Affirmed and Opinion filed May 3, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00172-CV

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PATRICIA A. GAIDES, Appellant

V.

FRANK CARL GAIDES, Appellee

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Cause No. 94-24154

O P I N I O N

Appellant, Patricia A. Gaides, appeals from a judgment dividing the marital estate in her divorce from appellee, Frank Carl Gaides. Patricia contends in five issues that the trial court erred by: (1) refusing to divide the community estate disproportionately; (2) valuing community property improperly; (3) mischaracterizing separate property as community property; (4) failing to reimburse the community estate for alleged waste; and (5) exceeding its authority by ordering a division of the probate estate of the Gaides' son. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Patricia A. Gaides and Frank Carl Gaides were married on February 8, 1964. The couple had three children, born in 1967, 1970, and 1974. Following the birth of their first child, only Frank worked outside the home, while Patricia had primary responsibility for the children's care. In 1988, the couple separated, prompted by Patricia's discovery that Frank was having an affair. Frank continued to deposit his paychecks into an account accessible to Patricia until March 1992, after which Patricia paid her living expenses through community accounts.

In May 1994, Patricia initiated divorce proceedings. The case was tried to the court, which heard eleven days of testimony spanning a period from May through November, 1997.[1] The trial court entered a Final Decree of Divorce on November 13, 1998, that included a division of property. Patricia filed a motion for new trial, which the court denied as to all matters except for the valuation of an automobile, on which the trial court heard additional evidence and orally modified its earlier decree. In response to a request from Patricia, the trial court entered Findings of Fact and Conclusions of Law. Patricia submitted objections to these findings and conclusions and requests for additional findings and conclusions, which were overruled by the trial court with one limited exception.

DIVISION OF THE ESTATE

In her first issue, Patricia complains that the trial court abused its discretion by ordering an essentially equal division of the community estate. The trial court has wide discretion in dividing the parties' estate. *Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981). In exercising its discretion the trial court may consider many factors, and it is presumed that the trial court exercised its discretion properly. *Id.* at 699. To disturb a trial court's division of property, the appellant must show the court clearly abused its discretion by a division that is manifestly

[1] The trial began on May 2, 1997. For reasons that are unclear in the record, the trial recessed on May 9 and reconvened on September 2, 1997, then recessed again on September 4, resuming on November 25, 1997.

unjust and unfair. *Schlafly v. Schlafly*, 33 S.W.3d 863, 871 (Tex. App.—Houston [14th Dist.] 2000, pet. denied.). The trial court abuses its discretion if it rules arbitrarily, unreasonably, or without regard to guiding legal principles, or rules without supporting evidence. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). An abuse of discretion does not occur where the trial court bases its decision on conflicting evidence, or where some evidence of a substantial and probative character exists in support of the trial court's property division. *Zieba v. Martin*, 928 S.W.2d 782, 787 (Tex. App.—Houston [14th Dist.] 1996, no writ).

In its Findings of Fact and Conclusions of Law, the trial court concluded that the estate of the parties should be divided "approximately 50% [to] Wife and 50% to Husband," and that such a division was fair and equitable, taking into consideration all factors presented by the parties. Patricia contends that the court's findings in support of an equal division are contrary to the great weight and preponderance of the evidence. Under the abuse of discretion standard, an attack on the factual sufficiency of the evidence is not an independent ground of error, but merely a relevant factor in assessing whether the trial court abused its discretion. *Zieba*, 928 S.W.2d at 786.

Patricia's arguments fail to show that a 50/50 division of the estate is manifestly unjust and unfair. The parties presented conflicting evidence regarding the cause for the breakup of the marriage. The trial court refused to adopt Patricia's requested conclusion that Frank was at fault, specifically noting that the parties' "discord and conflict of personality" preceded Frank's extramarital affair. Patricia also argues that a disproportionate division is justified by the "vast disparity of earning power" between the parties. Although Patricia did not work regular hours outside the home during the marriage, she admits that at the time of the divorce she had "several degrees, including a masters." Finally, there was considerable and conflicting evidence with respect to Patricia's claims against Frank for alleged wasting of community assets, on which the trial court made numerous specific findings of fact. Because there is probative evidence to support the trial court's conclusion to divide the estate in an approximately equal manner, the court's division was not an abuse of discretion.

