COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00213-CV

JULIA TERESA HECKERT — APPELLANT

V.

CLYDE L. HECKERT, JR. — APPELLEE

FROM THE 324TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 324-549526-14

MEMORANDUM OPINION[1]

This appeal and cross-appeal involve the propriety of a turnover order. In her appeal, Julia Teresa Heckert (Teresa)—who obtained the turnover order against her former husband Clyde L. Heckert, Jr.—challenges the trial court's refusal to order Clyde to turn over an additional bank account, its admission of

[1]*See* Tex. R. App. P. 47.4.

Clyde's testimony about the contents of that account, and its award of less than the full amount of trial attorney's fees she sought. In his cross-appeal, Clyde raises three issues, in which he alleges that (1) the trial court erred by ordering him to turn over any property because Teresa did not meet her burden of proof to obtain turnover relief under section 31.002 of the civil practice and remedies code, (2) one of the bank accounts ordered to be turned over is exempt under section 42.0021 of the property code, and (3) the only way his nonexempt interests in a sole-member limited liability company and a limited partnership may be reached by a judgment creditor is by charging order. We reverse the part of the trial court's order requiring Clyde to turn over his Vanguard account, but we affirm the remainder of the trial court's order.

I. Background

In a separate personal-injury action that Teresa originally brought against Clyde in their divorce—but which the trial court severed from the divorce—a jury awarded Teresa $381,342.47. A little over a year later Teresa filed a motion seeking the turnover of any of Clyde's nonexempt assets—or alternatively the appointment of a receiver—in satisfaction of the judgment. In his response to the motion, Clyde claimed that he owned two bank accounts, a 401k and an IRA, that are exempt assets not subject to turnover. After an evidentiary hearing, the trial court appointed a receiver and ordered Clyde to turn over the following assets to the receiver: his interest in three separate accounts—a Vanguard account, an Options Express account, and a T.D. Ameritrade account; his

interest in a limited partnership—A2R, Ltd.—and a single-member limited liability company—Averse 2 Risk, LLC—both of which he formed after the divorce while Teresa's personal injury suit against him was pending; and his interest generally in "any other nonexempt financial accounts . . . [and] [a]ll other nonexempt property that is in [his] possession or subject to his control." The trial court also awarded Teresa $10,000 in attorney's fees although she had sought $25,800. The trial court did not order Clyde to turn over another of his accounts, a Fidelity Investments account.

Teresa filed the first notice of appeal from the trial court's judgment, and Clyde filed a cross-appeal. For ease of discussion, we will address their issues out of order.

II. Law Governing Turnover Actions

Section 31.002 of the civil practice and remedies code sets forth the circumstances under which a trial court may order the turnover of assets:

> (a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that:
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> (1) cannot readily be attached or levied on by ordinary legal process; and
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> (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.
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> (b) The court may:

> (1) order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control, together with all documents or records related to the property, to a designated sheriff or constable for execution;
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> (2) otherwise apply the property to the satisfaction of the judgment; or
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> (3) appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment.
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> . . . .
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> (e) The judgment creditor is entitled to recover reasonable costs, including attorney's fees.
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> (f) A court may not enter or enforce an order under this section that requires the turnover of the proceeds of, or the disbursement of, property exempt under any statute, including Section 42.0021, Property Code. This subsection does not apply to the enforcement of a child support obligation or a judgment for past due child support.
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> . . . .
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> (h) A court may enter or enforce an order under this section that requires the turnover of nonexempt property without identifying in the order the specific property subject to turnover.

Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a) (West 2015). We review a turnover order for an abuse of discretion. *See, e.g.*, *Beaumont Bank N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991); *Barcroft v. Walton*, No. 02-16-00404-CV, 2017 WL 1738079, at *1 (Tex. App.—Fort Worth May 4, 2017, no pet.) (mem. op.). Such an order will not be reversed for an abuse of discretion if the judgment is sustainable for any reason, even if it is predicated on an erroneous

conclusion of law. *Main Place Custom Homes, Inc. v. Honaker,* 192 S.W.3d 604, 627 (Tex. App.—Fort Worth 2006, pet. denied) (citing *Buller*, 806 S.W.2d at 226).

