NO. 12-07-00022-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE ESTATE OF	***§***	***APPEAL FROM THE***
RONALD RAY WALLIS,	***§***	***COUNTY COURT AT LAW***
DECEASED	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Valerie A. Lewis appeals the trial court's order setting aside an order probating a will and authorizing letters testamentary. On appeal, Lewis presents four issues. We dismiss in part, and affirm in part.

BACKGROUND

On July 20, 2004, Ronald Ray Wallis signed several documents, including a will in which he named Lewis as his independent executrix and bequeathed his residuary estate to her (Will 1); a statutory durable power of attorney appointing Lewis as his attorney in fact; and two Wal-Mart forms designating Lewis as the beneficiary of his profit sharing/401(k) plan and life insurance policy. Approximately eight months later, Wallis signed three new documents: a will that named Richard L. Shomaker as his independent executor and bequeathed all of his property to David R. Lomax (Will 2); and two Wal-Mart forms designating Lomax as the beneficiary of his profit sharing/401(k) plan and life insurance policy.

Contrary to Wallis's specific instructions, a Wal-Mart employee informed Lewis that Wallis had changed the beneficiary of his profit sharing/401(k) plan and life insurance policy. On April 14, 2005, without communicating with Wallis or ever informing him of her actions, Lewis executed two Wal-Mart forms, designating herself as the beneficiary of Wallis's profit sharing/401(k) plan and life insurance policy. Wallis died on December 4, 2005. On

December 19, 2005, Lewis filed an application for the probate of Will 1 and issuance of letters testamentary. On January 17, 2006, the county court signed an order admitting Will 1 to probate, appointing Lewis as independent executrix, and authorizing letters testamentary.

On January 26, 2006, Shomaker filed an application to set aside the January 17, 2006 order probating Will 1, and an application for the probate of Will 2 and issuance of letters testamentary. He also filed a motion to transfer the case to the county court at law, which was granted. On April 12, 2006, Lomax and Shomaker sued Lewis in the district court, asserting that Lewis's changing the beneficiary of the profit sharing/401(k) plan and life insurance policy was outside the scope of authority granted by the power of attorney, constituted a breach of her fiduciary duty to Wallis and fraud, and resulted in Lewis's unjust enrichment. Lomax and Shomaker requested that the new beneficiary designation forms be declared void and set aside, and that a constructive trust be imposed on the funds.

Following a bench trial, the trial court filed an order setting aside the order probating Will 1 and authorizing letters testamentary. The trial court found that Will 2 was a valid will that had not been revoked, admitted Will 2 to probate, and appointed Shomaker as the independent executor of Will 2 and Wallis's estate. Further, the trial court ordered that the January 17, 2006 order probating Will 1 and authorizing letters testamentary be set aside, and that the letters testamentary issued to Lewis be revoked and canceled. The trial court also declared that the beneficiary designation forms signed by Lewis on April 14, 2005 were void, and ordered that they be set aside. Finally, the trial court ordered that a constructive trust be imposed on the funds from Wallis's profit sharing/401(k) plan and life insurance policy, and that those funds together with all accrued interest be awarded to Lomax.[1] This appeal followed.

STANDING

In her second issue, Lewis questions Shomaker's and Lomax's standing to seek the imposition of a constructive trust, stating that it is unclear how the fiduciary relationship between her and Wallis "vest[ed] or somehow pass[ed]" to Shomaker and Lewis. She did not raise this issue in the trial court.

Subject matter jurisdiction is an issue that may be raised for the first time on appeal, and may not be waived by the parties. ***Tex. Ass'n of Bus. v. Tex. Air Control Bd.***, 852 S.W.2d 440,

[1] The funds at issue were interpleaded into the registry of the court by First National Bank of Byers.

445 (Tex. 1993). Standing is a component of subject matter jurisdiction; therefore, standing cannot be waived and may be raised for the first time on appeal. ***Id.*** Moreover, we must ascertain that subject matter jurisdiction exists even if the parties have not questioned it. ***Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser***, 140 S.W.3d 351, 358 (Tex. 2004), *superseded by statute on other grounds*, TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2008). Consequently, we must determine whether Shomaker and Lomax had standing to sue for imposition of a constructive trust.

