969 leaving his wife, Magdalene B. Mzyk and daughter, Elaine Mzyk Clausson [sic] as his sole heirs-at-law."[3]

Jenschke filed a response to Claussen's motion and attached Joseph's January 16, 2015 affidavit to her response. In the affidavit, Joseph states no consideration was paid as part of the royalty deed transactions, and the grantors and grantees "intended for the interest to remain as separate property of the sibling Grantees." Finally, Joseph states, "The inclusion of the consideration recited was an inadvertent error made by the drafter of the royalty deed(s), and the parties intended rather to have language included consistent with language common to that of a gift or exchange deed." Claussen filed a reply objecting to Joseph's affidavit as being inadmissible parol evidence.

[3] Although the affidavit of heirship spells Magdalen's name differently and uses a different middle initial, Jenschke does not raise any challenge to the affidavit on this basis.

At the conclusion of a hearing on Claussen's motion, the trial court granted partial summary judgment in her favor. The trial court subsequently conducted a bench trial on Claussen's request for attorney's fees and signed an order awarding her attorney's fees. Finally, the trial court severed the claims Jenschke asserted against other defendants into a separate cause and entered a final judgment incorporating its prior orders. Jenschke appeals.

CONVEYANCE FOR CONSIDERATION OR GIFT

In her first issue, Jenschke challenges the trial court's order granting the partial summary judgment. Although Jenschke phrases her issue as a challenge to the trial court's conclusion that her claim was barred by limitations, Jenschke's brief also challenges the trial court's conclusion that "the unambiguous language of the Deeds provides for cash consideration." Because we conclude the trial court properly interpreted the royalty deeds, we do not address whether limitations barred Jenschke's claim. *See* TEX. R. APP. P. 47.1 (noting opinions need only address issues necessary to the final disposition of the appeal).

A. Standard of Review

"We review the grant of [a] summary judgment de novo." *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015). To prevail on a traditional motion for summary judgment, the movant must show "there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c). We take as true all evidence favorable to the nonmovant, resolve all conflicts in the evidence in the nonmovant's favor, and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Katy Venture*, 469 S.W.3d at 163.

B. Construction of a Deed

"The construction of an unambiguous deed is a question of law for the court," *Wenske v. Ealy*, 521 S.W.3d 791, 794 (Tex. 2017), which we review de novo, *Kardell v. Acker*, 492 S.W.3d

837, 842 (Tex. App.—San Antonio 2016, no pet.). In this case, neither party contends the royalty deeds are ambiguous, and we agree the deeds are unambiguous.

"When construing an unambiguous deed, our primary duty is to ascertain the intent of the parties from all of the language within the four corners of the deed." *Wenske*, 521 S.W.3d at 794; *accord Kardell*, 492 S.W.3d at 842. The Texas Supreme Court has recently instructed that if a court can ascertain the parties' intent from the language of the deed, "that should [generally] be the end of our analysis." *Wenske*, 521 S.W.3d at 794.

C. Jenschke's Argument

In her brief, Jenschke acknowledges the general rule that parol evidence is not admissible to contradict the terms of a deed; however, Jenschke cites several cases to support her argument that an exception to the rule allows parol evidence to be admitted to rebut recitals of consideration in a deed. *See, e.g.*, *Carrico v. Kondos*, 111 S.W.3d 582 (Tex. App.—Fort Worth 2003, pet. denied); *Keel v. Hoggard*, 590 S.W.2d 939 (Tex. Civ. App.—Waco 1979, no writ); *Bentley v. Andrewartha*, 565 S.W.2d 590 (Tex. Civ. App.—Austin 1978, no writ); *Latham v. Dement*, 409 S.W.2d 429 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.); *Puckett v. Frizzell*, 377 S.W.2d 715 (Tex. Civ. App.—Tyler 1964, no writ); *Cochell v. Cawthon*, 110 S.W.2d 636 (Tex. Civ. App.—Amarillo 1937, writ dism'd). Jenschke then relies on those cases to assert Joseph's affidavit was admissible to contradict the recitals of consideration in the royalty deeds and therefore raised a genuine issue of material fact as to whether the royalty deeds were conveyances for cash consideration or gift deeds.

