NUMBER 13-15-00222-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

DONNA KAHLA CLARK, Appellant,

v.

CURTIS CLARK, Appellee.

On appeal from the 94th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Chief Justice Valdez

Appellant, Donna Kahla Clark, appeals the trial court's divorce decree. By two issues, appellant contends that the trial court improperly awarded certain property to appellee, Curtis Clark. We affirm.[1]

[1] As this is a memorandum opinion and the parties are familiar with the facts of the case, we will not recite them here except as necessary to advise the parties of this Court's decision and the basic reasons for it. *See* TEX. R. APP. P. 47.4.

I. STANDARD OF REVIEW AND APPLICABLE LAW

We review property division incident to divorce under an abuse of discretion standard. *Garcia v. Garcia*, 170 S.W.3d 644, 648 (Tex. App.—El Paso 2005, no pet.). A trial court abuses its discretion if it acts without reference to any guiding rules and principles. *Id.* at 649; *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). Under the abuse of discretion standard applied in family law cases, legal and factual sufficiency of the evidence are not independent grounds of error, but are relevant factors for determining whether the trial court abused its discretion. *Boyd v. Boyd*, 131 S.W.3d 605, 611 (Tex. App.—Fort Worth 2004, no pet.).

We presume that property possessed by either spouse during or on dissolution of marriage is community property unless clear and convincing evidence is presented to the contrary. *See* TEX. FAM. CODE ANN. § 3.003 (West, Westlaw through 2015 R.S.); *Warriner v. Warriner*, 394 S.W.3d 240, 247 (Tex. App.—El Paso 2012, no pet.). "'Clear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." *In re J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002) (quoting TEX. FAM. CODE ANN. § 101.007) (West, Westlaw through 2015 R.S.)).

A spouse's separate property consists of property owned or claimed by a spouse before marriage or acquired after marriage by gift, devise, or descent. TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 3.001(1)(2) (West, Westlaw through 2015 R.S.). A trial court has no authority to divest one spouse of separate property and award it to the other spouse. *Cameron v. Cameron*, 641 S.W.2d 210, 215–16 (Tex. 1982). A spouse must establish the separate origin of the property by showing the time and means by which the spouse originally obtained possession of the property. *Warriner*, 394 S.W.3d at 247.

II. THE CULLEN FROST BANK STOCK

By her first issue, appellant contends that stock from Cullen Frost Bank (the Cullen Bank stock) that appellee transferred to her during the marriage constituted her separate property because it was a gift.

At trial, appellee testified that in 1996, the couple filed for divorce. During the 1996 divorce, appellee, pursuant to a divorce settlement agreement, transferred the Cullen Bank stock to appellant. According to appellant and appellee, the settlement agreement was contingent on the divorce becoming final. However, the couple decided to remain in the marriage, and the 1996 divorce proceeding was dismissed with prejudice. Appellee stated that he never intended to gift the Cullen Bank stock to appellant and that he instead transferred it to her in order to comply with the 1996 divorce settlement agreement. Appellant testified that when the couple filed the 1996 divorce, their attorneys asked the couple to sign a settlement agreement prior to finalizing the divorce so that the couple "could just focus on the custody part" of the proceeding. Specifically appellant testified as follows:

> So we agreed to do that. So at—the agreement from what I can remember and recall is that I was taking the condo and it had a balance—I mean, it had a loan on it. I was taking the condo. Curtis owed $70,000 in child support. He had quit paying a long, long time ago when the divorce had been going on for three-and-a-half years and he owed some money. So he transferred $70,000 worth of stock to me for the child support.[2]

[2] Appellee denied that he owed appellant $70,000 in child support and that he transferred the Cullen Bank stock to her as payment of that alleged child support debt. Appellant did not offer any documentary evidence supporting her testimony. And, as the finder of fact, the trial court was free to disbelieve appellant regarding the reason for the transfer. *See City of Keller v. Wilson*, 168 S.W.3d 802 819, 820 (Tex. 2005) (explaining that the finder of fact is the sole judge of credibility of the witnesses and the weight to be assigned to their testimony, is free to believe one witness and disbelieve another, and we must assume that if a reasonable person could do so, the fact finder decided all credibility questions and chose what testimony to disregard in a way that was in favor of the findings).

We also note that appellant testified that she recently sold a thousand shares of the Cullen Bank stock and received "about" $75,000.

Appellant's argument on appeal is premised on a finding that the Cullen Bank stock was a gift.[3] *Roberts v. Roberts*, 999 S.W.2d 424, 431 (Tex. App.—El Paso 1999, no pet.) ("A gift is a voluntary transfer of property to another made gratuitously and without consideration."). Appellant does not dispute that the Cullen Bank stock was appellee's separate property at its inception prior to the 1996 divorce settlement agreement; however, citing *Story v. Marshall*, she argues that we must presume that the Cullen Bank stock was a gift because appellee gave it to her during the marriage. 24 Tex. 305 (1859) (holding that a deed from a husband to a wife creates a presumption that the property given is the wife's separate property); *see also Pearson v. Pearson*, No. 03–13–00802–CV, 2016 WL 240683, at *5 (Tex. App.—Austin Jan. 15, 2016, no pet.) (mem. op.) ("Interspousal transfers are presumed to be a gift and, thus, the separate property of the recipient spouse.").