Applicable Law

We apply common law standing requirements to determine whether a party has standing to sue for imposition of a constructive trust. ***Everett v. TK-Taito, L.L.C.***, 178 S.W.3d 844, 859 (Tex. App.–Fort Worth 2005, no pet.). Therefore, we are concerned with whether Shomaker and Lomax pleaded an injury that can be redressed through an equitable action for a constructive trust. *See* ***id.*** We are also concerned with whether the conduct attributed to Lewis is the type of unfair conduct that supports an action for a constructive trust. *See* ***id.*** at 860; *see also* ***Fitz-Gerald v. Hull***, 150 Tex. 39, 50-51, 237 S.W.2d 256, 262-63 (1951).

Proceeds of an insurance policy are by statutory definition nontestamentary in nature. TEX. PROB. CODE ANN. § 450 (Vernon 2003); ***In re Stafford***, 244 S.W.3d 368, 369 (Tex. App.–Beaumont 2008, no pet.). Insurance policies, retirement accounts, and pension plans are deemed to be nontestamentary if they contain provisions that money controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently. TEX. PROB. CODE ANN. § 450(a)(1) (Vernon 2003). Because insurance policies, retirement accounts, and pension plans are nontestamentary, there is no instrument relating to them that must be probated nor does the personal representative of a decedent's estate have any power or duty with respect to the assets involved. ***Holley v. Grigg***, 65 S.W.3d 289, 293 (Tex. App.—Eastland 2001, no pet.). Nor does the right to funds from insurance policies, retirement accounts, and pension plans accrue as a testamentary right to those who will take under the laws of descent and distribution. ***Tramel v. Est. of Billings***, 699 S.W.2d 259, 262 (Tex. App.—San Antonio 1985, no writ).

It is well established that the beneficiary of a life insurance policy has at least an estate in anticipation sufficient to authorize the beneficiary to raise the issue of the decedent's mental

capacity to change the beneficiary designation. ***Westbrook v. Adams***, 17 S.W.2d 116, 120 (Tex. Civ. App.–Fort Worth 1929), *aff'd sub nom.*, ***Adams v. Bankers' Life Co.***, 26 S.W.2d 182 (Tex. Comm'n App. 1931, holding approved). Almost seventy years after ***Westbrook***, the Waco Court of Appeals held that equity may entertain jurisdiction of a suit by an original beneficiary of a life insurance policy to set aside a decedent's change to another beneficiary on the ground of undue influence and to enjoin the payment of the policy to the latter. ***Cobb v. Justice***, 954 S.W.2d 162, 167-68 (Tex. App.–Waco 1997, pet. denied) (quoting 4 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 60:72, at 60-132 to 60-134 (3d ed. 1996)); *see also* ***Tomlinson v. Jones***, 677 S.W.2d 490, 492-93 (Tex. 1984) (former beneficiary of life insurance policy has right to contest change of beneficiaries on ground that deceased insured was incompetent at time change was executed). And a constructive trust is available as a remedy when a beneficiary designation has been wrongfully changed. *See* ***Hudspeth v. Stoker***, 644 S.W.2d 92, 95-96 (Tex. App.—San Antonio 1982, writ ref'd) (trial court justified in imposing constructive trust on life insurance proceeds where decedent had changed beneficiary designation in violation of property settlement agreement in divorce). An assertion that a person wrongfully changed a beneficiary designation form is a distinct legal claim arising from a set of circumstances separate from a challenge to a will. ***Kongs v. Harmon***, No. 03-97-00444-CV, 1998 WL 394177, at *2 (Tex. App.–Austin July 16, 1998, pet. denied) (not designated for publication).

Analysis

Regarding Shomaker's standing, the funds from Wallis's profit sharing/401(k) plan and life insurance policy were nontestamentary. *See* TEX. PROB. CODE ANN. § 450(a)(1). There is no dispute that Shomaker, as the executor of Will 2, was not a designated beneficiary of either the profit sharing/401(k) plan or the life insurance policy. As such, Shomaker has no legal claim to the funds. *See* ***Irwin v. Irwin***, No. 04-08-00554-CV, 2009 WL 4153970, at *2 (Tex. App.—San Antonio Nov. 25, 2009, no pet. h); ***Holley***, 65 S.W.3d at 293; ***Tramel***, 699 S.W.2d at 262. Therefore, Shomaker did not have standing to file a suit for imposition of a constructive trust.

