IN THE
TENTH COURT OF APPEALS

No. 10-18-00285-CV

IN THE MATTER OF THE MARRIAGE OF
SUSAN VANDUSEN AND RICHARD KAIRIS

From the County Court at Law
Walker County, Texas
Trial Court No. D1716502

MEMORANDUM OPINION

Susan VanDusen appeals from a judgment of divorce that also found that a business partnership was formed in 1995 between her and Richard Kairis, her husband. This proceeding was initially a divorce proceeding filed by VanDusen alleging the date of marriage as the day the parties were formally married, February 22, 2009. Kairis filed a counterpetition alleging that the parties had been informally married since 1984 or, in the alternative, that he and VanDusen had entered into a business partnership in 1995 for the purpose of farming and ranching. The trial court did not find that an informal marriage existed but did find that a business partnership had been created in 1995 between the parties. The trial court further found that the real estate purchased during the existence of the partnership in VanDusen's sole name was partnership property

which was divided almost equally in the judgment. VanDusen complains that the evidence was legally and factually insufficient for the trial court to have determined that a business partnership was created in 1995 (issues one and two) and that the real property purchased was property of the partnership (issues three and four).[1] Because we find that the evidence was legally insufficient as to the formation of a partnership in 1995 and legally insufficient to find that the real property was property of that partnership, we reverse the judgment of the trial court and remand this proceeding for a new trial on the issue of the formation of a partnership and the division of any partnership property.

FACTS

VanDusen and Kairis were in a romantic relationship beginning in 1984 and began living together in VanDusen's residence in Houston sometime from 1984 to 1986. In 1990, a judgment was taken against Kairis and his brother relating to the operation of a boat business. Kairis transferred his interest in real estate he had purchased in 1987 to an employee of the business to avoid it being taken in execution of the judgment. In order to further avoid execution on the judgment, Kairis did not have income or bank accounts in his name from the time of the judgment until 2013 when he started to draw social security.

In 1995, Kairis found a tract in Walker County that VanDusen purchased near

[1] Richard did not file a notice of appeal challenging the trial court's findings regarding an informal marriage, therefore, that issue is not before us.

her mother. The property was purchased in VanDusen's individual name and she paid the down-payment and all payments on the property from her income. The property had a house on it that was in disrepair that Kairis moved into shortly after the purchase so that he could work on repairing the house and mowing the property. VanDusen continued working in Houston and would go to the property on the weekends to work on it also.

In 1998, VanDusen purchased a second tract in her sole name which she sold to her mother for the same amount as the purchase price shortly thereafter. The tract was adjacent to her mother's property.

In 2002, VanDusen purchased another tract in the same area in her sole name with funds provided by VanDusen's mother. Kairis worked on the house on that property which was also in disrepair and began to work on that property as well. Also, in 2002, Kairis purchased some miniature pigs which were raised on the property purchased in 1995. Any profits from the sale of the pigs went into VanDusen's bank accounts and VanDusen either paid for the expenses for the pigs or reimbursed Kairis for any expenses he paid. This business was never profitable and resulted in a loss which was taken fully by VanDusen as shown on her tax returns from 2003 to 2008, when they stopped selling the pigs. VanDusen's tax returns did not ever indicate the existence of a partnership. Kairis did not file taxes after the judgment was taken against him until 2009 when the parties were formally married and started filing joint tax returns.

In 2004, Kairis assisted VanDusen's mother and sisters with selling property in another county. Kairis demanded to be paid for his assistance and in 2005, was paid either $15,000 or $30,000 (there was evidence as to both amounts) which VanDusen applied to the mortgage on the property purchased in 2002.[2]

In 2006, VanDusen purchased another tract in her sole name. In 2007, VanDusen sold her residence in Houston and moved to the property purchased in 2002 while still commuting to her job in Houston. VanDusen used part of the proceeds from the sale of her residence to purchase additional property in her sole name in 2008. All of the real estate transactions were organized and executed by Kairis using a power of attorney for VanDusen.

