

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00030-CV

JACK EDWIN WARING, Appellant

V.

FELICIA PHILLIPS WARING, Appellee

**On Appeal from the 1st District Court
Jasper County, Texas
Trial Cause No. 33819**

MEMORANDUM OPINION

Jack Edwin Waring seeks to reverse several of the trial court's rulings that addressed the division and characterization of property in his divorce. We conclude the evidence admitted during the trial supports the trial court's findings, and we affirm the terms in the final decree.

Factual and Procedural Background

Jack Edwin Waring and Felicia Phillips married in 2012 but separated in 2014.

Approximately eleven months before marrying Felicia, Jack purchased a tractor¹ and several attachments from a tractor dealership in Beaumont, Texas. Jack signed a five-year note to finance approximately \$26,000 of the purchase price on the equipment that he purchased from the dealership.

In April, 2014, Felicia sued Jack for divorce. In the live pleadings before the court when the case was tried, Felicia and Jack alleged that they owned various assets before they married. Each asked the trial court to characterize certain assets as separate property, and the property at issue in the appeal is the tractor that Jack purchased in 2011 in Beaumont. Additionally, Jack complains in his appeal that the trial court erred in characterizing the entire bonus he received from his employer in May 2014 as community property, and he claims the majority of it should have been

¹ The trial court's findings reflect that the trial court treated the tractor and front-end loader as one piece of equipment, as its findings of fact state that the tractor has a front-end loader built onto it. Jack has not challenged this finding in his appeal, and the evidence in the record does not conclusively show that the front-end loader was more or less permanently attached to the tractor. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986). The inventory Felicia filed claiming that Jack gave the tractor and front-end loader to her before they married also treats the tractor and front-end loader as one piece of equipment.

characterized as his separate property because he earned the bonus over the life of a project that began before he and Felicia married.

The parties' disputes were resolved in a trial to the bench. During the trial, Felicia provided the trial court with an inventory. The inventory listed the various assets she claimed as community property, assets she claimed as her separate property, and it listed the bonus and the tractor among the assets on which the parties had a dispute. Felicia's inventory reflects that she was claiming Jack gave her the tractor as a gift before she and Jack married. Documents admitted into evidence in the trial show that Jack purchased the tractor on November 11, 2011, almost a year before he and Felicia married. The evidence also shows that Jack made all of the monthly installments due on the tractor since he purchased it in 2011.

Two witnesses, other than Felicia, testified in support of Felicia's claim that Jack gave her the tractor as a Christmas gift: Colleen Phillips (Felicia's mother) and Gerald Lewis (a man who Jack and Felicia hired to build fences). Generally, their testimony tends to support Felicia's claim that the tractor was given to her as a gift. Felicia testified in the trial that Jack purchased the tractor and gave it to her around Christmas in 2011 so that she could use it to clear some land that her father owned. Other testimony in the trial, including Jack's, indicates that before they married,

Felicia and Jack were remodeling a house on a farm that her Father owned but did not farm.

Lewis testified that Jack told him that “he was going to get [the tractor] for [Felicia] for a Christmas present and that’s what was brought up as a gift to Felicia for a Christmas gift.” Lewis explained that he believed Jack purchased the tractor around the time Jack and Felicia married. Lewis also testified that after the tractor arrived at the farm, he began using it. The context of Lewis’s testimony indicates the farm he was referring to is the farm owned by Felicia’s father.

Colleen testified that after Jack purchased the tractor, she was at a farmhouse that Jack and Felicia were remodeling when Jack asked her whether she had seen what he got Felicia for Christmas. According to Colleen, Jack made the statement while referring to the tractor, which was out in the yard. Colleen testified that she told Jack that a tractor seemed like a strange Christmas present, but she thought Felicia might like something like that because Felicia liked to farm.

When Jack testified, he disputed Felicia’s claim that the tractor was a gift. Jack stated that he could not recall having any conversations with Colleen or Lewis about giving Felicia the tractor as a Christmas present. Jack also denied that he would have purchased Felicia a \$30,000 Christmas present months before they married. Jack explained that he purchased the tractor in his name in November 2011, and he

stated that although he is generous, he would never have given Felicia such an expensive present before they married. According to Jack, he gave Felicia a bracelet and a ring on Christmas Day in 2011, gifts that were wrapped and in boxes. Jack also testified that the tractor was not wrapped or accompanied by anything such as a card to indicate that he intended to give the tractor away as a gift. Jack agreed that when he purchased the tractor, it was to be used on a farm owned by Felicia's father. Jack described the farm before he and Felicia began working on it as overgrown and he testified that the farm had not been used for years. Jack agreed that after he purchased the tractor, Felicia used it on the farm. However, Jack explained that he and Lewis also used it on the farm. Jack testified that as of the trial, he was still making installment payments that he owed on the tractor.