Lomax, however, was Wallis's designated beneficiary. As such, he had at least an estate in anticipation in the proceeds from Wallis's profit sharing/401(k) plan and life insurance policy. *See* ***Westbrook***, 17 S.W.2d at 120. This interest is sufficient to authorize Lomax the original beneficiary, to challenge the later change of the beneficiary designation. *See* ***id.*** Because he alleged that he was wrongfully deprived of those proceeds by Lewis's attempt to substitute

herself as beneficiary, Lomax has pleaded an injury that can be redressed through an action for a constructive trust. *See* ***Hudspeth***, 644 S.W.2d at 95-96; ***Cobb***, 954 S.W.2d at 167-68. A court of equity has jurisdiction to reach the property in the hands of a wrongdoer whenever legal title to property has been obtained through fraud, misrepresentations, concealments, or under similar circumstances that render it unconscionable for the holder of legal title to retain the interest. *See* ***Fitz-Gerald***, 237 S.W.2d at 262-63. Thus, the conduct attributed to Lewis is the type of unfair conduct that supports the imposition of a constructive trust. *See* ***id.*** Consequently, Lomax has standing to file suit as the prior beneficiary of the profit sharing/401(k) plan and life insurance policy.[2]

We sustain Lewis's second issue as to Shomaker's standing.

BENEFICIARY DESIGNATION FORMS

In her second issue, Lewis contends that the trial court erred in declaring void and setting aside the April 14, 2005 beneficiary designation forms relating to Wallis's profit sharing/401(k) plan and life insurance policies. Lomax contends that a power of attorney does not empower the agent to act with impunity for her own benefit.

Applicable Law

A constructive trust is a legal fiction, a creation of equity to prevent a wrongdoer from profiting from her wrongful acts. ***Procom Energy, L.L.A. v. Roach***, 16 S.W.3d 377, 381 (Tex. App.–Tyler 2000, pet. denied). Such trusts are remedial in character and have the broad function of redressing wrong or unjust enrichment in keeping with basic principles of equity and justice. ***Id.***; *see also* ***Hubbard v. Shankle***, 138 S.W.3d 474, 485 (Tex. App.–Fort Worth 2004, pet. denied). To obtain a constructive trust, the proponent must prove (1) the breach of a special trust, fiduciary relationship, or actual fraud; (2) unjust enrichment of the wrongdoer; and (3) tracing to an identifiable res. ***Troxel v. Bishop***, 201 S.W.3d 290, 297 (Tex. App.–Dallas 2006, no pet.); ***Hubbard***, 138 S.W.3d at 485. A constructive trust is a relationship with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that her acquisition or retention of the property is wrongful

[2] As defined in Texas Probate Code section 450(a)(1), the profit sharing/401(k) plan and the life insurance policy were nonprobate assets, and their proceeds have been interpleaded into the registry of the court. Consequently, we have concluded that constructive trust principles expressed in cases addressing life insurance proceeds are equally applicable to the proceeds from the profit sharing/401(k) plan at issue here. Neither party argues to the contrary.

and that she would be unjustly enriched if she were permitted to retain the property. ***Baker Botts, L.L.P. v. Cailloux***, 224 S.W.3d 723, 736 (Tex. App.–San Antonio 2007, pet. denied) (quoting ***Talley v. Howsley***, 142 Tex. 81, 86, 176 S.W.2d 158, 160 (1943)). Whether a constructive trust should be imposed at all is within the discretion of the trial court. ***Troxel***, 201 S.W.3d at 297; ***Hubbard***, 138 S.W.3d at 485. The proponent of a constructive trust must strictly prove the elements necessary for the imposition of the trust. ***Troxel***, 201 S.W.3d at 297; ***Hubbard***, 138 S.W.3d at 485.