Toward the end of 2008, the parties began raising cattle on the property, which continued until the time of the final trial in this proceeding. While the parties were together, Kairis was responsible for procuring feed for the cattle. During this time, Kairis paid for expenses either with cash he kept with VanDusen's agreement from sales, with VanDusen's debit or credit cards, or VanDusen would reimburse him by check which he could cash.

Kairis testified that the parties intended to purchase the tracts and to pursue the farming and ranching operations jointly and equally. Kairis alleged that VanDusen told him that the property was all "community property" and that "[t]his was the

[2] The evidence was disputed as to the total amount Kairis was paid and the trial court's findings of fact did not include a finding as to the amount paid. Ultimately, the actual amount is not material to the issues before us.

partnership that we formed up and this was the partnership we lived under." VanDusen testified that she did not ever intend for a business partnership to be formed and had paid for all of the real property herself other than the one-time contribution from Kairis on the property purchased in 2002, of which she disputed the amount and character.

VanDusen and Kairis were formally married on February 22, 2009 and continued everything in the same manner after their marriage until their separation. VanDusen filed for divorce in 2017 and Kairis filed a counterpetition in which he sought a finding that the parties had become informally married in 1984, or alternatively pled that the parties had entered into a business partnership, sought the imposition of a constructive trust, and made a claim for quantum meruit seeking compensation for the years of work he had done without being compensated. VanDusen did not file a verified denial denying the existence of a partnership as required by Rule 93(5) of the Rules of Civil Procedure.

At the beginning of the bench trial, the trial court made a finding that a business partnership existed due to VanDusen's failure to file a verified denial but required the parties to present evidence to prove when the partnership was formed, the terms of the partnership, or what property was partnership property. After the trial, the trial court later entered a judgment that the parties were not informally married but had entered into a business partnership in 1995. The trial court also found that the real estate purchased between 1995 and 2008 was property of the partnership, dissolved the

partnership, and divided the partnership property almost equally between the parties. Upon proper request, the trial court entered findings of fact and conclusions of law in support of the judgment.

In her first and second issues, VanDusen complains that the evidence was legally and factually insufficient for the trial court to have found that she and Kairis entered into a business partnership in 1995. In her third and fourth issues, VanDusen complains that the evidence was legally and factually insufficient for the trial court to have found that any of the real estate purchased beginning in 1995 was property of the partnership.

STANDARD OF REVIEW

A trial court's findings of fact have the same force and dignity as a jury's answers to jury questions, and we review the legal and factual sufficiency of the evidence supporting those findings using the same standards that we apply to jury findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). When the appellate record contains a reporter's record, findings of fact on disputed issues are not conclusive and may be challenged for evidentiary sufficiency. *Super Ventures, Inc. v. Chaudhry*, 501 S.W.3d 121, 126 (Tex. App.—Fort Worth 2016, no pet.). We defer to unchallenged fact findings that are supported by some evidence. *Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC*, 437 S.W.3d 518, 523 (Tex. 2014).

The test for legal sufficiency is "whether the evidence at trial 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). In making this determination, we credit evidence favoring the finding if a reasonable factfinder could, and disregard contrary evidence unless a reasonable factfinder could not. *City of Keller*, 168 S.W.3d at 827. If there is more than a scintilla of evidence to support the finding, the legal sufficiency challenge must fail. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). In reviewing a factual sufficiency issue, we consider all the evidence supporting and contradicting the finding. *Plas-Tex., Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). We set aside the judgment only if the finding is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

A trial court's conclusions of law present legal questions that we review de novo. *BMC Software Belg.*, 83 S.W.3d at 794. On appeal, we will uphold a conclusion of law if the judgment can be sustained on any legal theory supported by the evidence. *Sheetz v. Slaughter*, 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.).