Jack and Felicia also addressed the bonus Jack received from his employer in May 2014. The inventory in evidence reflects that Felicia claimed the entirety of the bonus as community property. Felicia asked the trial court to divide the bonus equally. In contrast, Jack asked the trial court to prorate the bonus over the four-year and eight-month period that he claimed the bonus had been earned while he was working on a project in Canada. Jack characterized approximately 82% of the bonus as his separate property, using a formula that he asked the trial court to use to characterize a large percentage of the bonus as his separate property. Felicia testified

that Jack did not know he was getting the bonus until the project in Canada ended, and that Jack had not earned the bonus over the life of the project. According to Felicia, Jack earned the bonus during their marriage. Neither Jack nor Felicia presented any documents from Jack's employer during the trial to support their testimony about how Jack's bonus had been earned.

Following the trial, the trial court reduced its findings of fact and conclusions of law to writing. In its written findings, the trial court characterized the tractor as Felicia's separate property because it found that Jack had given the tractor to Felicia as a Christmas present before he married. The trial court allocated the outstanding balance of the note on the tractor to Jack as his separate debt. The court characterized Jack's bonus as community property, and divided it equally.

Issues

Jack timely perfected an appeal from the final decree. In three issues, Jack asserts: (1) the trial court abused its discretion by awarding the tractor to Felicia as her separate property; (2) the trial court did not make a just and fair division of the property by awarding Felicia the tractor and ordering him to pay the remaining balance of the note; and (3) the trial court erred in characterizing his entire bonus as community property.

Analysis

By statute, property possessed by either spouse during or on dissolution of the marriage is presumed to be community property unless it is shown to be separate property by clear and convincing evidence. *See Tex. Fam. Code Ann. § 3.003* (West 2006). Separate property includes “the property owned or claimed by the spouse before marriage[.]” *Id. § 3.001(1)* (West 2006). Generally, characterizing property as separate or community depends on its character when it was acquired. *See Barnett v. Barnett*, 67 S.W.3d 107, 111 (Tex. 2001).

“When reviewing an alleged property characterization error, we must determine whether the trial court’s finding is supported by clear and convincing evidence and whether the characterization error, if established, was an abuse of discretion.” *Magness v. Magness*, 241 S.W.3d 910, 912 (Tex. App.—Dallas 2007, pet. denied). Evidence is clear and convincing if it will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation. *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied). “While the proof must weigh heavier than merely the greater weight of the credible evidence, there is no requirement that the evidence be unequivocal or undisputed.” *Boyd v. Boyd*, 131 S.W.3d 605, 611 (Tex. App.—Fort Worth 2004, no pet.).

Jack argues the evidence established that the tractor is his separate property because the evidence shows that he acquired the tractor before he and Felicia married. Because Felicia prevailed on her claim that the tractor was her separate property, she was required to present clear and convincing evidence proving (1) that Jack intended to give the tractor to her, (2) that the tractor was delivered, and (3) that she accepted his gift. *See In re Marriage of Moncey*, 404 S.W.3d 701, 710 (Tex. App.—Texarkana 2013, no pet.). In his brief, Jack argues that Felicia’s evidence establishing that he gave her the tractor is so vague and filled with conflicts that the evidence fails to meet the clear and convincing standard by which Felicia was required to show that the tractor was her separate property. According to Jack, Felicia’s testimony is supported by the testimony of biased witnesses, and the evidence that he gave Felicia the tractor as a gift is lacking without tangible evidence such as a gift card or pictures showing that Jack intended to give the tractor away. Additionally, Jack argues that the evidence conclusively showed that he purchased the tractor before he married, so it was his property, not Felicia’s. Jack further argues that the bill of sale shows that the equipment was not purchased at separate times as Felicia claimed when she testified, which made her testimony not very credible. Jack also argues that discrepancies exist in Colleen’s and Lewis’s accounts about details surrounding their claims that he gave the tractor to Felicia as a gift, and he argues

that the conflicts in their accounts make their testimony amount to evidence that is less than clear and convincing. For example, Jack asserts that Lewis undermined his testimony by placing the conversation he claimed to have had with Jack about giving the tractor to Felicia around the time that he and Felicia married. Jack points out that the evidence conclusively shows that he purchased the tractor nearly a year before he married. Jack also argues that Colleen's testimony claiming that he told her that he was giving Felicia the tractor is insufficient because even had he made that statement, the statement is consistent with bragging and does not show that he intended to give such an expensive gift to a person to whom he was not married.