Whether there is sufficient evidence to support a turnover order is a relevant consideration in determining whether the trial court abused its discretion. *Buller*, 806 S.W.2d at 226; *Anoco Marine Indus., Inc. v. Patton Prod. Corp.*, No. 2-09-00210-CV, 2010 WL 1426869, at *2 (Tex. App.—Fort Worth Apr. 8, 2010, no pet.) (mem. op.). Although there must be evidence that the judgment debtor has nonexempt property that is not readily subject to attachment or levy, "[s]ection 31.002 does not specify, or restrict, the manner in which evidence may be received in order for a trial court to determine whether the conditions of section 31.002(a) exist, nor does it require that such evidence be in any particular form, that it be at any particular level of specificity, or that it reach any particular quantum before the court may grant aid under section 31.002."[2] *Tidwell v. Roberson*, No. 14-16-00170-CV, 2017 WL 3612043, at *6 (Tex. App.—Houston [14th Dist.] Aug. 22, 2017, no pet. h.) (quoting *Tanner v. McCarthy*, 274 S.W.3d 311, 322 (Tex. App.—Houston [1st Dist.] 2008, no pet.)); *Blunck v. Blunck*, No. 03-15-00128-CV, 2016 WL 690669, at *2 (Tex. App.—Austin Feb.

[2]Clyde complains in his response to Teresa's first issue that the trial court failed to make written findings in support of its order, but Clyde did not request findings in the trial court. *See* Tex. R. Civ. P. 296–97. The case Clyde cites in support, *In re Wiese*, is inapposite because it involved whether a turnover order was sufficiently specific to support a contempt finding. 1 S.W.3d 246, 250–51 (Tex. App.—Corpus Christi 1999, orig. proceeding).

18, 2016, pet. denied) (mem. op.). Here, the trial court admitted evidence and took judicial notice of its entire file.

III. Evidence Supporting Turnover Order

A. Assets Not Subject to Ready Attachment or Levy

Clyde claims in his first issue that Teresa did not prove that he had any nonexempt property in his possession that could not readily be attached or levied upon. Courts may look to a judgment debtor's noncompliance and lack of cooperation in determining whether or not property can readily be attached. *See Henderson v. Chrisman*, No. 05-14-01507-CV, 2016 WL 1702221, at *4 (Tex. App.—Dallas Apr. 27, 2016, no pet.) (mem. op.). The Dallas Court of Appeals has held that evidence that a debtor had resources to pay the judgment, had chosen not to pay, and had admitted that the judgment was the only debt the debtor was not paying supported a conclusion that the property could not be readily attached. *See Stanley v. Reef Secs., Inc.*, 314 S.W.3d 659, 669 (Tex. App.—Dallas 2010, no pet.). It has also held that evidence showing a judgment debtor had the resources to pay the judgment but chose to spend that money on something else showed an unwillingness and lack of cooperation sufficient to support a conclusion that the debtor's property could not readily be attached. *Henderson*, 2016 WL 1702221, at *4.

Here, the evidence showed that after Teresa was awarded the personal-injury judgment, Clyde—whose paychecks had been directly deposited into his checking account during the divorce—began to cash his paychecks or deposit

them into his new wife's bank account. He testified that he paid thousands of dollars per month—a total of $87,000—toward the principal amount on his new wife's mortgage, for which she gave him a fifty percent ownership interest in her home. Her scheduled monthly mortgage payment at the time was around $500 per month. Clyde also refused to provide receipts for his expenses, prompting Teresa to file a motion to compel. Further, he had filed for bankruptcy protection during the divorce. *See Blunck*, 2016 WL 690669, at *3. We hold that there is sufficient evidence from which the trial court could have determined that any nonexempt property in Clyde's possession, including the shares of stock he transferred to A2R, Ltd., could not readily be attached. *See, e.g.*, *Henderson*, 2016 WL 1702221, at *4*; Hennigan v. Hennigan*, 666 S.W.2d 322, 323–24 (Tex. App.—Houston [14th Dist.] 1984), *writ ref'd n.r.e.*, 677 S.W.2d 495 (Tex. 1984); *see also, e.g.*, *Europa Int'l, Ltd. v. Direct Access Trader Corp.*, 315 S.W.3d 654, 657 (Tex. App.—Dallas 2010, no pet.) (holding that shares of stock cannot be readily attached or levied on by ordinary process); *Universe Life Ins. v. Giles*, 982 S.W.2d 488, 492 (Tex. App.—Texarkana 1998, pet. denied) ("Under current law, there is no requirement that the judgment creditor demonstrate that other methods of collecting the judgment have failed. A judgment creditor need not first exhaust other legal remedies prior to seeking relief under the turnover statute if the statutory requirements are met." (citations omitted)).

We will next address whether the record supports the turnover relief as to property specifically named in the turnover order that the parties complain about on appeal.