PARTNERSHIP FORMATION

In this proceeding, we are not asked to determine if a business partnership ever existed between the parties due to VanDusen's failure to properly deny the existence of a partnership. Rather, we are called upon to determine whether or not the evidence supported the trial court's finding that the partnership was created in 1995. "[A]n association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2)

the association is called a 'partnership,' 'joint venture,' or other name." *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732, 737 (Tex. 2020) (*quoting* TEX. BUS. ORGS. CODE § 152.051(b)). The Texas Business Organizations Code sets forth five factors that a court should review in determining whether a partnership exists:

> (1) receipt or right to receive a share of profits of the business;
> (2) expression of an intent to be partners in the business;
> (3) participation or right to participate in control of the business;
> (4) agreement to share or sharing:
> (A) losses of the business; or
> (B) liability for claims by third parties against the business; and
> (5) agreement to contribute or contributing money or property to the business.

TEX. BUS. ORGS. CODE § 152.052(a). Whether a partnership exists must be determined by an examination of the totality of the circumstances. *Ingram v. Deere*, 288 S.W.3d 886, 903-04 (Tex. 2009). Evidence of none of the factors will preclude the recognition of a partnership, and even conclusive evidence of only one factor will also normally be insufficient to establish the existence of a partnership. *Id*. at 904. Conclusive evidence of all five factors establishes a partnership as a matter of law. *Id.* For cases on the "continuum" between these two extremes, whether an arrangement is considered a partnership will often present a question of fact. *Westergren v. Hous. Pilots Ass'n*, 566 S.W.3d 7, 16 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

VanDusen argues that the evidence was insufficient for the trial court to have found that the partnership was established in 1995 because the elements required to form a partnership did not exist at that time. The evidence presented at trial relating to

what occurred prior to 1995 was that VanDusen was assaulted outside of her residence and had her car stolen twice in the early 1990's which led to VanDusen and Kairis deciding to find land outside of Houston to get out of the city. In 1995, Kairis located and VanDusen purchased a tract in her name only that referred to her as a "sole" purchaser. VanDusen paid for everything relating to that property, including the purchase price and all taxes. Kairis testified that the intent was for VanDusen to "work hard" in Houston and for him to work on the property because it was overgrown with weeds and the house was in disrepair, including problems with the foundation. Kairis moved to that tract in 1995 or 1996 after making the house livable.

While Kairis testified that the parties' intent was for him to work on the property, there was no evidence presented that the parties were intending to use that property for the purpose of operating a business of any kind in 1995. There was no evidence presented regarding the right to receive a share of profits of a business, any intent to be partners in a business, any agreement regarding sharing losses or liability for claims owed to any third parties of any potential business, or an agreement to contribute property to a business. There was no evidence presented that a farming or ranching operation or any other business was even contemplated in 1995, and no reference to any operable business was made until the miniature pigs were purchased around 2002 and VanDusen began taking an individual loss from the pigs on her tax returns. We find that the evidence was legally insufficient for the trial court to have determined that a business partnership was formed in 1995. We sustain issue one. Neither party has

requested this Court to determine whether, and if so, when the evidence established that the partnership was formed, so we will not do so. Because we have sustained issue one regarding the legal sufficiency of the evidence, we do not reach issue two regarding the factual sufficiency of the evidence to support the trial court's finding that the partnership was formed in 1995.

PARTNERSHIP PROPERTY

In her third and fourth issues, VanDusen complains that the evidence was legally and factually insufficient to support the trial court's finding that the real property purchased beginning in 1995 was property of the partnership pursuant to the Business Organizations Code. Section 152.102(c) of the Business Organizations Code, entitled "Classification as Partnership Property", states:

> (a) Property is partnership property if acquired in the name of:
>
> (1) the partnership; or
> (2) one or more partners, regardless of whether the name of the partnership is indicated, if the instrument transferring title to the property indicates:
> (A) the person's capacity as a partner; or
> (B) the existence of a partnership.
>
> (b) Property is presumed to be partnership property if acquired with partnership property, regardless of whether the property is acquired as provided by Subsection (a).
>
> (c) Property acquired in the name of one or more partners is presumed to be the partner's property, regardless of whether the property is used for partnership purposes, if the instrument transferring title to the property does not indicate the person's capacity as a partner or the existence of a partnership, and if the property is not acquired with partnership property.