A fiduciary duty applies to any person who occupies a position of peculiar confidence towards another. ***Johnson v. Brewer & Pritchard***, 73 S.W.3d 193, 199 (Tex. 2002). The appointment of an attorney in fact creates an agency relationship. ***Sassen v. Tanglegrove Townhouse Condominium Assoc.***, 877 S.W.2d 489, 492 (Tex. App.–Texarkana 1994, writ denied). An agency creates a fiduciary relationship as a matter of law. ***Id.*** A fiduciary owes her principal a high duty of good faith, fair dealing, honest performance, and strict accountability. ***Id.***

Similarly, the Texas Probate Code states that an attorney in fact is a fiduciary and has a duty to inform and to account for actions taken pursuant to the power of attorney. TEX. PROB. CODE ANN. § 489B(a) (Vernon 2003). The attorney in fact shall timely inform the principal of all actions taken pursuant to the power of attorney. TEX. PROB. CODE ANN. § 489B(b) (Vernon 2003). Regarding insurance transactions and retirement plan transactions, an attorney in fact has the power to designate the beneficiary of a contract. TEX. PROB. CODE ANN. §§ 498(4), 503(3) (Vernon 2003). But an attorney in fact or agent may be named as a beneficiary of the contract only to the extent the attorney in fact or agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney. ***Id.***

Several courts in this state and courts in at least two other states have held that an attorney in fact owes an affirmative duty to fully disclose to the fiduciary all material facts relating to actions taken pursuant to the power of attorney. *See* ***Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.***, 138 Tex. 565, 573, 160 S.W.2d 509, 513-14 (1942) (determining that employee, as fiduciary, had duty to fully disclose to employer all facts and circumstances concerning his dealings with another company involved in transaction with employer); ***Bright v. Addison***, 171 S.W.3d 588, 597 (Tex. App.–Dallas 2005, pet. denied) (stating that fiduciary has affirmative duty to make full and accurate confession of all fiduciary activities, transactions,

profits, and mistakes); ***Ball v. Posey***, 222 Cal. Rptr. 746, 749 (Cal. Ct. App. 1986) (noting that trustee, as fiduciary, has affirmative duty to render full and fair disclosure to beneficiary of all facts that materially affect his rights and interests and that this duty was an affirmative one); ***Testa v. Roberts***, 542 N.E.2d 654, 659 (Ohio Ct. App. 1988) (stating that fiduciary status imposes upon agent an affirmative duty to inform principal of all facts relating to subject matter of agency). A failure to do so is a breach of fiduciary duty. *See* ***Uzzell v. Roe***, No. 03-06-00402-CV, 2009 WL 1981389, at *4 (Tex. App.–Austin July 8, 2009, no pet.) (mem. op.) (holding that trustee failed and refused to provide account of trust transactions and wholly failed to communicate with beneficiary, thus breaching his fiduciary duty); ***Lee v. Hasson***, 286 S.W.3d 1, 27 (Tex. App.–Houston [14th Dist.] 2007, pet. denied) (holding that financial advisor failed to disclose all important information to person to whom he owed a fiduciary duty, thereby breaching his fiduciary duty).

When written findings of fact and conclusions of law are not filed, we must affirm the trial court's decision on any legal theory finding support in the evidence. ***Tex. Dep't of Pub. Safety v. Wilmoth***, 83 S.W.3d 929, 931 (Tex. App.–Amarillo 2002, no pet.). Oral pronouncements by the trial court that allegedly explain its decision cannot be substituted for those absent findings of fact and conclusions of law. ***Id.*** Moreover, we are not permitted to consider those oral comments. ***Id.*** (citing ***In re W.E.R.***, 669 S.W.2d 716, 717 (Tex. 1984)).

Analysis

As noted above, on July 20, 2004, Wallis signed a statutory durable power of attorney appointing Lewis as his attorney in fact, which became effective immediately, and two Wal-Mart forms designating Lewis as the beneficiary of his profit sharing/401(k) plan and life insurance policy. According to its terms, the power of attorney authorized Lewis to act for Wallis in any lawful way with respect to certain types of transactions including Wallis's estate, trust, and other beneficiary transactions, retirement plan transactions, and insurance and annuity transactions. Approximately eight months later, Wallis executed two new Wal-Mart forms designating Lomax as the beneficiary of the plan and policy. Contrary to Wallis's specific instructions, a Wal-Mart employee informed Lewis that Wallis had changed the beneficiary of his profit sharing/401(k) plan and life insurance policy. On April 14, 2005, without communicating with Wallis, Lewis executed two Wal-Mart forms, designating herself as beneficiary of the plan and policy. The trial court declared both beneficiary designation forms signed on April 14 void and set them

aside. Further, the trial court ordered that a constructive trust be imposed on the funds interpleaded into the registry of the court representing payments pursuant to Wallis's profit sharing/401(k) plan and life insurance policy.