D. Analysis

Although the cases Jenschke cites hold parol evidence is admissible in the context of those cases, the holdings in those cases cannot be divorced from their facts. None of the cited cases hold parol evidence is admissible to prove that a deed reciting consideration is actually a gift deed. *See,*

e.g., *Carrico*, 111 S.W.3d at 586–87 (holding parol evidence admissible to prove the affirmative defense of failure of consideration in a breach of contract case); *Keel*, 590 S.W.2d at 944 (holding parol evidence admissible to prove recited consideration had not been paid in action to collect unpaid balance due on a vendor's lien note); *Bentley*, 565 S.W.2d at 592 (holding parol evidence admissible to prove true consideration to be paid where deed recited ten dollars and other valuable consideration); *Latham*, 409 S.W.3d at 433 (same); *Puckett*, 377 S.W.2d at 722 (holding parol evidence admissible to prove total consideration owed for a conveyance); *Cochell*, 110 S.W.2d at 638 (holding parol evidence admissible to prove recited consideration was not paid). However, the admissibility of parol evidence in the context presented in the instant case has been addressed by one of our sister courts.

In *Johnson v. Driver*, Lillian Edge executed a deed conveying property to Tommye Stringfield. 198 S.W.3d 359, 361 (Tex. App.—Tyler 2006, no pet.). Several years later, Russell Driver, as trustee of the Billie Holcomb Living Trust, filed a lawsuit and sought a summary judgment declaring that the deed's recital of consideration proved the conveyance was a sale and the property, therefore, was part of the community estate of Tommye and her husband Leon. *Id*. Because the property was community property, Driver asserted Leon's undivided one-half interest in the property passed to Billie Holcomb when Leon subsequently died intestate. *Id*. Holcomb was Leon's daughter from a prior marriage and Leon's only child. *Id*. Upon Holcomb's death, Driver asserted the property passed to her trust. *Id*.

Daniel N. Johnson, independent executor of Tommye's estate, asserted the conveyance was a gift despite the recitals in the deed to the contrary. *Id*. In response to Driver's summary judgment motion, Johnson attached three affidavits wherein the affiants stated the conveyance was a gift. *Id*. at 361–62. The trial court granted summary judgment in favor of Driver. *Id*. at 361.

On appeal, the Tyler court rejected Johnson's argument that his affidavits created a fact issue as to whether the transaction was a gift. *Id*. at 363–64. The Tyler court noted the general rule that parol evidence is not admissible to vary the terms of an unambiguous deed or to contradict the legal effect of an unambiguous written instrument. *Id*. at 363. The Tyler court then concluded the affidavits proffered by Johnson were not admissible to contradict the consideration recited in the deeds, holding "the parol evidence rule prevented the trial judge from giving [the affidavits] any legal effect." *Id*. at 363–64; *see also Massey v. Massey*, 807 S.W.2d 391, 405 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (holding unambiguous deeds reciting consideration proved conveyances were bargained-for-exchanges and parol evidence was inadmissible to establish the transactions were actually intended to be gifts).

We agree with the Tyler court that parol evidence is not admissible to contradict the recital of consideration in a deed when a party is seeking to establish a deed reciting consideration is a gift deed. *See Johnson*, 198 S.W.3d at 363–64; *see also Cochell*, 110 S.W.2d at 638 ("[A]n entire want of consideration cannot be shown to contradict the recital of payment of a consideration for the purpose of defeating the effective words of a deed or other legal instrument . . . ."). Therefore, we conclude Joseph's affidavit was not admissible in this case to contradict the unambiguous recitals of consideration in the royalty deeds. *See Johnson*, 198 S.W.3d at 363–64. The trial court properly concluded "the unambiguous language of the Deeds provides for cash consideration." Jenschke's first issue is overruled.

AFFIDAVIT OF HEIRSHIP

In her second issue, Jenschke contends the trial court erred in relying on the affidavit of heirship as evidence that Magdalen was married to Louis on the date the royalty deeds were signed. Jenschke's primary argument is that the couple's marriage license would have been the best evidence to establish the date of their marriage.

A. Texas Estates Code Section 203.001

Section 203.001 of the Texas Estates Code allows a court to receive an affidavit of heirship as prima facie evidence of certain facts, such as marital status and the identity of heirs, in a suit involving title to property. TEX. ESTATES CODE ANN. § 203.001(a) (West 2014). In order to be considered by the court, the affidavit must have been of record for five years or more at the time the suit is commenced. *Id*.; *see Compton v. WWV Enterprises*, 679 S.W.2d 668, 671 (Tex. App.—Eastland 1984, no writ).