Patricia also argues that the trial court abused its discretion either by failing to consider all the evidence supporting the factors asserted by Patricia, or by "largely dismissing them." We find no support in the record for this assertion. During the hearing on Patricia's objections to the trial court's Findings of Fact and Conclusions of Law, the court stated that its property division was based on "a number of factors." The court cited the length of the marriage, the size of the estate, the age of the parties, Frank's continuous financial contributions toward the community, and Patricia's lack of effort to seek employment after separation. As noted above, the trial court directly addressed Patricia's claims regarding fault and waste of community assets.

We find no abuse of discretion by the trial court in its overall division of the estate. Patricia's first issue is overruled.

VALUATION OF COMMUNITY PROPERTY

In her second issue, Patricia contends that the trial court abused its discretion by improperly valuing certain community property, leading to a division of the estate that varied from the court's intended 50/50 split. The mere fact that certain assets are either undervalued or overvalued does not, in and of itself, constitute an abuse of discretion. *Thomas v. Thomas*, 603 S.W.2d 356, 358 (Tex. App.—Houston [14th Dist.] 1980, writ dism'd). The ultimate and controlling issue in a property division case is whether the trial court divided the property in a "just and right" manner. *Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *see* TEX. FAM. CODE ANN. § 7.001 (Vernon 1998). Thus, the value of specific property is not an ultimate issue and need not be set out in a finding of fact. *Rafferty*, 903 S.W.2d at 376. To obtain a reversal, Patricia must show that, because of the alleged errors in valuation, the trial court's overall property division is manifestly unjust. *See Cook v. Cook*, 679 S.W.2d 581, 585 (Tex. App.—San Antonio 1984, no writ).

In her brief, Patricia alleges that the following valuation errors impacted a just and right division of the community estate:

1. Wells Fargo Money Market Account

In its Final Decree of Divorce, the trial court awarded Patricia all funds on deposit in Wells Fargo account #6841965197 "up to a maximum of $11,000.00." According to Patricia, the funds in this account were insurance proceeds that were earmarked for repairs to the community residence, and the parties agreed that the account would be awarded to the party receiving the house, with the account's value included in the value of the property. Patricia contends that the trial court erred by assigning a value to this account separate and apart from the value assigned to the house. In its findings of fact, however, the trial court expressly noted that this account was "taken into consideration" in awarding the community residence to Patricia at a value of $85,000.00. We find no abuse of the trial court's discretion.

2. Wells Fargo Checking Accounts

Patricia complains about the trial court's valuation of two other Wells Fargo accounts: #0909-484644 ("Patricia's checking account"), and #0745-534388 ("Frank's checking account"). In the divorce decree, the trial court awarded all funds in Patricia's checking account to Patricia "up to a maximum of $28,000.00," whereas Frank was awarded "[a]ll funds on deposit, if any," in Frank's checking account.

The trial court made a finding of fact that Patricia's checking account had $28,000.00 in April 1997, just before the divorce proceedings began, but that during trial Patricia expended all but $152.00 from the account for her own benefit. Generally, community assets are to be valued as of the date of the divorce. *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 837 (Tex. App.—Texarkana 1996, writ denied). However, the trial court has broad discretion to arrive at a property division that is just and right. *See Murff*, 615 S.W.2d at 698. At the hearing where the trial court granted the divorce and rendered judgment (the "Rendition Hearing"), the court stated its intention "that each party receive approximately 50 percent credit for those accounts that were liquidated during the pendency" of the divorce proceedings. Accordingly, although the court assigned a value to Patricia's checking account, the court did not assign

values to other community accounts, not complained of on appeal, that were likewise under Patricia's control and liquidated during trial. Patricia failed to demonstrate that the trial court's overall valuations of these accounts affected the trial court's just and right division of the estate or otherwise constituted an abuse of discretion.

With respect to Frank's checking account, Patricia complains that the trial court did not use the same valuation standard. The trial court rejected Patricia's request for a supplemental finding that Frank's checking account be assigned a value of $4,713.00, based upon that account's balance in February 1997. However, the trial court heard testimony that, whereas Frank paid for some of his post-separation living expenses out of his separate property accounts, Patricia exclusively relied upon community accounts for her daily living expenses. Under the circumstances, the trial court acted within its discretion by applying a different valuation method to Frank's account in the process of entering a just and right division.

3. Olde Discount Corporation Brokerage Account

In the divorce decree, the trial court awarded Patricia all funds in this account "up to a total of $8,500.00." The evidence showed, and the trial court found, that this account had a balance of $17,000.00 just before trial began, and that Patricia, who had continuous control over the account, reduced its value to zero. The trial court's valuation is thus consistent with its stated intention of giving the parties equal credit for those accounts under Patricia's control that she liquidated while the divorce proceedings were pending. Patricia has failed to demonstrate any abuse of discretion.

