

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-10-00342-CV**

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**KATHLEEN ANN PRESTON AND KATHLEEN POLLAK PRESTON AS  
SUCCESSOR TRUSTEE OF THE GLADYS BOBB POLLAK LIVING TRUST,  
Appellant**

**V.**

**KANDY RHEA LEE KELLY, Appellee**

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**On Appeal from the 411th District Court  
San Jacinto County, Texas  
Trial Cause No. CV11,673**

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**MEMORANDUM OPINION**

Kathleen Ann Preston, who appears in this litigation in her individual capacity and in a representative capacity under the name Kathleen Pollak Preston as Successor Trustee of the Gladys Bobb Pollak Living Trust, appeals from a judgment on a jury verdict in favor of Kandy Rhea Lee Kelly. We affirm the trial court's judgment.

Preston is Kelly's mother. Gladys Bobb Pollak was Preston's mother and Kelly's grandmother. Following Pollak's death in 1999, the bulk of Pollak's estate went into the

Gladys Bobb Pollak Living Trust. Preston and Kelly are both named beneficiaries of the Trust, as are Kelly's brothers, Kevin Patrick Kelly and Keith Joseph Kelly. Preston is the successor trustee. The Trust granted broad powers to the trustee, including the power to distribute any part of the corpus to any beneficiary. Several real property conveyances by Preston from the Trust to Kelly are at issue in this case.

Kelly was licensed as an attorney in 2003 and in 2004 represented Preston in a breach-of-fiduciary-relationship lawsuit brought against Preston by the guardian of Preston's sister-in-law, Coye Geneva Whitmire. The motion to substitute Kelly as Preston's counsel was filed on December 2, 2004, and granted twelve days later. The case was settled in January 2005. Kelly and Preston have been estranged since they argued on December 26, 2005. In 2007, Kelly was placed on deferred adjudication community supervision for the felony offenses of securing execution of a document by deception and possession of a controlled substance. In 2008, Kelly surrendered her law license in a disciplinary action.

On November 4, 2004, Preston executed several deeds in her capacity as trustee. Alleging that these conveyances to Kelly were made for "safe-keeping and management" in the course of Kelly's legal representation of Preston in the Whitmire suit, Preston sued to rescind the deeds. Preston also alleged that a July 17, 2000 conveyance of the Preston homestead to Kelly was invalid because Preston's spouse, Larry Preston, had not joined the conveyance.

Kelly counterclaimed, seeking to quiet title in herself. Kelly alleged that in 2006 Preston forged Kelly's signature on deeds that purported to re-convey the property to Preston, and Kelly sought to have those deeds declared to be invalid.

With respect to Preston's claims against Kelly, the jury answered several questions. While the jury found that a relationship of trust and confidence existed between Kelly and Preston, as they had, at times, an attorney-client relationship, the jury found Kelly complied with her duty to Preston. The jury also failed to find that Kelly committed fraud against Preston. As to two of the tracts that had been conveyed from Preston to Kelly, the jury failed to find that Preston and Kelly made an oral agreement to convey the property to Kelly "for safekeeping until there was no longer threatened litigation against the Trust at [which] time [Kelly] would convey the real property . . . held in trust back to [Preston]." The jury also failed to find that Kelly conveyed the property back to Preston.

The judgment declares the deeds from Kelly to Preston to be invalid and quiets title to an approximately 25 acre tract and a .158 acre tract in Kelly. The judgment also declares void a February 23, 2006 conveyance from Kelly to Preston, quiets title to the property in Kelly, and declares a July 2000 conveyance of that property from Preston to Kelly to be valid, subject to the homestead rights of Larry Preston.

## Standard of Review

Preston challenges the sufficiency of the evidence supporting several of the answers to the questions in the jury charge. On appellate review of the legal sufficiency of the evidence supporting a jury's finding, the test is whether the evidence "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). As the reviewing court, we "must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not." *Id.* In addition, we "must consider [the] evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it. But if the evidence allows of only one inference, neither jurors nor the reviewing court may disregard it." *Id.* at 822 (footnotes omitted). We sustain a legal-sufficiency challenge if the record reveals: (1) the complete absence of evidence of a vital fact; (2) that the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) that the evidence offered to prove a vital fact is no more than a scintilla; or (4) that the evidence conclusively establishes the opposite of a vital fact. *Id.* at 810.