Our review reveals conflicting testimony existed in the trial about whether Jack intended to give the tractor to Felicia, but the conflicts that exist are not so severe that the trial court was required to disregard the testimony supporting the conclusion that the tractor was given to Felicia as a gift. For example, the testimony is generally consistent with Felicia's claim that Jack made statements that a person might make who intended a gift. The testimony shows that Jack and Felicia had been living together in a house that Felicia owned since 2010. The evidence also shows that Jack and Felicia were involved in a project to remodel a house on a farm owned by Felicia's father that he was not farming. Under the circumstances, the trial court could reasonably infer that before Jack married, he had a substantial interest in

getting Felicia to agree to marry him, and that he gave Felicia a substantial gift in contemplation of a marriage, a marriage that subsequently occurred. There was no testimony in the trial showing that Jack ever used the tractor on his own property, or indicating that Jack intended to use the tractor he purchased for some purpose other than to improve Felicia's father's farm. Jack also admitted during the trial that he was very generous towards Felicia and that he was living in Felicia's house before he married her. Therefore, the trial court could reasonably infer that Jack's gift was based on economic consideration favorable to him in light of an impending marriage. Under the circumstances, the trial court's conclusion that Jack gave Felicia the tractor was not unreasonable, Colleen's testimony that Jack told her that he gave Felicia the tractor is not unclear, and Lewis's testimony that Jack told him he intended to give Felicia the tractor is not unclear.

Acting as the factfinder in the bench trial, the trial court had the right to determine the credibility of the witnesses and the weight that he wished to give to their testimony. *Woods v. Woods*, 193 S.W.3d 720, 726 (Tex. App.—Beaumont 2006, pet. denied); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). The trial court was also entitled to resolve any conflicts in the testimony by deciding to believe some or all of a witness's testimony. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). As the factfinder, the evidence

favoring the trial court's findings allowed the trial court to believe that Jack gave the tractor to Felicia, and to find that when he gave Felicia the tractor, he did not intend to transfer his obligation to her to make the monthly installment payments due on the note used to finance the tractor. Jack's testimony that he never gave the tractor to Felicia is not so significant that a factfinder could not reasonably have formed a firm belief or conviction from the other three witnesses whose testimony supports the trial court's findings that Jack intended to give the tractor to Felicia. *See generally In re J.O.A.*, 283 S.W.3d 336, 345 (Tex. 2009).

Jack also argues that Felicia failed to prove that he gave Felicia complete control over the tractor after Felicia claimed the tractor was delivered to her father's farm. According to Jack, the evidence does not show that Felicia was the only one who used the tractor after the Christmas season in 2011. However, the circumstances do show that Felicia used the tractor and the fact that she might have allowed others to use it to improve land owned by her Father is a circumstance that allowed the trial court to find that Jack gave Felicia the right to control the tractor's use. We hold the trial court, as the factfinder, was entitled to conclude from the testimony and circumstances proven at trial that Felicia presented clear and convincing evidence that Jack gave her the tractor before the date they married. *Id.*

In his brief, Jack presents an additional argument that he raised for the first time in his motion for new trial asserting that he did not have the ability to divest himself of the tractor because the tractor was encumbered by a debt. According to Jack, a lien has existed on the tractor at all times based on terms that are in his note.² Jack concludes that the existence of the lien made it impossible for him to transfer his interest in the tractor to someone else. Relying on *Estate of Kuenstler v. Trevino*, 836 S.W.2d 715 (Tex. App.—San Antonio 1992, no writ), Jack suggests that he could not effectively convey title on the tractor because a lien on the tractor prevented him from completing delivery. Jack concludes that, given the existence of the lien, the alleged gift is either void or voidable.

In *Kuenstler*, Russell Kuenstler purchased a truck subject to a retail installment security agreement and subsequently assigned his right to the truck to his friend, Cari Trevino. 836 S.W.2d at 716. After receiving the gift, Trevino began making payments on the truck, but she defaulted after having made only two additional payments. *Id.* Kuenstler died the month after Trevino last paid the note on the truck. *Id.* Approximately three months later, the bank repossessed the truck. *Id.*

² Jack concedes no UCC financing statement was in evidence. Additionally, Jack did not provide the trial court with a copy of the note, so the evidence before the trial court does not show whether, under the terms of the note, Jack was subject to restrictions preventing him from transferring the tractor to others.