Although the trial court orally stated its reasons for the judgment, those reasons were not included in the judgment nor did the trial court file findings of fact and conclusions of law. *See* ***Wilmoth***, 83 S.W.3d at 931. Thus, we must ignore the oral pronouncements by the trial court and affirm the trial court's decision on any legal theory finding support in the evidence. *See* ***id.*** In his pleadings, Lomax requested that a constructive trust be imposed on the funds made the basis of the suit as a result of Lewis's breach of fiduciary duty and unjust enrichment. Regarding the first element of a constructive trust, Lomax was required to prove that Lewis breached a special trust or fiduciary relationship, or committed actual fraud. *See* ***Troxel***, 201 S.W.3d 297; ***Hubbard***, 138 S.W.3d at 485. Lewis had a special trust or fiduciary relationship with Wallis as his attorney in fact through the power of attorney. Lewis had the authority through her power of attorney to make beneficiary transactions. *See also* TEX. PROB. CODE ANN. §§ 498(4), 503(3) (providing that an attorney in fact has the authority to designate the beneficiary of an insurance or retirement plan transaction). Although Lewis, as Wallis's attorney in fact, named herself as the beneficiary, she had the power to do so because she had been named as beneficiary under the contracts before Wallis executed the power of attorney. *See* ***id.***

However, as Wallis's attorney in fact, Lewis had certain duties as a fiduciary, including the duty of full and complete disclosure, and the duty to act with integrity, fidelity, and good faith. *See* TEX. PROB. CODE ANN. § 489B(a), (b); ***Johnson***, 73 S.W.3d at 199; ***Montgomery v. Kennedy***, 669 S.W.2d 309, 313 (Tex. 1984). Here, Lewis admitted that she did not inform Wallis that she changed the beneficiaries of his profit sharing/401(k) plan and life insurance policy even though she had approximately eight months before his death to do so. In fact, she admitted that the last time she spoke to Wallis prior to his death on December 4, 2005 was in March of 2005. As Wallis's attorney in fact, Lewis had an affirmative duty to fully disclose all of the actions she took pursuant to the power of attorney. *See* ***Kinzbach Tool Co., Inc.***, 160 S.W.2d at 573; ***Bright***, 171 S.W.3d at 597. Because Lewis failed to inform Wallis that she changed the beneficiaries, particularly in light of his naming Lomax immediately prior to Lewis's action, she breached her fiduciary duty to him. *See* ***Uzzell***, 2009 WL 1981389, at *4; ***Lee***, 286 S.W.3d at 27. Thus, Lomax satisfied the first element for a constructive trust.

Regarding the second element, Lomax was required to prove that Lewis, as the wrongdoer, was unjustly enriched. *See* ***Troxel***, 201 S.W.3d at 297; ***Hubbard***, 138 S.W.3d at 485. Lewis failed to inform Wallis that she changed the beneficiary designation forms, thereby regaining her status as the beneficiary of Wallis's profit sharing/401(k) plan and life insurance policy. However, the policy against unjust enrichment mandates that Lewis not be allowed to retain the funds from the plan and insurance policy because she obtained the funds as a result of her breach of fiduciary duty. *See* ***Ginther v. Taub***, 675 S.W.2d 724, 728 (Tex. 1984). Further, the third element of a constructive trust requires that there be an identifiable res. *See* ***Troxel***, 201 S.W.3d at 297; ***Hubbard***, 138 S.W.3d at 485. Here, the funds representing payments pursuant to Wallis's profit sharing/401(k) plan and life insurance policy were interpleaded into the registry of the court and are, thus, readily identifiable. Thus, Lomax satisfied the second and third elements for a constructive trust.

Because Lomax proved all three elements necessary to obtain a constructive trust, the trial court did not abuse its discretion in declaring void and setting aside the April 14, 2005 Wal-Mart beneficiary designation forms, and imposing a constructive trust on the proceeds of Wallis's profit sharing/401(k) plan and life insurance policy. Accordingly, Lewis's second issue is overruled.

