

Affirmed and Opinion filed March 30, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00055-CV

RALF FRANZ BREHM, Appellant

V.

ANGELA MARIE BREHM, Appellee

**On Appeal from the 310th District Court
Harris County, Texas
Trial Court Cause No. 98-00188**

O P I N I O N

In this appeal from a final divorce decree, Ralf Brehm challenges the characterization and division of property by the trial court. He also challenges the trial court's decision to allow Angela Brehm to testify regarding the valuation of property divided in the decree. Because we find that the trial court did not err, we affirm its judgment.

ANGELA'S VALUATION TESTIMONY

Ralf's first point of contention is that the trial court erred in allowing Angela to testify, since she only

identified herself as a fact witness three days before trial. We find the trial court did not abuse its discretion by deciding to allow Angela to testify.

Ralf's challenge is based on an order entered by the trial court after Angela's original attorney was disqualified. Prior to trial, Ralf successfully moved to disqualify Angela's attorney based on a conflict of interest. In its order disqualifying Angela's attorney, the trial court stated that all discovery could be served on Angela by sending it to her personal address. The order also stated that the discovery was deemed received ten days after mailing. Immediately after the trial court entered the order, Ralf sent a set of interrogatories and requests for production on Angela. These were returned unopened bearing the postal stamps "Attempted-Not Known" and "Insufficient Address." After Angela retained new representation, Ralf eventually served the discovery the new attorney, and the discovery was completed within the time prescribed in the Rules of Civil Procedure.

At the original trial setting, Ralf moved to disqualify Angela and all other fact and expert witnesses identified in her discovery responses on the ground they were not timely filed. *See* TEX. R. CIV. P. 215.5.¹ The trial court denied this motion but reset the case to allow time for Ralf to investigate these witnesses. The court also offered to further reset the trial should depositions need to be taken. Ralf took no depositions, but renewed his objection at the second trial setting. The trial court allowed Angela to testify over his objections.

We review a trial court's discovery rulings for abuse of discretion. When witnesses are not identified timely, or are not identified at all, the trial court must exclude them unless it finds the failure to file a timely response was supported by good cause. *See* TEX. R. CIV. P. 215.5. This rule is designed to prevent trial by ambush and is not intended to create a trap for the unwary. *See Smith v. Southwest Feed Yards*, 835 S.W.2d 89, 91 (Tex.1992).

Ralf contends that since the trial court did not make an express finding of good cause on the record, it abused its discretion in allowing her to testify. His argument, however, ignores the presumption that we

¹ This rule is now TEX. R. CIV. P. 193.6(a).

must entertain that the trial court made all findings necessary to support its judgment. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex.1990). The trial court heard evidence that Angela did not receive the interrogatories containing the requests for the identities of potential witnesses and such failure was not intentional. It also heard evidence that a list of Angela's witnesses was given to Ralf shortly after Angela actually received the interrogatories. Thus, we find the trial court did not abuse its discretion in allowing Angela to testify.

Even if its decision were in error, however, the error was harmless under the facts of this case. Here, Ralf was served with the list of potential witnesses prior to trial. The trial court also allowed Ralf additional time to investigate the witnesses and was willing to allow even more time to depose these witnesses. Moreover, allowing a party to a divorce suit to testify despite her failure to identify herself as a fact witness is unlikely to serve as a surprise to the other party and cannot be considered a trial by ambush. *See Ramirez v. Ramirez*, 873 S.W.2d 735, 740 (Tex. App.—El Paso 1994, no writ). Thus, Angela's appearance as a witness did not unfairly surprise or prejudice Ralf and could not have harmed him.

Even if she was a proper fact witness, Ralf contends that the trial court erred in allowing Angela to give expert testimony about the value of the business and business property. Ralf makes this claim that her testimony was expert testimony even though he likewise offered testimony about the same subjects without being qualified as an expert. It is well-established that an owner of property can testify to its value without being qualified as an expert. *See Porras v. Craig*, 675 S.W.2d 503, 504 (Tex.1984); *Laprade v. Laprade*, 784 S.W.2d 490, 492 (Tex. App.—Fort Worth 1990, no writ). Further, a trial court can admit any non-expert opinion testimony that is rationally based on the perceptions of the witness and would be helpful to a determination of a fact issue. TEX. R. EVID. 701.

