Affirmed and Opinion filed September 6, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00077-CV

ELIZABETH ANN ROGERS, Appellant

V.

RONALD LEE ROGERS, M.D., Appellee

On Appeal from the 257th District Court
Harris County, Texas
Trial Court Cause No. 98-50602

M E M O R A N D U M O P I N I O N

This is an appeal from a property division in the divorce of Elizabeth Ann Rogers (Ann) and Ronald Lee Rogers, M.D. (Ron). At trial, the jury found that a certain bank account ("Grace Account") was the separate property of the appellant, Ann. However, the trial judge rendered a judgment notwithstanding the verdict finding that Ann did not overcome the community property presumption with clear and convincing evidence. We determine whether the trial court properly rendered the judgment notwithstanding the verdict. We affirm.

Background

During September 1999, the proceedings of Ann and Ron's divorce commenced. At issue was a bank account, referred to as the Merrill Lynch "Grace Account," that consisted of $175,230 at the dissolution of the marriage. The following facts are undisputed: (1) the account originally contained approximately $400,000;

(2) Ron had signatory authority, before separation, to withdraw funds from the account per Ann's authorization;

(3) the account was interest-bearing; and

(4) the account came into existence during the twenty-one year marriage.

At trial, Ann contended that the account was her separate property. Ron contended that the account was community property. No other testimony other than Ann's and Ron's testimony was admitted regarding the Grace Account.

A few limited and incomplete documents were admitted into evidence regarding the Grace Account: (1) Petitioner's Exhibit number 5, which lists certain check numbers, their amounts, the names of the payees, and the transaction dates; and (2) Petitioner's Exhibit number 6, which is simply a duplicate of the first two pages of exhibit number 5 with the addition of eight pages of photocopied bank statements. However, due to the poor quality of the photocopies, some of the information presumably found on the original bank statements, such as account numbers, is not always decipherable.

The first bank statement in Petitioner's Exhibit number 6 reveals that the account is a Merrill Lynch account. The account number ends in 12300. The name on the account reads, "– White Rogers", and below that it reads, "Grace Account." The statement period is from 4/25/98 to 5/29/98, with a balance of $63,786.80. The second statement shows a full account number, 60B-12300, and the name on the account reads, "–ite Rogers." The balance is not reflected, but check number 108, dated 6/21/98, shows a withdrawal of $10,000 by "RE Rogers MD." The statement period is 5/3098 to 6/26/98. The third

statement does not reflect an account number, but does show account name, "–ite Rogers." A third-party check for $345,074.88 was deposited on 7/30/98. The fourth page seems to be the same account because the opening balance is $345,015.91, but it does not reflect an account number. The account name reads "White Rogers." Over fifteen checks were written in this account from dates 6/23/98 to 8/08/98. Statements five and six also seem to be the same account but do not reflect the account number. The account name reads, "–n White Rogers." Statements seven and eight also seem to be the same account and do reflect that the account number is 60B-12300. The name on the account reads, "-nn White Rogers." The ending balance was $336,969.95 for statement period 11/28/98 to 12/31/98.

Ann's trial counsel asked her, in regard to Petitioner's exhibit number 5, "Well, does this document summarize the expenditures that were made from your separate account for community debts?" Ann answered, "Each and every one." Then her counsel asked, "I'm going to hand you what's been marked now as Petitioner's exhibit [number] 6 and ask you if that is the back-up for Petitioner's Exhibit 5." Ann answered affirmatively. Some of the check numbers, amounts, and payees from the bank statements match those listed on the expenditures summary. Notably, the account number listed on some of the alleged Grace Account statements (60B-12300) does *not* match the account number listed in the final divorce decree. Appendix "A" of Ann's brief reads, "The sum of $87,615.00 from the Harris Webb & Garrison brokerage account number 71286710, formerly known as the Merrill Lynch 'Grace Account', Account number 044-000-804." This same information is listed in Appendix "D" Ann's brief, and also lists the account number of the Merrill Lynch "Grace Account" as "044-000-804."

Standard of Review

In reviewing a judgment notwithstanding the verdict, "we must review the record in the light most favorable to the jury findings, considering only the evidence and inferences which support the findings and rejecting the evidence and inferences contrary to the findings." *Holeman v. Landmark Chevrolet Corp.*, 989 S.W.2d 395, 402 (Tex.