(d) For purposes of this section, property is acquired in the name of the partnership by a transfer to:

(1) the partnership in its name; or

(2) one or more partners in the partners' capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property.

TEX. BUS. ORGS. CODE § 152.102.

In its findings of fact, the trial court made a finding that at the time that each tract of real property was acquired, the parties intended for the real property purchased to be partnership property regardless of the source of the purchase money or in whose name the property was purchased. VanDusen complains that there was legally and factually insufficient evidence for the trial court to have made this finding.

It is undisputed that each of the tracts of real property were purchased by VanDusen individually, were titled in her name only with no reference to a partnership, and all initial payments for the property were paid by VanDusen. Kairis contends that because he presented some competing evidence that the property was partnership property, the presumption that the property was not partnership property was of no effect. VanDusen argues that the above facts conclusively establish that the property was not property of the partnership pursuant to Section 152.102 of the Business Organizations Code and that there is no presumption in the statute otherwise that applies in this circumstance. We disagree with VanDusen's assertion that no presumption applies. Section 152.102(c) uses the term "presumption" for property

owned by a person that is not considered partnership property. To say that there is no presumption because she bought the property in her name and paid for it disregards what appears to be the clear intent of the statute. We find that there was a presumption that the property was not partnership property but was VanDusen's property. *See* TEX. BUS. ORGS. CODE § 152.102(c).

From a legal standpoint, a presumption is a procedural device by which the existence of one fact (presumed fact) is assumed from evidence of the existence of another fact (basic or predicate fact). *See Empire Gas & Fuel Co. v. Muegge*, 135 Tex. 520, 143 S.W.2d 763, 767 (Tex. 1940). If a presumed fact is not rebutted by contradictory evidence, the trier of fact is required to reach a particular conclusion. *Temple Indep. Sch. Dist. v. English*, 896 S.W.2d 167, 169 (Tex. 1995). The opponent has to produce evidence in rebuttal that is sufficient to support a finding of the nonexistence of the presumed fact, at which time the presumption disappears or vanishes[3] and the determination of the fact is based on the evidence in the record without regard to the presumption.

It was Kairis's burden to rebut this presumption and to prove that each of the tracts of real property were partnership property. At a minimum, the property acquired in 1995 was improperly characterized as partnership property because we have found that no partnership existed as of that time. Kairis argues that his testimony that he worked on the properties for years without compensation and that he would never have done so if he had thought that he did not own the property equally with

[3] This is sometimes referred to as a "vanishing presumption."

VanDusen might be sufficient contradictory evidence to eliminate the presumption. However, there was no testimony as to the purpose for which any of the other tracts of real property were purchased at the time of their purchase, except one on which Kairis stated that VanDusen wanted to raise chickens and plant an orchard, although there was no evidence that this was for business or personal purposes or that either of these things ever took place. There was no testimony regarding a partnership business purpose for the properties by either Kairis or VanDusen given at the time of each purchase to support the trial court's finding of fact. Kairis had arranged for the purchases of each of the tracts and completed them using a power of attorney given to him by VanDusen yet he did not include a mention of a partnership on any of the deeds. All of the payments made on the property were made by VanDusen with the exception of the one-time payment in 2005 of either $15,000 or $30,000 from funds that were potentially attributable to Kairis that VanDusen applied to the tract of property purchased in 2002. There was no evidence that VanDusen intended for the real property to be partnership property when it was purchased. We do not find that the evidence was legally sufficient to support the trial court's findings that at the time of their purchase, the properties purchased between 2002 and 2008 were intended by both of the parties to be property of a partnership. We sustain issue three. Because we have sustained issue three, we do not reach issue four regarding the factual sufficiency of the evidence.

CONCLUSION

Because we have found that the evidence was legally insufficient for the trial court to have found that the parties entered into a partnership in 1995 and that the real property purchased between 1995 and 2008 was property of that partnership, we reverse the judgment of the trial court as to the partnership issues and the division of the partnership property and remand for a new trial on the issue of the formation of a partnership and related issues.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Reversed and remanded
Opinion delivered and filed August 26, 2020
[CV06]