Here, the record reflects that Angela was familiar with the value of the business and property. The record also reflects that Angela's testimony would be helpful to the trial court since it had no method of determining the value other than testimony. We find the trial court did not abuse its discretion in allowing her to testify to the value of the business and property.

PROPERTY DIVISION ISSUES

Ralf's other points of error center on the trial court's division of property. He argues that the trial court improperly divided a \$40,000.00 certificate of deposit that was his separate property. He also argues that the trial court erred in failing to award him a reimbursement claim for separate property funds expended on the purchase of community property. His final argument is that the trial court erred by ordering the sale of the business and property in the just and right division of the marital estate.

The Trial Court's Division of the CD

Ralf complains about the trial court's characterization of the \$40,000.00 CD as community property. Ralf testified that the money used to buy the CD was profit from the sale of a piece of property he inherited from his uncle. Because property acquired by inheritance is separate property, *see* TEX. FAM. CODE ANN. § 3.001(2) (Vernon 1998), and the proceeds from the sale of that property remain separate property, *see Martin v. Martin*, 759 S.W.2d 463, 466 (Tex. App.—Houston [1st Dist.] 1988, no writ), he argues that the CD is separate property.

The trial court has broad discretion in dividing the marital estate at divorce. *See Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981). Upon appeal, we presume the trial court acted within its discretion and will reverse its determinations only where it is clear that its discretion was abused. *See id.* A clear abuse of discretion is shown only if the division of the property is manifestly unjust and unfair. *See id.*; *Hanson v. Hanson*, 672 S.W.2d 274, 277 (Tex. App.—Houston [14th Dist.] 1984, writ dismissed w.o.j.).

All property present upon the dissolution of a marriage is presumed to be community property. *See* TEX. FAM. CODE ANN. § 3.003(a) (Vernon 1998). To overcome this presumption of community property, the spouse claiming certain property as separate property must by clear and convincing evidence trace and clearly identify the property claimed to be separate. *See id.* at § 3.003(b); *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975); *McElwee v. McElwee*, 911 S.W.2d 182, 188 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Mere testimony that the property was purchased with separate funds, without any tracing of the funds, is generally insufficient to rebut the presumption. *See Robles v. Robles*, 965 S.W.2d 605, 614 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Moreover, only when separate funds can be traced through a joint account to specific property purchased

with those funds, without surmise or speculation about funds withdrawn from the account in the interim, is the property purchased also separate. *See McKinley v. McKinley*, 496 S.W.2d 540, 543-44 (Tex.1973); *Welder v. Welder*, 794 S.W.2d 420, 425(Tex. App.—Corpus Christi 1990, no writ).

Here, the only testimony presented by Ralf that this CD was his separate property was his own testimony that it was purchased with proceeds from the sale of property he inherited from his uncle. Ralf testified that he inherited the property, sold it, deposited the proceeds into the joint account he shared with Angela, and purchased the CD four months later. Ralf introduced no bank records which would clearly trace the money used to buy the CD to the proceeds from his inheritance, nor did he introduce any other evidence which would show deposits and withdrawals from the account over the four month period. Rather, Ralf argues that since Angela did not controvert his assertion that the CD was his separate property, he should prevail. We disagree, because this improperly and prematurely places the burden of proving the nature of the property on Angela. Because Ralf failed to provide clear and convincing evidence that the CD was his separate property, we find the trial court did not abuse its discretion in dividing it with the community estate.

Ralf's Reimbursement Claim

In his third issue on appeal, Ralf argues that the trial court erred in failing to reimburse him for separate property funds expended on community property. Ralf claims that he expended \$170,000.00 of his separate property on community assets such as the real estate where the family business was located, the franchise fee for the business, and equipment used in the business.