B. Whether Specific Items Are Exempt

1. T.D. Ameritrade Account

The evidence shows that Clyde was awarded a T.D. Ameritrade account in the divorce. Clyde does not claim that the stock held in the T.D. Ameritrade account is exempt; rather, he claims that Teresa failed to prove that the account is nonexempt. The evidence shows that Clyde listed the T.D. Ameritrade account in his sworn inventory in the divorce under the heading, "Brokerage Accounts/Mutual Funds," and he listed "Retirement Benefits," including IRAs, separately. The trial court awarded the account to Clyde in the divorce decree as his separate property, under the heading, "stocks, bonds, and securities." The evidence also shows that in response to interrogatories propounded by Teresa in the turnover action, Clyde did not list the T.D. Ameritrade account as exempt property although he did list a "401K" and "IRA" as exempt. To the extent the evidence suggests that Clyde transferred the T.D. Ameritrade account to A2R, Ltd., there is no evidence that the account contained anything other than nonexempt stock.[3] We hold that the evidence supports the trial court's inclusion of the T.D. Ameritrade account in its turnover order.

[3]The supplemental clerk's record shows that Clyde assigned this account to the receiver subject to his right to appeal the turnover order, but

2. Vanguard Account

Clyde claims that no evidence supports a conclusion that the Vanguard account is nonexempt and therefore subject to being turned over. Although the turnover statute does not require a particular quantum of evidence that must exist before a trial court can order the turnover of property, an absence of any evidence that property is eligible for turnover will preclude relief.[4] *See, e.g.*, *Tanner*, 274 S.W.3d at 322.

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correspondence from his counsel to Teresa's counsel also suggests that the account has been closed.

[4]The parties dispute which of them bore the burden of proving whether the account is exempt. Intermediate appellate courts, including this court, have long held that once a judgment creditor proves that a judgment debtor owns certain property, the judgment debtor has the burden to prove that property is exempt from attachment, execution, or seizure. *See, e.g., Alexander, Dubose, Jefferson & Townsend, LLP v. Chevron Phillips Chem. Co.*, 503 S.W.3d 1, 5 (Tex. App.—Beaumont 2016, pet. filed); *Mata v. Ellis*, No. 11-14-00207-CV, 2016 WL 4386187, at *1 (Tex. App.—Eastland Aug. 11, 2016, no pet.) (mem. op.); *Karlseng v. Wells Fargo, N.A.*, No. 05-13-01734-CV, 2014 WL 7232734, at *2 (Tex. App.—Dallas Dec. 19, 2014, pet. denied) (mem. op.); *Hanif v. Clarksville Oil & Gas Co.*, No. 06-09-00110-CV, 2010 WL 2105936, at *5 n.7 (Tex. App.—Texarkana May 27, 2010, no pet.) (mem. op.); *Jones v. Am. Airlines, Inc.*, 131 S.W.3d 261, 270 (Tex. App.—Fort Worth 2004, no pet.); *Gary Pools, Inc. v. McCaffety*, No. 03-01-00446-CV, 2002 WL 1070890, at *2 n.1 (Tex. App.—Austin May 31, 2002, no pet.) (mem. op.); *Rucker v. Rucker*, 810 S.W.2d 793, 795–96 (Tex. App.—Houston [14th Dist.] 1991, writ denied); *Dale v. Fin. Am. Corp.*, 929 S.W.2d 495, 498 (Tex. App.—Fort Worth 1996, writ denied). The cases that Clyde cites to the contrary are inapposite, either because (1) the evidence in those cases was sufficient to show that the type of property involved was nonexempt as a matter of law, i.e., stock, *Childre v. Great Sw. Life Ins. Co.*, 700 S.W.2d 284, 288 (Tex. App.—Dallas 1985, no writ), or current wages, *Sloan v. Douglass*, 713 S.W.2d 436, 439–40 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); *see Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas*, 810 S.W.2d 738, 739 n.2 (Tex. 1991) (noting that version of section 31.002 that had been amended effective after the date of the order in that case would have prohibited

Section 42.0021(a) of the Texas Property Code describes the types of bank accounts that are exempt from levy or execution:

> (a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, annuity, deferred compensation, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, or a simplified employee pension plan, an individual retirement account or individual retirement annuity, including an inherited individual retirement account, individual retirement annuity, Roth IRA, or inherited Roth IRA, or a health savings account, and under any annuity or similar contract purchased with assets distributed from that type of plan or account, is exempt from attachment, execution, and seizure for the satisfaction of debts to the extent the plan, contract, annuity, or account is exempt from federal income tax, or to the extent federal income tax on the person's interest is deferred until actual payment of benefits to the person under Section 223, 401(a), 403(a), 403(b), 408(a), 408A, 457(b), or 501(a), Internal Revenue Code of 1986, including a government plan or church plan described by Section 414(d) or (e), Internal Revenue Code of 1986. For purposes of this subsection, the interest of a person in a plan, annuity, account, or contract acquired by reason of the death of another person, whether as an owner, participant, beneficiary, survivor, coannuitant, heir, or legatee, is exempt to the same extent that the interest of the person from whom the plan, annuity, account, or contract was acquired was exempt on the date of the person's death. If this subsection is held invalid or preempted by federal law in whole or in part or in certain circumstances, the subsection remains in effect in all other respects to the maximum extent permitted by law.

Tex. Prop. Code Ann. § 42.0021(a) (West 2014). The statute also provides that

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turnover of doctor's paychecks), *abrogated in part on other grounds by In re Sheshtawy*, 154 S.W.3d 114, 124–25 (Tex. 2004); *DeVore v. Cent. Bank & Trust*, 908 S.W.2d 605, 609–10 (Tex. App.—Fort Worth 1995, no writ); or (2) the party seeking relief presented no evidence at all in support of its motion, *Tanner*, 274 S.W.3d at 323.

> [c]ontributions to an individual retirement account that exceed the amounts permitted under the applicable provisions of the Internal Revenue Code of 1986 and any accrued earnings on such contributions are not exempt under this section unless otherwise exempt by law. Amounts qualifying as nontaxable rollover contributions under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986 before January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts treated as qualified rollover contributions under Section 408A, Internal Revenue Code of 1986, are treated as exempt amounts under Subsection (a). In addition, amounts qualifying as nontaxable rollover contributions under Section 402(c), 402(e)(6), 402(f), 403(a)(4), 403(a)(5), 403(b)(8), 403(b)(10), 408(d)(3), or 408A of the Internal Revenue Code of 1986 on or after January 1, 1993, are treated as exempt amounts under Subsection (a). Amounts qualifying as nontaxable rollover contributions under Section 223(f)(5) of the Internal Revenue Code of 1986 on or after January 1, 2004, are treated as exempt amounts under Subsection (a).

Id. § 42.0021(b).

Teresa presented evidence that Clyde owned a Vanguard account that Vanguard had labeled a "Traditional IRA brokerage account." Although Clyde did not list an account with Vanguard in response to one of Teresa's interrogatories asking which of his property he claimed was exempt, he did list an IRA with a different lender, Provident Trust, in the amount of $39,000. The evidence also showed that Clyde had listed an IRA with Provident Trust with a balance of around $36,000 in his inventory in the divorce, under the title "Retirement Benefits" and "IRA/SEP," and the trial court awarded that IRA to Clyde in the decree as his separate property. The Vanguard account statement—which was dated about two months after the date Clyde served a supplemental response to Teresa's interrogatories—listed a balance of $30,029.86. Additionally, Clyde

testified that the Vanguard account was an IRA. There is no other evidence about the nature of the Vanguard account, and the trial court sustained Teresa's objection to any testimony by Clyde opining whether the account is exempt by law. Thus, the only evidence in the record is that the Vanguard account is a "[t]raditional" IRA and that Clyde had been awarded an IRA containing around the same amount in the divorce. At least one state and one federal court have held that evidence an account is labeled an IRA—in the absence of any controverting proof—is sufficient to prove its exempt status under section 42.0021 in light of Texas's rule that exemption statutes should be liberally construed in the debtor's favor. *See In re Jarboe*, 365 B.R. 717, 722–25 (S.D. Tex. 2007) (mem. op.); *Lozano v. Lozano*, 975 S.W.2d 63, 67 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

Teresa contends that Clyde nevertheless did not meet his burden to show that the Vanguard account is exempt because he did not present evidence that (1) the account is either exempt from federal income tax or that federal income tax is deferred until payment of actual benefits under the Internal Revenue Code, and (2) his contributions to the account or earnings on those contributions have not "exceed[ed] the amounts permitted under the applicable provisions of the Internal Revenue Code of 1986" as set forth in subsection (b) of property code section 42.0021. According to Teresa, section 42.0021(a) "was significantly revised in 2011" to preclude a trial court from finding that a judgment debtor's property is exempt unless the debtor presents evidence proving that the

account—no matter what it is called—is actually entitled to tax-exempt or tax-deferred treatment under the Internal Revenue Code. In other words, Teresa argues that the 2011 amendment to section 42.0021(a) was intended to make it more difficult for a judgment debtor to prove that his or her property is exempt under Texas law.

