Opinion issued July 21, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00936-CV

JASON HENRY LATHE, Appellant

V.

RACHEL LATHE, Appellee

On Appeal from the County Court at Law
Atascosa County, Texas[1]
Trial Court Case No. 17-03-0243-CVA

MEMORANDUM OPINION

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[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court. *See* Misc. Docket No. 18–9130 (Tex. September 26, 2018); *see also* TEX. GOV'T CODE ANN. § 73.001 (authorizing transfer of cases). We are unaware of any conflict between the precedent of the Court of Appeals for the Fourth District and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

Appellant, Jason Henry Lathe, challenges the trial court's property division in its final decree, entered after a bench trial, in his suit for divorce against appellee, Rachel Lathe. In two issues, Jason contends that the trial court erred in mischaracterizing certain community property as separate property wholly owned by Rachel and in awarding his separate estate only $8,695.90 in reimbursement.

We affirm.

Background

In his original petition, Jason sought a divorce from Rachel, alleging that their marriage had "become insupportable because of discord or conflict of personalities." If he and Rachel did not reach an agreement for the division of the marital estate, Jason asked that he "be awarded a disproportionate share of the parties' estate" for, among other reasons, "fault in the breakup of the marriage." Jason also asked the trial court to reimburse his separate estate "for funds or assets expended by [his] separate estate for the benefit of the community."[2]

At trial, Jason testified that he and Rachel married on September 19, 2003 and they had three children. They separated in February 2017, and Jason filed for divorce.

As to ownership of the property on which Jason and Rachel lived, Jason testified that several months before he and Rachel married, in March 2003, Rachel's

[2] Rachel answered and filed a counterpetition for divorce.

parents, Raymond and Sheila Tschetter, gifted him and Rachel a lot located at 265 Sara Lane, Lytle, Texas 78052 (the "265 Sara Lane lot"). The trial court admitted into evidence Petitioner's Exhibit 6, a copy of a completed "Gift Certification" form that had been sent by facsimile delivery from Palm Harbor Homes, a manufactured home dealer. The completed form declared:

> This is to certify that I intend to give to [Jason and Rachel] a gift in the amount of Lot #177 Block #2, to be used for the purchase [illegible] located at 255 [sic] Sara Ln, Lytle TX 78052.
>
> This is an outright gift from me and does not have to be repaid. There is no repayment expected or implied, written or verbal, in the form of cash or by [illegible] or service by the Mortgagor. These funds are not being made available t[o] the donor from any person or entity with an interest in the sale or the property including the seller, real estate agent, or broker, builder, loan officer, or any entity associated with them.
>
> Relationship: son in law to be and daughter
>
> Signature[s]: [Sheila Tschetter] Address: 265 Sara Ln
> [Raymond Tschetter] Lytle TX 78052
>
> "We, the Mortgagors, acknowledge that we will have received this gift [illegible] above."
>
> [Signatures of Jason and Rachel]

The trial court also admitted into evidence Respondent's Exhibit 1, a copy of a June 13, 2003 warranty deed with vendor's lien listing Rachel's parents as grantors and "Rachel Tschetter," with a mailing address of 265 Sara Lane, Lytle, Texas 78052, as the sole grantee of:

> Property
>
> Being tract number one hundred seventy-seven (177), in block number 2 (2), Quail Creek Ranches Subdivision, Unit Five (5), situated in Atascosa County, Texas, as per map or plat of said subdivision recorded in sheets 190 A & B and 191 A & B, new plat cabinet, plat records, Atascosa County, Texas.

The warranty deed was recorded on July 3, 2003. Respondent's exhibit 2, a copy of a vendor's lien admitted into evidence, lists a principal amount of $100.00 and names Rachel Tschetter as the maker and Raymond Tschetter and Sheila R. Tschetter as payees. Also included in the exhibit is a Release of Lien acknowledging Rachel's payment of the $100.00 and releasing the property from the lien. Respondent's Exhibit 3, admitted into evidence, contains a copy of the Atascosa County Appraisal District's 2018 Property Details for the 265 Sara Lane lot, which shows Rachel as the 100 percent owner of the lot.

In July 2003, before their marriage, Rachel and Jason took out a loan to pay that debt and borrowed an additional $90,000 to buy a manufactured home for the lot. The lot served as collateral for the loan. Copies of mortgage documents admitted into evidence list Rachel and Jason as responsible parties. According to Jason, at the time of trial, the parties still owed about $60,000 on that loan.