On appellate review of the factual sufficiency of the evidence, we must consider and weigh both the evidence in favor of, and contrary to, the challenged finding in determining whether the evidence supporting the finding is so weak, or so contrary to the great weight and preponderance of the evidence, that the answer should be set aside and a

new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951).

#### Issue One

In the first issue, Preston contends that the jury's negative answers to Questions 1 and 2, which asked if Preston and Kelly made an oral agreement in which Preston would convey property to Kelly for safekeeping until there was no longer threatened litigation against the Trust, are against the great weight and preponderance of the evidence. Preston testified that she conveyed the properties to Kelly for safekeeping. Kelly denied the existence of a safekeeping agreement. When asked "were you ever told that you were expected to give them back?" Kelly replied, "Absolutely not." According to Kelly, the first time Preston mentioned Kelly returning the property was at the conclusion of a heated argument between the two on December 26, 2005. Preston contends that Kelly's testimony that no oral agreement to re-convey the property existed is not credible. Preston argues that the credible facts indicate that Kelly's legal representation of Preston pre-dated the deeds and that the conveyances were made on Kelly's legal advice that the transfer would protect the assets.

The deeds Preston executed on November 4, 2004, were drafted by Preston, not by Kelly. Kelly claimed that Preston conveyed the 25-acre tract to Kelly because the tract needed to be re-financed and Kelly had good credit. Preston argues that this testimony is not credible because Kelly had just lost her job. However, after the conveyance, Kelly

did apply for and receive a \$160,000 loan against the property, of which the prior lienholder was paid approximately \$142,000 for a release of lien. Kelly used approximately \$8,800 of the remaining funds to pay the first installments on the new note. According to Kelly, the income produced from one of the properties was supposed to be paid directly to Preston and her husband, who were managing the property.

Preston claimed that Kelly told her that the entire trust was in danger due to Whitmire's lawsuit. According to Preston, Kelly suggested that Preston should convey the trust property to Kelly. Preston testified that she could have obtained a loan to re-finance the property, but that she accepted Kelly's offer to help. Preston testified that they had an agreement for Kelly to obtain a loan for \$160,000, to pay the \$144,000 owed to the lienholder and one year's worth of the notes on the loan, after which time they would "sell something and pay off the entire note." Kelly made the first eight payments, from May through December 2005, out of a joint checking account into which the loan proceeds had been deposited.

Preston admitted at trial that she forged Kelly's signature on the re-conveyances. According to Preston, she did it to protect the property because Kelly was "in debt \$100,000 and on drugs." Preston admitted that she had falsely testified in her deposition that Kelly signed those deeds. Preston agreed that she first asked Kelly to re-convey the property at the conclusion of the argument in December 2005.

“It is a familiar principle that in conducting a factual sufficiency review, a court must not merely substitute its judgment for that of the jury.” *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). “It is an equally familiar principle that the jury is the sole judge of the credibility of witnesses and the weight to be given to their testimony.” *Id.* The jury had reason to be skeptical of both Kelly’s and Preston’s credibility, particularly because one of them admitted to pleading guilty to securing the execution of a document by deception and the other admitted to having lied under oath. The evidence of the existence of an oral agreement to re-convey the property is not so overwhelming that the jury’s failure to find such an agreement should be set aside and a new trial ordered. We overrule issue one.

#### Issue Two

Preston also challenges the legal and factual sufficiency of the evidence supporting the jury’s responses to Question 5, which failed to find that Kelly breached her duty of good faith and fair dealing to Preston, and Question 7, which found that Kelly complied with her fiduciary duty to Preston. Preston contends that Kelly breached her fiduciary duty to Preston as a matter of law because there is no evidence that the transaction in which Preston conveyed the Trust property to Kelly was fair and equitable to Preston. Kelly contends that the transaction pre-dated the commencement of an attorney-client relationship between Kelly and Preston.