The former version of section 42.0021(a) read as follows:

> (a) In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, and under any annuity or similar contract purchased with assets distributed from that type of plan, and under any retirement annuity or account described by Section 403(b) or 408A of the Internal Revenue Code of 1986, and under any individual retirement account or any individual retirement annuity, including a simplified employee pension plan, and under any health savings account described by Section 223 of the Internal Revenue Code of 1986, is exempt from attachment, execution, and seizure for the satisfaction of debts *unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986*.

Act of May 27, 2011, 82nd Leg., R.S., ch. 933, § 1, 2011 Tex. Sess. Law Serv. 2351, 2351 (emphasis added). Teresa contends that the change of wording from "unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986" to "to the extent the plan, contract, annuity, or account is exempt from federal income tax, or to the extent federal income tax on the person's interest is deferred until actual payment of benefits to the person under [eight listed sections of the] Internal Revenue Code of 1986" shows that the legislature intended that a judgment debtor must present

proof of the account's tax exempt or tax-deferred status to now be entitled to exempt treatment.

But a review of legislative history shows this is not the case. The House Committee Bill Analysis notes,

> A bankruptcy court in Texas recently held that the Texas statute exempting individual retirement accounts (IRAs) from creditors did not apply to inherited IRAs. C.S.S.B. 1810 seeks to clarify an inherited IRA's exemption status with regard to creditors' claims by amending provisions protecting certain savings plans from a creditor's claims.

House Comm. on Pensions, Invs., & Fin. Servs., Bill Analysis, Tex. S.B. 1810, 82nd Leg., R.S. (2011). After stating that the amendment clarifies that an inherited IRA is likewise exempt under section 42.0021, the bill analysis also states, "The bill removes a condition that made the exemption for a plan, contract, or account contingent on the plan, contract, or account not being disqualified under applicable provisions of the Internal Revenue Code of 1986." Additionally, the "Author's/Sponsor's" statement of intent for the bill reads as follows:

> Texans hold millions of dollars in inherited IRAs based on the assumption that they are exempt from creditors' claims. Virtually all estate planners have long read Section 42.0021 . . . as exempting these IRAs; therefore, Texans hold these accounts based on the false assumption of their protection. Section 42.0021 must be changed so that Texans will not be in the undesirable position of having to file bankruptcy to protect their inherited IRAs.
>
> Texas has a long history of protecting assets such as IRAs, not only in the hands of persons who create and fund them, but also in the hands of beneficiaries.

Senate Bus. & Commerce Comm. Bill Analysis, Tex. S.B. 1810, 82nd Leg., R.S. (2011). Thus, contrary to Teresa's argument, the legislative history shows that the 2011 amendment was not intended to expand the type of proof a judgment debtor must bring forward to show property is exempt but to more expansively define the type of property that qualifies as exempt under section 42.0021.[5]

In the bankruptcy case referenced in the bill analysis, *In re Jarboe*, the Southern District of Texas bankruptcy judge held that the version of section 42.0021 then in effect did not provide exempt status to IRAs acquired by inheritance because even though the rollover into the debtor's account by inheritance was tax-deferred—and subsequent earnings on the account were tax deferred—such an account could not receive or make rollovers like a regular IRA; thus, the court determined that an inherited IRA did not "qualify under the applicable provisions of the Internal Revenue Code of 1986" so as to be considered exempt under section 42.0021(a). 365 B.R. at 722–25. It was the additional evidence that the IRA in that case had been acquired by inheritance that caused the court to determine that the account was not qualified and therefore not exempt.[6] *Id.*

[5]*Rucker*, relied on by Teresa, is distinguishable because it was decided before the 2011 amendment to section 42.0021(a) and did not involve an IRA. 810 S.W.2d at 795–96. In any event, we find the reasoning in *Lozano* and *Jarboe* more persuasive on this issue.

[6]This fact distinguishes this case from *Jones*, in which there was evidence that the payment to the appellant had been made in error and, thus, was not a rollover to an exempt account. 131 S.W.3d at 270.

We therefore hold that in the absence of any controverting evidence that the Vanguard account is not entitled to exempt treatment under section 42.0021 under Texas's liberal rules of construction, the trial court abused its discretion by including it in the list of property to be turned over to the receiver. We sustain Clyde's second issue and the part of his first issue that challenges the turnover award as to the Vanguard account.