In a bench trial, the trial court found that Kuenstler gave the truck to Trevino, and that Kuenstler's estate was obligated to the bank for the balance due on the note used to finance the truck. *Id.* at 717.

On appeal, Kuenstler's estate argued that Kuenstler's attempt to give away the truck was incomplete because the attempted transfer was subject to the bank's prior rights. *Id.* at 717. In *Kuenstler*, our sister court acknowledged that a donor may make a gift of encumbered property in which the donor agrees to discharge the debt. *See id.* Additionally, the court stated that: "The donor may also give away property and agree to pay off the indebtedness, but he is not bound to pay off the indebtedness unless there is evidence that he intended to pay it." *Id.* at 718. Ultimately, the appeals court reasoned that the gift of the truck failed under facts proven during the trial showing that Trevino promised to pay the installments when they became due and there was no evidence showing that Kuenstler had agreed to continue to make the monthly payments toward the debt owed on the truck. *Id.*

In contrast, the circumstantial evidence relevant to the tractor in this case allowed the trial court to conclude that Jack intended and did in fact continue to make the monthly installment payments when they became due on his note after he gave the tractor away. Jack does not dispute that he continued to pay the note after Christmas 2011, and as of the date of trial, no evidence was presented to show that

Jack had not made each payment when it became due. Additionally, the evidence in this case does not include a copy of the note on the tractor, so the trial court was not asked to consider the terms that were in the note either during the trial or in the hearing on his motion for new trial. Unlike the circumstances before the court in *Kuenstler*, none of the conditions attendant to Jack's alleged gift were shown to have failed. Given the record available to the trial court, the trial court's decision to award the tractor to Felicia as her separate property is supported by sufficient evidence of a completed gift.

In issue two, Jack argues that it was unjust for the trial court to find the tractor was Felicia's separate property without also making Felicia responsible for paying the remaining installments when they became due on the note. According to Jack, Felicia's claim that the tractor was a gift was conditional on a marriage that lasted long enough to pay the note. Jack argues the trial court's judgment should be reversed and the case remanded to allow the trial court to consider making Felicia reimburse him for the payments he has made on the note since their divorce, and to order that she pay the remaining installments on the note. While Jack did not pursue a reimbursement claim in the trial, he suggested in his motion for new trial that Felicia should be required to reimburse him for the installments that he made on the note after he and Felicia divorced. Essentially, Jack contends that in equity, he

should not be required to continue to pay the note when he anticipated using the tractor in a marriage that he anticipated would outlast the length of the loan he obtained to buy the tractor.

A trial court resolves a claim for reimbursement of one marital estate against another marital estate using equitable principles. *See Tex. Fam. Code Ann. § 3.402(b)* (West Supp. 2016). The party seeking reimbursement has the burden of proof. *Id. § 3.402(e)* (West Supp. 2016). The decision to deny a claim for reimbursement is reviewed for abuse of discretion. *Sonnier v. Sonnier*, 331 S.W.3d 211, 216 (Tex. App.—Beaumont 2011, no pet.). However, equity is not involved when the trial court properly characterized a married person’s property and debt. In *Sonnier*, we explained that “[a] gift from one estate to another generally is not a proper basis for a reimbursement claim.” *Id.* at 217. With respect to the trial court’s characterization of the tractor as Felicia’s separate property, we have already concluded that the trial court did not abuse its discretion when it found that the tractor is Felicia’s separate property and characterized the note Jack obtained to finance the tractor as his separate debt. Consequently, notwithstanding Jack’s disappointment that his marriage was of a shorter duration than his note, the trial court did not abuse its discretion by denying his motion for new trial.

In issue three, Jack argues the trial court erred when it failed to characterize at least part of the bonus he received from his employer as his separate property. Because the bonus was paid during the marriage, the trial court was entitled to presume that it was community property and Jack had the burden to show otherwise. *See Tex. Fam. Code Ann. § 3.003.* Jack relies on his testimony and the formula he provided the trial court to support his argument that the bonus was partly his separate property. Nonetheless, acting as the factfinder, the trial court was not required to rely on Jack's testimony in deciding whether Jack met his burden of proving that part of the bonus was earned prior to his marriage. *See McGalliard*, 722 S.W.2d at 697.