MOTION FOR JUDGMENT

In her fourth issue, Lewis argues that the trial court erred by failing to grant her motion for judgment. More specifically, she contends that Lomax and Shomaker failed to carry their burden of proof regarding the invalidity of Will 1 and the validity of Will 2.

Applicable Law

When a defendant files a motion for judgment in a nonjury trial, the trial court has the authority to rule on both the legal and factual sufficiency of the plaintiff's evidence after hearing only the plaintiff's evidence. ***Quantel Bus. Sys., Inc. v. Custom Controls Co.***, 761 S.W.2d 302, 304 (Tex. 1988); ***Ashcreek Homeowner's Ass'n v. Smith***, 902 S.W.2d 586, 587 (Tex. App.–Houston [1st Dist.] 1995, no writ). On appeal, the legal and factual sufficiency of the evidence to support the judgment can be challenged as in any other nonjury case. ***Ashcreek Homeowner's Ass'n***, 902 S.W.2d at 587.

However, an appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i). We must interpret this requirement reasonably and liberally. ***San Saba Energy, L.P. v. Crawford***, 171 S.W.3d 323, 338 (Tex. App.–Houston [14th Dist.] 2005, no pet.). A party asserting error on appeal must put forth some specific argument and analysis showing that the record and the law support her contentions. ***Id.***

Analysis

In her brief, Lewis states the basis of her motion for judgment, and that the trial court denied the motion without a response from Shomaker or Lomax. After citations to authority, Lewis makes a brief, conclusory statement that the trial court erred in denying her motion for judgment, and that its actions were based on legally and factually insufficient evidence. Even under a liberal construction, these two statements are not sufficient to articulate a clear and concise argument as to why we should reverse the trial court's judgment. *See* ***id.***

Further, Lewis's presentation of her fourth issue lacks any reference to the record. We have no duty to search the record without guidance from Lewis for evidence to support her contentions. *See* ***Emerson Elec. Co. v. Am. Permanent Ware Co.***, 201 S.W.3d 301, 313 (Tex. App.–Dallas 2006, no pet.); ***Rendleman v. Clarke***, 909 S.W.2d 56, 59 (Tex. App.–Houston [14th Dist.] 1995, writ dism'd as moot). Because Lewis's brief fails to contain a clear and concise argument for her contentions and lacks any reference to the record, she has waived appellate review of this issue. Accordingly, Lewis's fourth issue is overruled.

MOTION FOR CONTINUANCE

In her first issue, Lewis argues that the trial court abused its discretion by denying her request for a continuance until discovery could be completed.

Applicable Law

When reviewing a trial court's order denying a motion for continuance, we consider on a case by case basis whether the trial court committed a clear abuse of discretion. ***Joe v. Two Thirty Nine J.V.***, 145 S.W.3d 150, 161 (Tex. 2004). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. ***Id.*** We consider the following nonexclusive factors when deciding whether a trial court abused its discretion in denying a motion for continuance seeking additional time to conduct

discovery: (1) the length of time the case has been on file; (2) the materiality and purpose of the discovery sought; and (3) whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. ***Id.*** If the ground of a motion for continuance is the want of testimony, the movant shall make an affidavit (1) that such testimony is material, (2) showing the materiality of such testimony, (3) that she has used due diligence to procure such testimony, stating the diligence shown and the cause of the failure to procure the testimony, if known, and (4) that such testimony cannot be procured from any other source. TEX. R. CIV. P. 252.

Ordinarily, diligence to procure the testimony of a witness is the issuance and service of a subpoena within a sufficiently reasonable time before trial to enable the witness to appear or by taking depositions. ***J.C. Penney Co. v. Duran***, 479 S.W.2d 374, 380 (Tex. Civ. App.–San Antonio 1972, writ ref'd n.r.e.). The failure of a litigant to diligently utilize the rules of civil procedure for discovery purposes will not authorize the granting of a continuance. ***State v. Wood Oil Distr., Inc.***, 751 S.W.2d 863, 865 (Tex. 1988).