Jason opined that the 265 Sara Lane lot was community property because the Gift Certification named both Rachel and Jason as recipients. And he believed that he was entitled to $30,000 for his share of the lot and home, which, he represented, was fifty percent of the equity in its appraised value.

Rachel's mother testified that her and her husband lived next door to the 265 Sara Lane lot; Rachel's brother and his wife lived on the property on the other side of the parents' home. Rachel's mother and her husband had purchased three adjacent lots on Sara Lane, one for each of their biological children, for each one to "have their own land." For this reason, Rachel's mother explained, she and her husband transferred the 265 Sara Lane lot to Rachel only and never intended to gift the land to both Rachel and Jason. As for preparing the Gift Certification, Rachel's mother recalled that "Palm Harbor wanted a document saying a gift with Jason's name on it . . . even though it would not override the deed." She and her husband signed the Gift Certification "[b]ecause that's what Palm Harbor asked us to do so they could get the house loan." When Rachel's parents signed the Gift Certification, about $17,000 in debt remained outstanding on the 265 Sara Lane lot.

The trial court found that the 265 Sara Lane lot was Rachel's separate property and the manufactured home on it was the separate property of both Jason and Rachel as co-tenants. It awarded fifty percent of the manufactured home's value to Jason and fifty percent to Rachel. Because part of the home loan was used to pay off the debt on the 265 Sara Lane lot, the trial court found that Rachel was solely responsible for that portion of the loan and that Jason was entitled to reimbursement in the amount of $8,695.90. The trial court ordered that Jason be given a lien on the lot to secure his right to that reimbursement. The trial court then awarded 100 percent of

the lot value to Rachel, fifty percent of the structure value to Rachel and fifty percent of the structure value to Jason. The final divorce decree awards a 100 percent undivided interest in the 265 Sara Lane lot to Rachel "as her sole and separate property" and divests Jason "of all right, title, interest, and claim in and to that property."

Property Characterization

In his first issue, Jason argues that the trial court erred in mischaracterizing the 265 Sara Lane lot as separate property instead of community property and in awarding Rachel a 100 percent undivided interest in the lot because the evidence is legally and factually insufficient to support the trial court's determination.

Most of the appealable issues in family-law cases, including property division incident to divorce, are reviewed for an abuse of discretion. *Reddick v. Reddick*, 450 S.W.3d 182, 187 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Moroch v. Collins*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied). A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without any reference to guiding rules and principles. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). The trial court has broad discretion in dividing the community estate, and we must indulge every reasonable presumption in favor of the trial court's proper exercise of its discretion. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981); *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 384 (Tex. App.—Dallas 2013, no pet.). But only

community property is subject to the trial court's division of the marital estate and in making its division the trial court may not divest one party of his separate property. *Cameron v. Cameron*, 641 S.W.2d 210, 220 (Tex. 1982); *Robles v. Robles*, 965 S.W.2d 605, 614 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). When a court mischaracterizes separate property as community property, the error requires reversal because the subsequent division divests a spouse of his or her separate property. *McElwee v. McElwee*, 911 S.W.2d 182, 189 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

In family-law cases, legal- and factual-sufficiency challenges do not constitute independent grounds for asserting error but are relevant factors in determining whether the trial court abused its discretion. *Moroch*, 174 S.W.3d at 857. To determine whether a trial court abused its discretion because the evidence is legally or factually insufficient to support its decision, we consider whether the trial court (1) had sufficient evidence upon which to exercise its discretion and (2) erred in its application of that discretion. *Id.* We conduct the applicable sufficiency review when considering the first prong of the test. *Id*. We then determine whether, based on the evidence, the trial court made a reasonable decision. *Id.* Stated another way, the party challenging the trial court's characterization of property must establish error by challenging the legal or factual sufficiency of the evidence to support the property's characterization and then show that because of

the mischaracterization, the trial court abused its discretion. *See Viera v. Viera*, 331 S.W.3d 195, 207 (Tex. App.—El Paso 2011, no pet.). A trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision. *Moroch*, 174 S.W.3d at 857.

"Community property consists of the property, other than separate property, acquired by either spouse during marriage." TEX. FAM. CODE ANN. § 3.002. A spouse's separate property includes property owned or claimed by the spouse before the marriage. *Id.* § 3.001.

"Generally, whether property is separate or community is determined by its character at inception . . . ." *Barnett v. Barnett*, 67 S.W.3d 107, 111 (Tex. 2001). "Inception occurs when a party first has a right of claim to the property, i.e., when title is finally vested." *McClary v. Thompson*, 65 S.W.3d 829, 834 (Tex. App.—Fort Worth 2002, pet. denied).