3. Membership Interests in A2R, Ltd. and Averse 2 Risk, LLC

Clyde further argues that Teresa failed to show that his interest in the limited partnership A2R, Ltd. and limited liability company Averse 2 Risk, LLC are nonexempt and that even if the evidence supports a finding that they are nonexempt, turnover relief is prohibited under sections 101.112 and 153.256 of the Business Organizations Code.

a. Membership Interests and Their Assets are Nonexempt

The evidence shows that Clyde formed both A2R, Ltd. and Averse 2 Risk, LLC in August 2014 after the parties' divorce and while Teresa's personal injury suit was pending. Averse 2 Risk, LLC is the general partner of A2R, Ltd., of which Clyde is the sole limited partner. Clyde is also the sole member of Averse 2 Risk, LLC. A2R, Ltd. owns stock that is held in an Options Express account. This stock was awarded to Clyde in the divorce, and he testified at a prior hearing on a motion to compel that he had transferred ownership of the stock to "a family limited partnership." Not only is his membership interest in both entities nonexempt, *see* Tex. Prop. Code Ann. §§ 42.001–.002 (West 2014), so too is the

stock owned by A2R, LLC, *see Holland v. Alker*, No. 01-05-00666-CV, 2006 WL 1041785, at *4 (Tex. App.—Houston [1st Dist.] Apr. 20, 2006, pet. denied) (mem. op.). But Clyde nevertheless contends that his interests are not susceptible to turnover.

b. Charging Order Not Exclusive Remedy

According to Clyde, even if his membership interests in A2R, LLC and Averse 2 Risk, LLC are nonexempt, the turnover order is nevertheless prohibited as to those interests because sections 101.112 and 153.256 of the Business Organizations Code provide that the exclusive remedy by which a judgment creditor of a limited partnership or limited liability company may satisfy a judgment out of the judgment debtor's interest in that limited partnership or limited liability company is a charging order. Tex. Bus. Org. Code Ann. §§ 101.112, 153.256 (West 2012).

Section 101.112 provides,

> (a) On application by a judgment creditor of a member of a limited liability company or of any other owner of a membership interest in a limited liability company, a court having jurisdiction may charge the membership interest of the judgment debtor to satisfy the judgment.
>
> (b) If a court charges a membership interest with payment of a judgment as provided by Subsection (a), the judgment creditor has only the right to receive any distribution to which the judgment debtor would otherwise be entitled in respect of the membership interest.
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> (c) A charging order constitutes a lien on the judgment debtor's membership interest. The charging order lien may not be foreclosed on under this code or any other law.

> (d) The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of any other owner of a membership interest may satisfy a judgment out of the judgment debtor's membership interest.
>
> (e) This section may not be construed to deprive a member of a limited liability company or any other owner of a membership interest in a limited liability company of the benefit of any exemption laws applicable to the membership interest of the member or owner.
>
> (f) A creditor of a member or of any other owner of a membership interest does not have the right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company.

Id. § 101.112. Section 153.256, which applies to limited partnerships instead of limited liability companies, is virtually identical. *Id.* § 153.256.

The plain language of sections 101.112(d) and 153.256(d) provides that a charging order is generally the exclusive remedy by which to satisfy a judgment out of the judgment debtor's interest in a limited partnership or limited liability company. *See Pajooh v. Royal W. Invs. LLC, Series E*, 518 S.W.3d 557, 565 (Tex. App.—Houston [1st Dist.] 2017, no pet.). But courts have held that there are some exceptions to this rule. For example, the Dallas Court of Appeals has held that these sections do not preclude turnover of a person's distributions from a limited partnership or limited liability company. *Henderson*, 2016 WL 1702221, at *2 (section 101.112); *Stanley*, 314 S.W.3d at 664 (section 153.256). And the Fourteenth District Court of Appeals has recently held that turnover of a member's interest in a limited liability company was not precluded by section 101.112 "when the judgment creditor seeking the membership interest is the

entity from which the membership interest derives" and the turnover order "involves an explicit award of the membership interest itself from one party to the other as part of the judgment." *Gillet v. ZUPT, LLC*, 523 S.W.3d 749, 758 (Tex. App.—Houston [14th Dist.] Feb. 23, 2017, no pet.). This is because in these types of situations, the purpose of a charging order has not come into play: the charging order was developed to prevent a judgment creditor's disruption of an entity's business by forcing an execution sale of the partner's or member's entity interest to satisfy a debt of the individual partner or member. *Id.* at 757 (citing *Stanley*, 314 S.W.3d at 664); *see also* Michael C. Riddle, et al., *Choice of Business Entity in Texas*, 4 Hous. Bus. & Tax L.J. 292, 318 (2004) ("[T]he charging order developed as a way to prevent the creditor of one partner from holding up the business of the entire partnership and causing injustice to the other partners.").