4. Household Furnishings in Frank's Possession

The Final Decree of Divorce awarded to each party all "items of household furniture, furnishings and fixtures" that were in the possession of or subject to the control of that party. Patricia complains that the trial court improperly valued the furnishings in Frank's possession at $6,000.00. Patricia's argument relies solely on a statement made by the trial court during

the Rendition Hearing. The court made no finding of fact, nor did Patricia request any supplemental finding of fact, regarding the value of these furnishings. Oral statements made by the trial court at the conclusion of trial cannot be construed as findings of fact, and thus cannot be relied upon in attacking the division made by the trial court. *Thomas*, 603 S.W.2d at 358.

Moreover, the trial court has discretion to value property within the range of evidence presented at trial. *See Grossnickle*, 935 S.W.2d at 844. Frank's amended inventory and appraisement placed a value of $6,300.00 on his household furnishings. Even though the trial court's oral "valuation" of Frank's furnishings apparently falls $300.00 outside the range of evidence, Patricia has failed to show that this alleged undervaluation resulted in a property division that was manifestly unjust. *See Cook*, 679 S.W.2d at 585. We find no abuse of the trial court's discretion.

5. Frequent Flyer Mileage Accounts

The trial court's final decree awarded Frank a Continental Frequent Flyer mileage account in his name, as well as a Continental Airlines One Pass account in Patricia's name, while Patricia was awarded a US Air Frequent Traveler Program account in her name. Patricia contends that the division of these accounts, which were assigned no value by either party, was erroneous because the number of miles accrued in the two Continental accounts far outweighs the number of miles in the US Air account. We disagree.

Patricia asserts, without any authority, that in the absence of evidence as to the accounts' monetary values, the trial court should have divided these assets "in kind" to preserve an equal division of the estate. It would be an unnecessary and onerous burden to require the trial court to divide every physical asset for which no monetary value has been assigned in the same proportions as the overall division of the estate. Furthermore, even if we agreed that the trial court erred by dividing these accounts unequally, without any evidence of their value, we cannot conclude that such an error had more than a *de minimis* effect on the overall

distribution of the estate. *See McElwee v. McElwee*, 911 S.W.2d 182, 189 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding that a trial court's erroneous characterization of community property as separate property does not constitute an abuse of discretion if the mischaracterized property had only a *de minimis* effect on the trial court's just and right division). Accordingly, there is no basis for finding an abuse of discretion.

6. Raveneaux Country Club Membership

Finally, the trial court's decree awarded Frank all right, title and interest in and to a membership to Raveneaux Country Club. Patricia contends this asset should have been valued at $8,500.00, based on the cost of the membership and monthly dues, both of which were paid by Frank's employer. Frank testified, however, that the membership cannot be sold or transferred, and therefore has no value. The trial court was well within its discretion to assign no value to this asset.

Patricia has failed to demonstrate that the trial court's overall property division was manifestly unjust as a result of any alleged valuation error. We overrule Patricia's second issue.

CHARACTERIZATION OF PROPERTY

In her third issue, Patricia alleges that the trial court abused its discretion by characterizing certain of Patricia's separate property as community property. A spouse's separate property is defined exclusively by the Texas Constitution, and may not be altered or enlarged by legislative action. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977); *see* TEX. CONST. art. XVI, § 15. Thus, 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*, 911 S.W.2d at 189.

A presumption exists that all property possessed by either spouse upon dissolution of the marriage is community property. TEX. FAM. CODE ANN. § 3.003(a) (Vernon 1998). A party seeking to establish that such property is separate property bears the burden of rebutting the presumption by clear and convincing evidence. *See id.* § 3.003(b). To rebut the community property presumption, a spouse must trace and clearly identify property claimed as separate property. *McKinley v. McKinley*, 496 S.W.2d 540, 543 (Tex. 1973). If the evidence shows that "separate and community property have been so commingled as to defy resegregation and identification, the burden is not discharged and the statutory presumption prevails." *Id.* Mere testimony that property was purchased with separate property funds, without any tracing of the funds, is generally insufficient to rebut the presumption. *McElwee*, 911 S.W.2d at 188.