No one testified that the conveyance of the Cullen Bank stock was intended as a gift to appellant. *See Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726, 730 (Tex. App.—Corpus Christi 1993, writ. denied) ("A gift is a transfer of property made voluntarily and gratuitously" and requires "an intent to make a gift."). In fact, appellee testified that he did not intend it as a gift. Appellant points to no evidence supporting a finding that the Cullen Bank stock was a gift and relies only on the presumption that an inter-spousal conveyance is a gift. However, that presumption can be rebutted. *Roberts v. Roberts*, 999 S.W.2d 424, 431 (Tex. App.—El Paso 1999, no pet.) (explaining that an inter-spousal gift creates

[3] Appellant did not make any argument in the trial court that the Cullen Bank stock constituted her separate property because it was a gift. *See Matter of Marriage of Bradley*, No. 07-16-00051-CV, 2016 WL 7094206, at *4 (Tex. App.—Amarillo Dec. 1, 2016, no pet.) (mem. op.) ("Because the claim of gift was not presented to the trial court, it was not preserved for our review and we will not consider it as a ground for reversal of the judgment."). Appellant does not cite the record wherein she argued or claimed that the Cullen Bank stock was a gift. And, although she documented some of her separate property in her personal property list, appellant did not mention the Cullen Bank stock. Appellee, on the other hand, claimed ownership of the Cullen Bank stock in his inventory.

a rebuttable presumption that the property is the grantee's separate property; however, if the conveyance contains recitations that the grant is the grantee's separate property then the presumption of a gift cannot be rebutted with parol evidence unless there a showing of fraud, accident, or mistake).[4] And, after reviewing the record in the light most favorable to the trial court's ruling, appellant and appellee agreed that the transfer occurred pursuant to a contemplated divorce settlement agreement, and no one testified it was intended as a gift. Thus, we cannot conclude that the trial court abused its discretion by finding that the transfer did not constitute a gift. We overrule appellant's first issue.[5]

III. THE GARDENDALE INVESTMENT COMPANY STOCK

By her second issue, appellant contends that stock in the Gardendale Investment Company (the Gardendale stock) that appellee acquired during the marriage constituted community property. However, appellee acquired the Gardendale stock in a probate proceeding after the death of his brother. As stated above, separate property includes

[4] Here, there is no instrument that contains a recitation that the grant of the stock is appellant's separate property. Therefore, the transfer created a rebuttable presumption. See *Roberts v. Roberts*, 999 S.W.2d 424, 431 (Tex. App.—El Paso 1999, no pet.).

[5] Without citation to any appropriate authority, appellant also argues as follows:

> [Appellee] never once from 1996 to 2011, contested or even mentioned [appellant's] ownership of the stock, because he gave her the stock to settle the back support he owed. When [appellant] refiled for divorce, the stock had risen significantly in value, and suddenly [appellee] claimed it was his separate property. Did he meet the standard of "clear and convincing" evidence to establish the stock was his separate property? No, his testimony established that he voluntarily transferred the stock to [appellant] in "a settlement." He owed $70,000 for court ordered child support. He never denied that the transfer of the stock was compensation for back support.

Appellant has not cited the appropriate standard of review, has not explained the proper analysis of the issue required by the appropriate standard of review, and has not discussed which party had the burden in the trial court. *See* TEX. R. APP. P. 38.1(i). We are not required to make appellant's arguments for her. *See id.* ("An appellate court has no duty–or even right–to perform an independent review of the record and applicable law to determine whether there was error. Were we to do so, even on behalf of a pro se appellant, we would be abandoning our role as neutral adjudicators and become an advocate for that party.") (internal citations omitted). And, we are prohibited from performing an independent review of the applicable law to determine whether there was error. *See id.* Therefore, we have only addressed her issue to the extent that she has provided proper authority and analysis regarding whether the Cullen Bank stock was a gift.

property that is acquired during the marriage by descent or devise. TEX. CONST. art. XVI, § 15; TEX. FAM. CODE ANN. § 3.001(1)(2). Appellant, nonetheless, asserts that because the parties in the probate proceeding entered a settlement agreement regarding the estate, the stock is community property. Appellant cites no authority, and we find none, supporting that assertion. Appellee presented clear and convincing evidence that the Gardendale stock became his separate property when he acquired it by inheritance; thus, he overcame the presumption that it was community property. Accordingly, we conclude that the trial court did not abuse its discretion by finding the Gardendale stock was appellee's separate property. We overrule appellant's second issue.

IV. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
20th day of April, 2017.