Analysis

Lewis alleged two grounds in her motion for continuance. First, she alleged that Lomax had not produced information requested during his October 17, 2006 deposition, and asked the trial court to compel the production of Lomax's cancelled checks used to pay Wallis's medical providers and to make payments on Wallis's leased vehicle. However, the record does not show that Lewis filed a motion to compel these documents. *See* ***BMC Software Belgium N.V. v. Marchand***, 83 S.W.3d 789, 800-01 (Tex. 2002) (concluding that record did not reveal plaintiff had ever filed motion to compel or otherwise attempted to obtain any discovery not provided and, thus, trial court did not abuse discretion in denying motion for continuance); ***Barron v. Vanier***, 190 S.W.3d 841, 851 (Tex. App.–Fort Worth 2006, no pet.) (stating that failure to file motion to compel discovery or otherwise attempt to obtain items objected to may indicate lack of diligence). By failing to file a motion to compel this discovery, Lewis displayed a lack of due diligence.

Second, Lewis alleged that she needed additional time to obtain evidence revealed during depositions on October 17, 2006, specifically medical records and/or deposition testimony of physicians and two Wal-Mart employees who had knowledge regarding allegations that Wallis was mentally competent. A party requesting additional time for discovery must comply with rule 252 under oath. *See* ***Hatteberg v. Hatteberg***, 933 S.W.2d 522, 527 (Tex. App.–Houston [1st

Dist.] 1994, no writ). This includes the requirement to show due diligence. *See* ***id.*** Here, Shomaker's application to set aside the order probating Will 1 was filed January 26, 2006, and the petition in district court was filed April 12, 2006. Lewis stated in her motion that she propounded a request for disclosure to Shomaker and Lewis attempting to secure the identity of persons having knowledge of relevant facts. She attached her request and Shomaker and Lomax's response dated March 21 to her motion. On August 22, 2006, the attorneys for the parties agreed to a November 8 bench trial. Lewis did not file additional discovery requests until September 28. According to Shomaker's attorney at the hearing on the motion for continuance, Lewis did not request depositions until October, and the witnesses were made available on October 17.

Although Lewis filed an initial discovery request early in the case, she did not request additional discovery or attempt to depose witnesses until one month after the attorneys agreed on a trial date, which was approximately three weeks before trial. A last minute attempt at discovery does not indicate due diligence. *See* ***Hatteberg***, 933 S.W.2d at 526-27. Further, a party who does not diligently utilize the procedures for discovery can seldom claim reversible error when the trial court refuses a continuance. *See* ***id.*** at 527. Because Lewis did not file discovery requests or depose witnesses until one month after the attorneys agreed on a trial date and approximately three weeks before trial, she has failed to show due diligence in procuring the discovery. Thus, the trial court did not abuse its discretion in denying Lewis's second motion for continuance.

Additionally, in an attempt to demonstrate due diligence regarding depositions and discovery, Lewis attached four letters to her appellate brief that were part of the correspondence between the attorneys in the case. She also attached a notice of written discovery stating that she had served Shomaker and Lomax requests for disclosure, admissions, interrogatories, and requests for production on February 27, 2006. None of these documents appear in the record. We must determine a case on the record as filed, and may not consider the documents attached as exhibits to Lewis's appellate brief. *See* ***Till v. Thomas***, 10 S.W.3d 730, 733 (Tex. App.–Houston [1st Dist.] 1999, no pet.). Additionally, Lewis argues that the discovery period, triggered by the filing of discovery requests in February 2006, had not yet expired pursuant to rule 190.3(b)(1)(B)(ii) of the Texas Rules of Civil Procedure. However, she did not assert this in her motion as a ground for continuance. As a prerequisite to presenting a complaint for appellate

review, the record must show that the complaint was made to the trial court by a timely request, objection, or motion that stated the grounds for the ruling that the complaining party sought with sufficient specificity to make the trial court aware of the complaint. TEX. R. APP. P. 33.1(a)(1)(A). Because Lewis did not assert that the discovery period had not expired as a ground for her motion for continuance, she has waived this argument.

Lewis's first issue is overruled.

EXPERT TESTIMONY

In her third issue, Lewis argues that the trial court erred in excluding the expert testimony of Denise Jarrett regarding the genuineness of Wallis's signature on the beneficiary designation forms. Lomax and Shomaker contend that Lewis failed to plead that these signatures were forgeries.