With respect to the majority of Patricia's claims to certain accounts as her separate property, the trial court found that Patricia did not offer sufficient evidence to overcome the presumption that these accounts were community property. On appeal, Patricia identifies ten assets that she claims were erroneously characterized as community property:

- 400 shares of Baxter International stock;
- a Merrill Lynch Brokerage account, #063 531 25803-6;
- three Dean Witter accounts: #305 017508 (the "Dean Witter '508 account"), #305 049010 (the "Dean Witter '010 account"), and #305 041341 (the "Dean Witter '341 account");
- two Paine Webber accounts: #RS03877BS (the "Paine Webber '877 account") and #RJ03878BS (the "Paine Webber '878 account"); and
- three life insurance policies: one from GE Capital Assurance, one from Keyport Life Insurance Company, and one from Metropolitan Life Insurance Company.

1. Baxter International Stock

Patricia first alleges that the trial court erred in characterizing 400 shares of Baxter International stock as community property. The evidence showed that these shares were held

in the name of "Frank C. Gaides & Patricia A. Gaides." Patricia testified that the stock was first purchased by her in October 1969 with funds from both the proceeds of a car Patricia owned before marriage and "gifting money" from Patricia's mother and grandmother. Patricia's testimony alone, however, is insufficient to rebut the statutory presumption that the shares are community property. *See McElwee*, 911 S.W.2d at 188. Moreover, Patricia testified that before 1987, all gifts received from her mother "were put in the community account." The trial court did not err in finding that Patricia failed to establish that this asset was her separate property.

2. Brokerage Accounts

We next turn to the numerous brokerage accounts which Patricia alleges to be her separate property. We begin with an examination of the oldest and most active of these accounts, the Dean Witter '508 account. The trial court found that Patricia failed to overcome the community property presumption as to all funds in this account with the exception of $180,000.00, which was stipulated by Frank to be Patricia's separate property.[2] We find no error in this finding.

Patricia testified that the initial funds for the Dean Witter '508 account came from an E.F. Hutton account that she started in March of 1976. For approximately two months, this E.F. Hutton account contained only shares of American Nuclear stock, which Patricia alleged that she received as a gift from her father, as well as cash received from selling some of that stock. In May of 1976, however, Patricia transferred bonds with a face value of $7,000.00 from another E.F. Hutton account into this allegedly separate account. These bonds had been bought as part of a larger purchase with a total face value of $20,000.00 and a purchase price of $13,434.17. Apparently, Patricia determined that her separate property had contributed seven-twentieths of the initial purchase price, thus making $7,000.00 (seven-twentieths of

[2] The court later modified this figure to $190,500.00 in response to Patricia's Objections to Findings of Fact and Conclusions of Law.

$20,000.00) face value of the bonds her separate property as well. The evidence, however, showed that the funds used to purchase the bonds came from four sources: (1) $3,389.00 from an E.F. Hutton margin account, which Patricia admits was community property; (2) $2,775.00 from an E.F. Hutton "conv. bond" account, the source of which Patricia was unable to identify; (3) a check for $3,802.31 from a community checking account; and (4) $3,467.86 in additional margin in the account where the bonds were originally held. We cannot say that Patricia has met her burden of clearly and convincingly tracing the $7,000.00 worth of bonds that she claims as her separate property. Thus, even assuming that the 400 shares of American Nuclear stock were Patricia's separate property, the E.F. Hutton account, almost from its inception, commingled community property with separate property.

Patricia nonetheless contends that over the years, she made several additional deposits of separate property into the Dean Witter '508 account. Patricia has not satisfied her burden of tracing any of these deposits through their various mutations within the commingled account. The evidence shows that this account was actively traded. According to the account statement for July 1997, the account no longer contained the initial 400 shares of American Nuclear stock, and the cash balance in the account was, at times, zero. The trial court did not err in finding that Patricia failed to satisfy her tracing burden with respect to separate funds she allegedly deposited into the Dean Witter '508 account. Thus, aside from the amount stipulated to be Patricia's separate property, this account was properly characterized as community property. Based on this conclusion, we also find no error in the trial court's determination as to the Merrill Lynch account and the Paine Webber '877 account, both of which were opened with funds taken directly from the Dean Witter '508 account.[3]

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[3] Patricia also argues that the income generated from the assets in these accounts is her separate property, based on two post-nuptial agreements that she claims partition all interest and dividends from Patricia's separate property to Patricia as her separate property. The trial court found that both agreements were nullities. Because we conclude that Patricia failed to meet her tracing burden with respect to any of the assets in these three accounts, we need not consider Patricia's argument with respect to the interest and dividends from those assets.