We believe the same reasoning applies here because neither A2R, Ltd. nor Averse 2 Risk, LLC is an operating business; both entities appear to have been formed by Clyde for the sole purpose of taking ownership of nonexempt assets awarded to him in the divorce. No other party's interest will be disrupted by the turnover of those interests and the stock owned by A2R, Ltd. In fact, Clyde has already assigned his interests and the account to the receiver, subject to his right of appeal.

We therefore hold that the trial court did not abuse its discretion by ordering turnover of Clyde's interests in A2R, Ltd. and Averse 2 Risk, LLC, and we overrule Clyde's third issue and the remainder of his first issue.[7]

4. Fidelity Account

In her first issue, Teresa claims that the trial court abused its discretion by refusing to order Clyde to turn over the Fidelity account because Clyde did not meet his burden to prove that it is exempt under section 42.0021. She also complains in her second issue about the trial court's admission of Clyde's testimony about the character of the funds in that account. Because her second issue informs our discussion of her first issue, we address her second issue first.

a. Clyde's Testimony Regarding Fidelity Account

Teresa contends that the trial court improperly allowed Clyde to testify about the contents of the Fidelity account. Clyde's counsel asked him, "What did that Fidelity account come from?" Teresa's counsel objected,

> Now, if he's going to testify – he's not qualified to testify about what happened to money, about whether it met all the regs; that's a legal question or a financial question that somebody has to answer as to when money was moved, if it was moved. And I guess by what she's telling us, and what he's answered in his interrogatories that he says he has some other account that he claims contains tax-deferred income.

[7]Clyde also complains in his response to Teresa's first issue that there is no evidence that Teresa is a judgment creditor or that he has not paid a judgment, but the personal injury judgment is in the clerk's record (of which the trial court took judicial notice), and Teresa presented evidence showing that the judgment had not been paid.

> And there's no proof -- we have no documents and we have no proof of how any transfer was made, if, in fact, it was.
>
> So I object to him testifying from it. He's not qualified to. Any testimony that has [sic] would be hearsay looking at documents, I suppose.

The trial court overruled the objection, stating, "I suppose he can testify that he moved that money into that account, at least to that extent."

Clyde testified that the Fidelity account contained the repayment of a prior loan he had taken from his 401K plan during the divorce, plus the thirty-five percent of his 401K that he had been awarded in the divorce, which he had "rolled over," and contributions to the 401K that he had made "legally" since the divorce.[8] Clyde answered yes to his counsel's question asking whether he had continued to contribute to his 401K "in the same manner that [he had been] contributing to it[] prior to the divorce." He also denied having taken any distributions from the Fidelity account. But the trial court sustained Teresa's objections to any questions asking Clyde's opinion as to whether the account is exempt.

Upon Clyde's counsel's request, the trial court took judicial notice of its entire file. It had previously admitted without objection the following of Teresa's exhibits: (1) Clyde's inventory in the divorce claiming an interest in two different American Airlines 401K plans, about which Teresa's counsel said at the turnover

[8]The record contains a February 2015 paystub indicating that Clyde's employer had deducted funds from his paycheck for two different 401K accounts.

hearing, "He just testified that he kept putting money in his American Airlines 401K that existed at the time of the divorce. I don't have any problem with that. We all knew plan B was one of the 401Ks" and (2) the divorce decree in which the trial court had divided Clyde's Plan A and Plan B, awarding thirty-five percent of Plan B to Clyde and the other sixty-five percent to Teresa.[9]

Teresa contends that the trial judge erroneously allowed Clyde to testify as an unqualified expert regarding the contents of the account and that his only knowledge of the character of the funds in the account was based on hearsay; [10] in other words, Clyde could only testify that he had "rolled over" his 401K funds into that account because someone else told him he had. Article VII of the Texas Rules of Evidence governs the admissibility of opinions; however, the trial court did not allow Clyde to testify to his opinion, lay or expert, regarding the exempt status of the account. Tex. R. Evid. 701–06. Instead, the trial court allowed Clyde to testify that he "rolled over" the thirty-five percent of the Plan B awarded to him in the divorce into the Fidelity account; in other words, he withdrew the 401K funds from one account and deposited them in another. The trial court did

[9]The trial court also admitted a copy of a 2014 investment report from Fidelity showing a 2014 year-end balance of $156.20 and a withdrawal of $67,155.42, along with a check for that amount payable from Fidelity to Clyde dated November 13, 2014, a little over a month before the trial court signed the judgment in the personal-injury suit. But there is no evidence linking this Fidelity account to the Fidelity account about which Clyde testified.