Reimbursement is an equitable doctrine, and a court of equity is bound to look at all the facts and circumstances and determine what is fair, just and equitable. *See Penick v. Penick*, 783 S.W.2d 194, 197 (Tex.1988); *Gutierrez v. Gutierrez*, 791 S.W.2d 659, 663 (Tex. App.—San Antonio 1990, no writ). Such a claim is not merely a balancing of the ledgers between the marital estates. *See Penick*, 783 S.W.2d at 198. Rather, in deciding whether to award reimbursement, the trier of fact should consider the benefits and detriments to each estate. *See Gutierrez*, 791 S.W.2d at 553.

"Reimbursement is not available as a matter of law but lies in the discretion of the court." *Id.*

(quoting *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex.1982)). The discretion to be exercised in evaluating a claim for reimbursement is equally as broad as the discretion exercised in making a just and right division of the community estate. *See Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex. App.—Houston[14th Dist.] 1996, no writ). Moreover, the party claiming the right of reimbursement has the burden of proof. *See Vallone*, 644 S.W.2d at 459 (Tex.1982). Great latitude must be given to the trial court's application of equitable principles to a claim for reimbursement. *See Penick*, 783 S.W.2d at 198.

Here, as noted earlier, Ralf failed provide clear and convincing evidence that the funds he used to purchase the community property were separate. Though Ralf produced deposit slips for the deposits into the joint business account from his separate accounts, these slips were made by him and did not clearly reflect the origin of the money. Again, he did not produce bank records, certified copies of checks, copies of canceled checks, or any other such evidence that would have allowed the trial court to trace these funds, even though he testified that these records were available.

Based on Ralf's inability to prove that the expended funds were separate property, we find no abuse of discretion in the trial court's failure to award him reimbursement.

The Sale of the Community Property Business and Real Property

Ralf's final complaints center on the trial court's order that the community property business and real property upon which it is situated be sold. The order also allowed the appointment of a receiver to sell the property if it could not be sold conventionally within two months. Ralf argues that the trial court should have partitioned the business and property or allowed him an option to purchase them. Ralf also argues that the trial court's forced sale caused harm to the estate because of the reduction in the value of the business brought on by the forced sale. Ralf also argues that the trial court ordered the sale instead of valuing the real property, which constitutes an abuse of discretion.

Though a trial court has wide discretion in dividing community property in a divorce action, a trial court should not order the sale of community property unless it finds that the property is not subject to partition in kind. *See Walston v. Walston*, 971 S.W.2d 687, 693 (Tex. App.—Waco 1998, pet.

denied). In determining if property is subject to division in kind the trial court should consider the "nature and type of particular property involved and the relative conditions, circumstances, capabilities and experience of the parties." *See id.* at 693; *In re Marriage of Jackson*, 506 S.W.2d 261, 266 (Tex. Civ. App.—Amarillo 1974, writ dismissed). When community property is not subject to partition in kind, the divorce court can appoint a receiver and order the property sold and the proceeds divided between the parties in a manner it deems to be just, fair, and equitable. *See Vannerson v. Vannerson*, 857 S.W.2d 659, 673 (Tex. App.—Houston[1st Dist.] 1993, writ denied). Moreover, in the absence of findings of fact and conclusions of law, the judgment of the trial court implies all necessary fact findings in support of the judgment. *See In re W.E.R.*, 669 S.W.2d 716, 717 (Tex.1984).

Based on this standard of review, we find support in the record for the trial court's determination to sell the property and appoint a receiver to effect the sale if the property was not sold within two months. In this case there were insufficient community assets to allow the court to partition these properties in kind. In fact, these assets were the only contested community assets to be divided in the marital estate. Also, Ralf's complaint that the trial court's order prevented him from buying Angela's interest in this property is without merit. We can find nothing in the court's order that would have prevented Ralf from taking such a course of action should he have desired to do so. This issue is overruled and the judgment of the trial court is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed March 30, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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