Patricia next argues that the trial court erred in characterizing the Dean Witter '010 and '341 accounts as community property. Patricia asserts that the initial funds for both of these accounts came from her portion of the settlement proceeds in a personal injury lawsuit that was filed by Frank Gaides, individually and as next friend of the Gaideses' son, Michael.[4] Patricia was not named as a plaintiff in the lawsuit; however, she was a party to the "Release and Settlement Agreement." Under that agreement, the defendants agreed to pay $655,000.00 to "Frank C. Gaides, individually and as next friend of Michael Gaides, Patricia Gaides and their attorneys."[5] Frank and Patricia eventually received a check for $320,000.00. After a series of transactions involving these funds, Patricia ultimately created the Dean Witter '010 account and the Dean Witter '341 account, each of which was initially funded with a deposit of $80,000.00.

Patricia asserts that because these two accounts were created with her one-half portion of the settlement proceeds ($160,000.00), both accounts were and remain her separate property. Recovery for the personal injuries of a spouse, including damages to emotional interests, are the separate property of that spouse. *See Whittlesey v. Miller*, 572 S.W.2d 665, 669 (Tex. 1978); *see also* TEX. FAM. CODE ANN. § 3.001(3) (Vernon 1998). This includes each spouse's individual recovery for the loss of companionship of a child. *Williams v. Steves Indus., Inc.*, 678 S.W.2d 205, 210 (Tex. App.—Austin 1984), *aff'd*, 699 S.W.2d 570 (Tex. 1985). In this case, however, we find no evidence to support Patricia's contention that $160,000.00 of the settlement proceeds was payment for her personal injuries, and therefore her separate property. When a spouse receives a settlement from a lawsuit during marriage, some of which could be separate property, it is that spouse's burden to demonstrate which portion of the settlement is her separate property. *Licata v. Licata*, 11 S.W.3d 269, 273 (Tex.

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[4] In 1980, when Michael was six years old, he was struck by a car while riding his bicycle, leaving him severely and permanently disabled until his death in 1994.

[5] In addition to this lump-sum payment, two separate annuities were established for Michael's benefit.

App.—Houston [14th Dist.] 1999, pet. denied). Without clear and convincing evidence showing that the claimed portion of the recovery is solely for her personal injuries, Patricia cannot overcome the community property presumption. *See id.*

The language in the settlement agreement provides no support for Patricia's claim. The agreement provides for a payment of $655,000.00 to "Frank C. Gaides, individually and as next friend of Michael Gaides, Patricia Gaides and their attorneys" in exchange for their agreement to release

> any and all claims, demands and causes of action of whatsoever nature, whether known or unknown, whether in contract or in tort, for personal injuries, and any and all survivorship and death claims and claims for loss of consortium, loss of society or similar intangible damages, which have accrued or may ever accrue . . . for and on account of the injuries received by Michael Gaides . . . .

Patricia was not a party to the lawsuit; therefore, there is no indication what, if any, claims for personal injuries she may have had. Moreover, even if we assume that some portion of the settlement proceeds were, in fact, her separate property, she has provided no evidence to support her suggested division among those funds that constitute her separate property, Frank's separate property, and community property.

We conclude that Patricia did not satisfy her burden of proving by clear and convincing evidence that $160,000.00 from the settlement proceeds was her separate property. Accordingly, we find no error in the trial court's community property characterization of the two Dean Witter accounts that were allegedly opened with these funds.[6] We also find that the Paine Webber '878 account, which originated with a deposit taken directly from the Dean Witter '010 account, was properly characterized as community property.

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[6] Because we find that Patricia failed to prove what portion, if any, of the settlement funds were her separate property, we need not address Frank's argument that Patricia failed to meet her burden of tracing the funds from the time the settlement check was received to the opening of the Dean Witter accounts.

3. Life Insurance Policies

Patricia next contends that the trial court erred in its characterizations of three life insurance policies. It is undisputed that all three policies were acquired during the Gaides' marriage. The trial court found that Patricia failed to rebut the presumption of community property as to these policies and that the policies were paid for with community funds and were at no time made a gift from Frank to Patricia. The trial court awarded 60 percent of the right, title and interest in the policies to Patricia and 40 percent to Frank.

The first of these policies was issued by General Electric Capital Assurance Company (the "GE policy"). At trial, Patricia admitted that the funds used to purchase the GE policy came from a community account. Nevertheless, Patricia argues that Frank intended to make a gift of his community interest in the GE policy. A gift is a transfer of property made voluntarily and gratuitously. *Hilley v. Hilley*, 161 Tex. 569, 342 S.W.2d 565, 569 (1961). The necessary elements to establish the existence of a gift are: (1) delivery; (2) acceptance; and (3) intent to make a gift. *Kiel v. Brinkman*, 668 S.W.2d 926, 929 (Tex. App.—Houston [14th Dist.] 1984, no writ).