There is some evidence in the record that supports Kelly's assertion that the attorney-client relationship began after the November 4, 2004 conveyance of Trust property to Kelly. Another attorney of record had been representing Preston in the Whitmire litigation. That attorney negotiated a settlement on behalf of Preston that was outlined in a Rule 11 agreement that Preston signed in 2002. According to Kelly, that attorney withdrew and Preston asked Kelly to act as counsel, but Kelly told Preston that she could not because Kelly had a full-time job in Austin. Kelly provided another attorney's name to Preston. That attorney subsequently represented Preston for approximately three months. According to Preston, the second attorney was "too expensive[.]" On October 12, 2004, an amended petition was filed in the Whitmire suit. A motion to substitute Kelly as counsel of record for Preston was filed on December 2, 2004, and was granted on December 14, 2004. The parties thereafter signed a settlement agreement and mutual release on January 4, 2005. From this record, the jury could reasonably believe Kelly when she testified that she did not represent her mother on November 4, 2004. *City of Keller*, 168 S.W.3d at 827.

There is some evidence in the record to support Preston's claim that Kelly was providing legal advice to Preston before November 4, 2004. Like Kelly, Preston also testified that "[t]he first time I asked [Kelly] about the Coye Whitmire case she was busy and in Austin with her new -- with her job up there." However, Preston claimed that Kelly gave Preston "a little advice occasionally when I asked questions, but she was



helping me with other things.” Preston claimed Kelly told her “we were getting ready to be sued by [Whitmire’s guardian/administrator] big time and [she] needed to give everything to her to protect it.” When Preston was asked when Kelly made that statement, Preston replied, “September, probably.” Preston added that Kelly “has always been my attorney since she graduated from law school. That’s what she does.” Preston claimed they discussed the matter over the telephone, but she could not recall how many conversations they had. The jury could reasonably have chosen to disbelieve Preston’s claim that Kelly provided legal advice to Preston regarding protecting the property in the Trust. Although there is some evidence that Kelly assumed legal representation of Preston in the Whitmire suit before November 4, 2004, that evidence does not so outweigh the evidence that that representation commenced after that date that the jury’s finding could be said to be clearly wrong and unjust. *See Pool*, 715 S.W.2d at 635. Because there is legally and factually sufficient evidence to support the jury’s answers to Question 5 and Question 7, we overrule issue two.

### Issue Three

Preston contends in her third issue that the jury’s answer to Question 6, finding that a relationship of trust and confidence existed between Kelly and Preston, irreconcilably conflicts with the jury’s answers to Questions 5 and 7. Generally, an objection that jury findings conflict must be raised before the jury is discharged, or the conflict is waived. *Sears, Roebuck & Co. v. Kunze*, 996 S.W.2d 416, 423 (Tex. App.—

Beaumont 1999, pet. denied). Preston did not raise the issue before the trial court discharged the jury. We overrule issue three.

#### Issue Four

Preston contends in her fourth issue that there is factually insufficient evidence to support the jury's failure to find affirmative answers to Questions 8 and 9, which asked the jury to find whether Kelly committed common law or statutory fraud. Preston argues that Kelly, through her words and actions, represented to her mother that she would return the property to Preston immediately after the lawsuit was resolved. Instead, Preston argues Kelly secured a loan using the property as collateral. Preston testified that it was her understanding that Kelly took the property to protect it, but the jury was free to disbelieve Preston's proffered motive for executing the deeds and instead believe Kelly's explanation for the transaction. *See Golden Eagle*, 116 S.W.3d at 761. According to Kelly, the motivation for the transaction was not to protect the property from a lawsuit that was in the course of settling, but to convey the property to her so that she could obtain financing while the Prestons continued to realize income by managing the property on Kelly's behalf. Likewise, the jury could also believe Kelly when she testified that the transfer occurred before any attorney-client relationship commenced, and disbelieve Preston when she testified that Kelly provided Preston legal advice in September 2004. Although the testimony was not free from contradictions, on this record we cannot conclude that the evidence is factually insufficient. We overrule issue four.

### Issue Five

Preston contends in her fifth issue that the jury's failure to answer Question 12, which concerned an unpredicated award of attorney fees for Preston, is not supported by factually sufficient evidence. The jury, instead of answering the question in dollars and cents, wrote "N/A" at the bottom of the question. Given the disposition of issues one through four, we need not address issue five as Preston is not a "prevailing party" entitled to any award of attorney's fees. *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666 (Tex. 2009).

### Conclusion

Having overruled each of appellant's issues on appeal, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER  
Justice

Submitted on September 28, 2011  
Opinion Delivered December 22, 2011

Before Gaultney, Kreger, and Horton, JJ.