Applicable Law

The exclusion of evidence, including expert testimony, is committed to the trial court's sound discretion. ***Texas Dep't of Transp. v Able***, 35 S.W.3d 608, 617 (Tex. 2000); ***Buls v. Fuselier***, 55 S.W.3d 204, 208 (Tex. App.–Texarkana 2001, no pet.). The trial court abuses its discretion when its ruling is arbitrary, unreasonable, or without reference to any guiding rules or legal principles. ***Buls***, 55 S.W.3d at 208. For an expert's testimony to be admissible under rule 702 of the Texas Rules of Evidence, the expert must be qualified, and the expert's opinion must be relevant to the issues in the case and based upon a reliable foundation. TEX. R. EVID. 702; ***Exxon Pipeline Co. v. Zwahr***, 88 S.W.3d 623, 628 (Tex. 2002); ***E.I. du Pont de Nemours & Co. v. Robinson***, 923 S.W.2d 549, 556 (Tex. 1995). The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under rules 401 and 402 of the Texas Rules of Civil Procedure. ***Robinson***, 923 S.W.2d at 556. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the [fact finder] in resolving a factual dispute." ***Id.*** (quoting ***United States v. Downing***, 753 F.2d 1224, 1242 (3d Cir. 1985)). Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy the rule 702 requirement that the testimony be of assistance to the fact finder. ***Id.***

A party must specifically plead an affirmative defense or it is waived. TEX. R. CIV. P. 94; ***Kinnear v. Texas Comm'n on Human Rights***, 14 S.W.3d 299, 300 (Tex. 2000). At least one

court has determined that forgery is an affirmative defense. ***Williams v. Walker***, No. 10-00-00303-CV, 2004 WL 691637, at *4 (Tex. App.–Waco Mar. 31, 2004, pet. denied) (mem. op.).

Analysis

In her response to Shomaker's application to set aside the order probating Will 1 and application to probate Will 2, Lewis alleged that the signature subscribed to Will 2 was a forgery. Before trial, Shomaker and Lomax objected to Lewis's handwriting expert, Denise Jarrett, stating that the expert was not timely disclosed. Further, Shomaker and Lomax stated that the expert's testimony was outside the pleadings, specifically, that Lewis did not raise forgery as an issue with respect to the profit sharing/401(k) plan and insurance policy beneficiary forms. Lewis admitted that the pleadings did not support her claims of forgery regarding the signatures on the beneficiary forms. The trial court determined that Jarrett could testify regarding Will 2, but not regarding the signatures on the beneficiary forms. After Jarrett's testimony, Lewis made a bill of exception regarding the signatures on the beneficiary forms.

In order to determine if the trial court abused its discretion in excluding Jarrett's testimony regarding the signatures on the beneficiary forms, we must first decide if her testimony was relevant. *See* TEX. R. EVID. 702; ***Zwahr***, 88 S.W.3d at 628; ***Robinson***, 923 S.W.2d at 556. To be relevant, Jarrett's proposed testimony must be tied to the facts of the constructive trust suit and aid the fact finder in resolving a factual dispute. *See* ***Robinson***, 923 S.W.2d at 556. Here, Lewis admitted that she did not raise the issue of forgery regarding these signatures. Thus, evidence from the handwriting expert regarding this issue has no relationship to any issue in the constructive trust suit. *See* ***id.*** Further, Shomaker and Lomax's timely objection that the proposed testimony regarding the signatures on the beneficiary forms related to a matter outside the pleadings precluded the issue from being tried by consent. *See* ***Princess Enters., Inc. v. Superstar Amusements, Inc.***, 718 S.W.2d 40, 42 (Tex. App.–Dallas 1986, no writ). Accordingly, Lewis's third issue is overruled.

DISPOSITION

Having sustained Lewis's second issue in part, we conclude that Richard L. Shomaker lacked standing to file suit against Lewis for imposition of a constructive trust, and ***dismiss for want of jurisdiction*** as to Shomaker and that suit only. Having overruled all of Lewis's remaining issues, we ***affirm*** the trial court's ***order*** setting aside the order probating Will 1,

authorizing the issuance of letters testamentary to Lomax, and imposing a constructive trust on the proceeds of Wallis's profit sharing/401(k) plan and life insurance policy. All pending motions are overruled as moot.

SAM GRIFFITH
Justice

Opinion delivered February 26, 2010.
Panel consisted of Worthen, C.J., Griffith, J. and Hoyle, J.

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