The evidence shows that Jack's employer paid the bonus after he completed a project at a potash mine process and storage facility. Jack worked on the project both before and after he married Felicia. Jack provided the trial court with his own calculation prorating the bonus, and his formula was based on a ratio that considered how long he worked on the project before he married. However, Jack agreed during the trial that he never asked his employer for any information about how his bonus had been calculated, and other than his own testimony claiming the bonus was based on the total time worked on the project in Canada, no testimony or other evidence from Jack's employer explained how the bonus was earned.

Citing *Loya v. Loya* and *Sprague v. Sprague*, Jack argues that an employer paid bonus is characterized based on the periods when the work was performed. *See Loya v. Loya*, 473 S.W.3d 362, 368-69 (Tex. App.—Houston [14th Dist.] 2015), reversed, 2017 WL 1968033 (Tex. May 12, 2017); *Sprague v. Sprague*, 363 S.W.3d 788, 798-802 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). In *Sprague* the trial court found a discovery violation and excluded evidence concerning the employer’s cash deferral program. *Sprague*, 363 S.W.3d at 800-801. After determining that the trial court erred in deciding to exclude the evidence about the details of the employer’s cash deferral program, the Fourteenth Court of Appeals determined that the trial court’s error was harmful because the excluded evidence included a letter from the employer that explained the basis on which the bonus was to be paid. *Id.* at 802. The letter indicated that the employer deemed half of Sprague’s bonus payable based on his work over the prior eighteen months, and that it considered the other half payable in the future, contingent upon Sprague’s continued employment. *Id.* The evidence from Sprague’s employer showed that Sprague earned all but one and one-half months of the bonus before his marriage occurred. *Id.* According to the Fourteenth Court of Appeals, the error in excluding the details about the cash deferral program had been harmful to Mr. Sprague because the evidence showing how the program worked raised questions of fact about whether

Mr. Sprague earned the bonus before he married. *Id.* In the appeal now before us, no one has complained that the trial court excluded any evidence showing how Jack's bonus was earned.

In *Loya*, Leticia, Loya's former wife, filed a post-divorce proceeding to divide an employment-related bonus that Miguel, her ex-spouse, received nine months after they divorced. 473 S.W.3d at 364. Miguel argued that a partition agreement the parties reached in a mediated settlement agreement gave him the right to receive all of his future earnings. *Id.* Leticia appealed a take-nothing summary judgment in which the trial court had rejected her claim to Miguel's bonus. The Fourteenth Court of Appeals held that Leticia's affidavit about Miguel's bonus raised a genuine issue of material fact concerning whether Miguel earned some portion of the bonus during the period that he and Leticia were married. *Id.* at 369.

Miguel subsequently appealed the Fourteenth Court of Appeals' decision to the Texas Supreme Court. *Loya*, 2017 WL 1968033. The Texas Supreme Court reversed the Fourteenth Court of Appeals holding on other grounds, and did not reach whether the Fourteenth Court properly decided whether the evidence raised a fact issue regarding its characterization of Miguel's bonus. *Id.* at **3, 5.

Both *Sprague* and *Loya* are dependent on their unique facts. Both are also distinguishable from the facts before the trial court in this case, as there is no

evidence from Jack's employer about how it calculated Jack's bonus. Ultimately, *Loya* turned upon the terms of a mediated settlement agreement in the divorce, not whether the Fourteenth Court of Appeals properly held that a fact issue existed requiring a retrial on the issue of how Miguel's bonus should have been characterized. *Id.* at *5. In *Sprague*, the Fourteenth Court of Appeals remanded the case for a new trial based on its conclusion that issues of fact were required to be resolved to determine how the bonus should be characterized, and it did so based on an employer's letter characterizing Sprague's bonus. 363 S.W.3d at 802. In this case, no evidence was excluded about the bonus, and there was no evidence from Jack's employer indicating the methodology used by Jack's employer to calculate the amount of his bonus. Acting as the factfinder, the trial court was entitled to reject Jack's testimony explaining how he claimed his employer calculated his bonus. *See McGalliard*, 722 S.W.2d at 697. Because it had the right to both reject Jack's testimony about his bonus and to view Jack's testimony as insufficient to overcome the community property presumption, Jack has failed to show that the trial court abused its discretion by characterizing the bonus paid by his employer after he married as community property. *See generally Magness*, 241 S.W.3d at 912.

We overrule issue three. Having overruled all of Jack's issues, we affirm the trial court's judgment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on July 5, 2017
Opinion Delivered September 21, 2017

Before McKeithen, C.J., Horton and Johnson, JJ.