App.—Houston [14th Dist.] 1999, pet. denied). When there is more than a scintilla of competent evidence to support the jury's findings, the judgment notwithstanding the verdict should be reversed.[1] *Id.*

Overcoming the Community Property Presumption

In this case, Ann had to prove with clear and convincing evidence that the Grace Account was her separate property. *See* TEX. FAM. CODE ANN. § 3.003(a) – (b) (Vernon 2000) (stating that "property possessed by either spouse during or on dissolution of marriage is presumed to be community property," and "the degree of proof necessary to establish that property is clear and convincing evidence."). To discharge this presumption of community property, Ann must "trace and clearly identify the property as separate." *See Evans v. Evans*, 14 S.W.3d 343, 346 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *see also Robles v. Robles*, 965 S.W.2d 605, 614 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (ruling that "mere testimony . . . without tracing of the funds, is generally insufficient to rebut presumption."). Finally, if the funds are "so commingled as to defy desegregation and identification, the burden it not discharged and the statutory presumption prevails." *See McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973). Therefore, after reviewing the entire record, we must determine whether the evidence, viewed in a light most favorable to Ann, shows by more than a scintilla of evidence that the Grace Account was separate property. If we find that this burden has not been met, then the trial court's ruling should be affirmed.

Separate property consists of: (1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the spouse during

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[1] In the context of reviewing the constitutional issue of actual malice, the Texas Supreme Court recently held that the reviewing court must apply the clear and convincing standard as applied at the trial level. *Turner v. KTRK Television Inc.*, 38 S.W.3d 103, 120 (Tex. 2000). We have recently followed *Turner* in a parental termination case in which also prescribed the clear and convincing burden. *See In the Interest of W.C.*, No. 14-00-01280-CV (Tex. App.—Houston [14th Dist.] September 6, 2001, no pet. h.) (designated for publication).

marriage, except any recovery for loss of earning capacity during marriage. See TEX. FAM. CODE ANN. § 3.001(1) – (3) (Vernon 2000).

First, Ann states that the account was received "two months before [Ron] decided to" end their "21-year marriage." She also stated that she received it two months before Ron "started dating" other women. Therefore, under either scenario, this property is not shown to be separate property under the first criterion because it was received during the marriage. However, Ann argues that the Grace Account was given to her as a gift or through and inheritance, thereby taking this property out of the community property presumption.

Both Ann and Ron concede that the money in the Grace Account originally belonged to Ann's mother, and the opening balance was approximately $400,000. However, other than the non-specific testimony of Ann, there is no evidence to suggest that the funds in the account were given exclusively to her. Ann's contradictory, vague and equivocal testimony, without more, was insufficient for a reasonable jury to determine under the clear and convincing standard[2] that the funds, at their inception, were her separate property. *Robles*, 965 S.W.2d at 614.

Moreover, even if the evidence established that the Grace Account might have been a gift only to Ann, there is no evidence provided that traces or clearly identifies it as her separate property. Specifically, the account number that Ann refers to in the divorce decree (Appendix "A") as the Merrill Lynch "Grace Account" does not at all match the account number listed on four of the eight statements listed in Petitioner's Exhibit 6. Ann's post-submission memorandum does not clear up the discrepancy between the different account numbers because it does not list an account number at all. Further, because Grace Account is interest- and dividend-bearing, and because we cannot

[2] The clear and convincing standard is the 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 proved. *In re G.M.*, 596 S.W.2d 846, 847 (Tex. 1980).

determine whether the statements in the record are that of the Grace Account, it is impossible to accurately segregate and identify which portions of the account belong to whom. The Merrill Lynch records are sparse and incomplete, sometimes only providing one out of eight pages. The account numbers and names are varied and incomplete. Accordingly, we find that Ann has not met her burden to overcome the strong community property presumption concerning the Grace Account. Appellant's first point of error is overruled. Because the trial court properly rendered a judgment notwithstanding the verdict we need not address appellant's second point of error. TEX. R. APP. P. 47.1.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed September 6, 2001.
Panel consists of Justices Yates, Fowler, and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).