B. Analysis

In the underlying lawsuit, Jenschke sought a declaration regarding the ownership of the royalty interests; therefore, the suit involves title to property. The affidavit of heirship Claussen produced as summary judgment evidence was filed of record in 1991, and Jenschke filed her lawsuit in 2016. Therefore, section 203.001 authorized the trial court to consider the affidavit as "prima facie evidence" that Louis and Magdalen were married in 1948, several years before the 1965 royalty deeds were executed. *See Radcliffe v. Tidal Petroleum, Inc.*, 521 S.W.3d 375, 379 (Tex. App.—San Antonio 2017, pet. denied) (considering affidavits of heirship as summary judgment evidence); *Jeter v. McGraw*, 79 S.W.3d 211, 215 (Tex. App.—Beaumont 2002, pet. denied) (noting affidavit of heirship served as prima facie evidence of facts stated therein). In addition, by stating Louis left his wife Magdalen as one of his heirs when he passed away in 1969, the affidavit is prima facie evidence that Louis and Magdalen were still married in 1965. Jenschke did not produce any summary judgment evidence to controvert the affidavit. Accordingly, the trial court properly concluded the royalty interests conveyed by the royalty deeds were the community property of Magdalen and Louis. *See* TEX. FAM. CODE ANN. § 3.003(a) (West 2008) ("[P]roperty possessed by either spouse during . . . marriage is presumed to be community property."); *Pearson*

v. Fillingim, 332 S.W.3d 361, 364 (Tex. 2011) ("All property acquired during a marriage is presumed to be community property . . . ."). Jenschke's second issue is overruled.

ATTORNEY'S FEES

In her last issue, Jenschke asserts the trial court erred in awarding Claussen $34,459.50 in attorney's fees "since incomplete and incomprehensible records were submitted by [Claussen's] counsel." Specifically, Jenschke argues the evidence is insufficient to support the award of attorney's fees because the redactions to the attorney's billing records precluded the trial court from determining if the fees were reasonable and necessary.

A. Standard of Review

In a declaratory judgment action, the trial court is authorized to award "reasonable and necessary attorney's fees as are equitable and just." TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2014); *see also City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 646 (Tex. 2013). We review a trial court's award of attorney's fees for an abuse of discretion. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex.1998).

B. Evidence Presented

Claussen attached the affidavit of one of her attorneys to her motion requesting a bench trial on attorney's fees. In the affidavit, the attorney stated $34,459.50 was a reasonable and necessary fee for the services rendered in Claussen's case. The attorney opined the rates charged for the services were customary, and the attorneys and paralegal had billed approximately 132 hours for services rendered. The attorney further summarized the general nature of the services and provided the total number of hours spent by each attorney and paralegal and their respective billing rates. The attorney also summarized the experience of each attorney and paralegal. Finally, the attorney attached the redacted billing records. Although some of the entries were redacted, the billing records established the dates on which services were rendered, the person rendering the

services, and the number of hours spent on those services. At the bench trial, Jenschke's attorney agreed the affidavit could be used as evidence on the issue of attorney's fees and live testimony was not necessary. Therefore, no objection was made to the trial court admitting the affidavit as evidence.

C. Attorney's Testimony Sufficient Evidence

"'[A]n attorney's testimony about his experience, the total amount of fees, and the reasonableness of the fees charged is sufficient to support an award [of attorney's fees].'" *Ferrant v. Graham Assocs., Inc.*, No. 02-12-00190-CV, 2014 WL 1875825, at *9 (Tex. App.—Fort Worth May 8, 2014, no pet.) (mem. op.) (quoting *Metroplex Mailing Servs., LLC v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013, no pet.)). Documentary evidence, such as time sheets or other detailed hour calculations, is not required "if the testimony regarding the hours worked is not speculative." *Ferrant*, 2014 WL 1875825, at *8; *see Metroplex Mailing Servs., LLC*, 410 S.W.3d at 900. In this case, the affidavit admitted into evidence provides detailed testimony about each attorney's and paralegal's experience, the total amount of fees, and the reasonableness of the fees charged; the affidavit was not speculative. *See Ferrant*, 2014 WL 1875825, at *8. Accordingly, the affidavit is sufficient evidence to support the attorney's fee award, and the trial court did not abuse its discretion in awarding the fees. Jenschke's third issue is overruled.

CONCLUSION

The deeds conveying the royalty interests were unambiguous and parol evidence was not admissible to contradict the deeds' express terms. Thus, Joseph's affidavit asserting that the deeds were actually gifts was not admissible, and the trial court did not err in concluding the deeds were not gifts. Further, the affidavit of heirship was uncontroverted summary judgment evidence, and

the trial court did not err in considering it. Finally, based on the evidence before it, the trial court did not abuse its discretion in awarding attorney's fees as stated in the judgment.

Having overruled each of Jenschke's issues, we affirm the trial court's judgment.

Patricia O. Alvarez, Justice