"Property possessed by either spouse during or on dissolution of the marriage is presumed to be community property." TEX. FAM. CODE ANN. § 3.003(a). To overcome the community property presumption, the spouse claiming the property must trace and clearly identify the property claimed to be separate. *McElwee*, 911 S.W.2d at 189. Tracing involves establishing the separate origin of the property by which the spouse originally obtained possession of the property. *Zagorski v.*

Zagorski, 116 S.W.3d 309, 316 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

"The degree of proof necessary to establish that property is separate property is clear and convincing evidence." TEX. FAM. CODE ANN. § 3.003(b). "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 C.H.*, 89 S.W.3d 17, 25 (Tex. 2002).

Jason argues that the evidence is legally and factually insufficient to support the trial court's determination that the 265 Sara Lane lot was Rachel's separate property because the Gift Certification contradicts the warranty deed showing that Rachel as the sole grantee.

Jason's argument discounts the deed's evidentiary effect. Title to transferred property vests on a deed's execution and delivery. *Rothrock v. Rothrock*, 104 S.W.3d 135, 138 (Tex. App.—Waco 2003, pet. denied) (citing *Stephens Cty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974)). "A prima facie case of delivery and the accompanying presumption that the grantor intended to convey the land according to the terms of the deed is established when it is shown that the deed has been filed for record." *Id*.

The Gift Certification is not evidence of a property transfer. At most, it is some evidence that Rachel's parents, before the conveyance, may have intended to

give the 265 Sara Lane lot to both Jason and Rachel, but it does not counter the evidence of the warranty deed filed about a month later, which proves that the actual conveyance was to Rachel alone.

Jason could have overcome the presumption that the deed's delivery was accompanied by the required intent that it was to become operative as a conveyance by showing (1) that the deed was delivered or recorded for a different purpose, (2) that fraud, accident, or mistake accompanied the delivery or recording, or (3) that the grantor had no intention of divesting himself of title. *Id*. But Jason makes no such showing. The conveyance occurred before the parties' marriage, and Rachel's mother testified that in conveying the lot, she and her husband intended that Rachel be the lot's sole owner. Because title finally vested in Rachel alone before marriage, we conclude that the evidence supports a firm belief or conviction that the 265 Sara Lane lot is Rachel's separate property.

Jason also argues that the use of the lot as collateral for the down payment on the manufactured home creates doubt as to whether the lot is separate property because it shows an intent to use the lot for the community's benefit. This argument ignores the inception-of-title rule. The later use of property for community purposes or improvement of the property with community funds cannot change the property's character. *See Leighton v. Leighton*, 921 S.W.2d 365, 367 (Tex. App.—Houston

[1st Dist.] 1996, no writ). We hold that the trial court did not err in determining that Rachel separately held a 100 percent undivided interest in the 265 Sara Lane lot.

We overrule Jason's first issue.

Reimbursement

In his second issue, Jason argues that the trial court erred in awarding him $8,695.90 of reimbursement to be paid by Rachel, which amounts to about half of the portion of the home loan attributable to the debt on the lot, because it was inequitable.

A trial court must use equitable principles in resolving a claim for reimbursement. TEX. FAM. CODE ANN. § 3.402(b); *Barton v. Barton*, 584 S.W.3d 147, 154 (Tex. App.—El Paso 2018, no pet.). Pertinent to this case, "a claim for reimbursement includes the reduction of the principal amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage." TEX. FAM. CODE ANN. § 3.402(a)(4). A party claiming the right of reimbursement must plead and prove that the expenditures and improvements were made and that they are reimbursable. *Hailey v. Hailey*, 176 S.W.3d 374, 384 (Tex. App.—Houston [1st Dist.] 2004, no pet.). The trial court's discretion in evaluating a claim for reimbursement is as broad as its discretion to effect a just and right division of the community estate. *Id.* (citing *Penick v. Penick*, 783 S.W.2d 194, 198 (Tex. 1988)).

Jason does not challenge the trial court's calculation of reimbursement or identify any claim to reimbursement that the trial court failed to address. His argument on this issue appears to challenge the trial court's division of the community estate generally, a contention that lies beyond the scope of the reimbursement issue, and we hold that his complaint is therefore waived. *See* TEX. R. APP. P. 38.1(f).

Conclusion

We affirm the trial court's final decree.

Julie Countiss
Justice

Panel consists of Justices Goodman, Landau, and Countiss.