[10]Teresa did not object that Clyde failed to list this account in response to her discovery requests. *See* Tex. R. Civ. P. 193.6(a), 621a.

not allow Clyde to testify about the legal effect of these actions. This type of evidence is neither an opinion nor hearsay. *See* Tex. R. Evid. 401, 801(d); *Rogers v. Dep't of Family & Protective Servs.*, 175 S.W.3d 370, 377 (Tex. App.—Houston [1st Dist.] 2005, pet. dism'd w.o.j.); *Swate v. Schiffers*, 975 S.W.2d 70, 78–79 (Tex. App.—San Antonio 1998, pet. denied); *Pena v. Ludwig*, 766 S.W.2d 298, 304 (Tex. App.—Waco 1989, no writ); *Chesshir v. Nall*, 218 S.W.2d 248, 253 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.). Accordingly, we hold that the trial court did not abuse its discretion by overruling Teresa's objection to Clyde's testimony. We overrule Teresa's second issue.

b. Excluding Fidelity Account From Turnover Relief Proper

The only evidence in the record concerning the character of the funds in the Fidelity account is that those funds consist of proceeds rolled over from Clyde's Plan B 401K, which Teresa's counsel did not argue was nonexempt. Nothing in the record indicates that the Fidelity account contains any nonexempt funds or that the 401K proceeds were no longer entitled to exempt status under section 42.0021. Thus, we hold that the trial court did not abuse its discretion by refusing to include the Fidelity account in the turnover order. We overrule Teresa's first issue.

A. Attorney's Fees Award Proper

In her third issue, Teresa contends that the trial court erred by failing to award the full amount of attorney's fees she requested, $25,800. Teresa cites *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990), as

controlling because Clyde did not controvert her attorney's fee affidavit. Although Teresa's counsel's affidavit testimony was "clear, direct and positive, and not contradicted by any other witness or attendant circumstances," the supreme court has noted that—since issuing *Ragsdale*—it has further held that in assessing attorney's fees, "the factfinder should [also] consider 'the amount involved and the results obtained,' among other things." *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009). This consideration applies when the trial court is the factfinder; thus, a trial court does not err by awarding less than an uncontroverted amount of attorney's fees when the trial court does not grant all of the movant's requested relief on the merits. *See Campbell v. Luong*, No. 04-16-00460-CV, 2017 WL 3044591, at *6 (Tex. App.—San Antonio July 19, 2017, pet. denied) (mem. op.); *Brasel v. Manhattan Homeowners Ass'n*, No. 01-13-00655-CV, 2014 WL 2809816, at *3–4 (Tex. App.—Houston [1st Dist.] June 19, 2014, no pet.) (mem. op.); *Hudspeth Cty. Underground Water Conservation Dist. No. 1 v. Guitar Holding Co.*, 355 S.W.3d 428, 438 (Tex. App.—El Paso 2011, pet. denied); *see also Young v. Qualls*, 223 S.W.3d 312, 314 (Tex. 2007) ("Although attorney's fees in this case were awarded by the trial court rather than the jury, the factors governing their assessment are the same and include consideration of the 'results obtained.'"); *cf. Midland W. Bldg. L.L.C. v. First Serv. Air Conditioning Contractors, Inc*., 300 S.W.3d 738, 739 (Tex. 2009) ("While the jury could have rationally concluded that a reasonable and necessary fee was less than the amount sought, an award of no fees was improper in the absence

of evidence affirmatively showing that no attorney's services were needed or that any services provided were of no value.").

We hold that the trial court did not abuse its discretion by awarding less than the full amount of fees requested by Teresa, and we therefore overrule Teresa's third issue.

B. Conclusion

Having sustained Clyde's second issue and part of his first issue, we reverse the part of the trial court's order requiring Clyde to turnover the Vanguard account to the court-appointed receiver and render judgment deleting that account from the turnover order. But having overruled all of Teresa's issues and Clyde's remaining issues, we affirm the remainder of the trial court's order. The injunctive relief ordered by this court in cause number 2-16-00215-CV on July 19, 2016 shall terminate when the court issues mandate in this cause number.

/s/ Kerry Fitzgerald
KERRY FITZGERALD
JUSTICE

PANEL: SUDDERTH, C.J.; GABRIEL, J.; and KERRY FITZGERALD (Senior Justice, Retired, Sitting by Assignment).

DELIVERED: November 9, 2017