The parties provided the trial court with conflicting testimony as to whether Frank intended to make a gift of his one-half community interest in the GE policy to Patricia. Patricia, however, contends the policy application, which was signed by Frank and lists Patricia as the owner and beneficiary of the GE policy, creates a presumption that the policy was her separate property. Thus, according to Patricia, the burden of proof shifted to Frank to prove that the policy was in fact community property.

The cases on which Patricia relies, however, all involve conveyances of real property. Such cases necessarily involve a deed or other document that, on its face, identifies a grantor and a grantee and contains operative words or words of grant evidencing the grantor's intention to convey title to a real property interest to the grantee. *See Harlan v. Vetter*, 732 S.W.2d 390, 392 (Tex. App.—Eastland 1987, writ ref'd n.r.e.) (setting forth the requisites of a legally

effective deed). We find that the mere act of signing a policy application and naming Patricia as the "owner" of the policy is not sufficiently indicative of Frank's donative intent to overcome the presumption of community property, much less create a contrary presumption of separate property.

We are guided in our analysis by the Fifth Circuit's opinion in *Freedman v. United States*, 382 F.2d 742 (5th Cir. 1967), which we find persuasive. The issue in *Freedman* was whether an insurance policy that was purchased during the Freedmans' marriage with community funds, but which named the husband as both beneficiary and owner, should have been included in the community estate for estate tax purposes upon the wife's death. Applying Texas law, the court held that, despite the fact that the policy application was signed by the wife and named the husband as owner and beneficiary, the wife "did not perform an affirmative act which would clearly reflect an intention to make a gift of her community share." *Id.* at 747. The court concluded: "In the absence of a clause expressly purporting to transfer Mrs. Freedman's community interest to her husband's separate estate, it must be assumed that she merely agreed for the policy to be owned by Mr. Freedman as the community's agent." *Id.*

In contrast, the Fifth Circuit found that an insurance policy was made a gift in *Parson v. United States*, 460 F.2d 228 (5th Cir. 1972). As in *Freedman*, the decedent (here, the husband) had signed a policy application naming his wife as beneficiary and owner. In *Parson*, however, the applicant was given an option between "Third Party Ownership" and a "'Regular' Beneficiary Program." The application expressly stated that, by selecting "Third Party Ownership," the applicant agreed that "all right and title to the insurance applied for shall vest in and every incident of ownership thereof may be exercised and enjoyed irrevocably without the consent of any other person by" the person named as owner. The court held that, under those facts, the policy application forced the husband to make "a conscious decision between irrevocably assigning all rights, title and every incident of ownership to [his wife], or expressly retaining ownership and naming a beneficiary." *Id.* at 231. By selecting the "Third Party

Ownership" option, the court held that the husband "performed a positive affirmative act . . . clearly reflect[ing] an intention to make a gift of his community share." *Id.* at 232.

The policy application in this case is significantly closer to the application in *Freedman* than that in *Parson*. Here, the application contains only a section headed "Owner (if other than Proposed Insured)," with a blank for entering the name and other personal information. We cannot say that by writing Patricia's name in this section and signing the application, Frank was put to a "conscious decision" or that he performed a "positive affirmative act" that "clearly reflected an intention to make a gift of his community share." *Id*; *see also Daubert v. United States*, 533 F. Supp. 66, 69 (W.D. Tex. 1981). We conclude, therefore, that the trial court did not err in characterizing the GE policy as community property.

Patricia also challenges the trial court's characterization of two other life insurance policies, issued by Keyport Life Insurance Company and Metropolitan Life Insurance Company. Patricia alleges that both policies are her separate property because both were purchased with funds Patricia inherited from her father's estate. However, Patricia admitted that the funds from her father's estate were transferred through more than one account and that "there were lapses in time between when it was purchased." Moreover, Patricia testified that she could not recall from which account she withdrew funds to pay for the single premiums on each of these policies. Once again, Patricia did not meet her burden of presenting clear and convincing evidence tracing her inherited funds into these two policies. Because Patricia failed to overcome the community property presumption, the trial court did not err in its characterization of these policies.

REIMBURSEMENT TO THE COMMUNITY

In her fourth issue, Patricia argues that the trial court abused its discretion by failing to order Frank to reimburse the community estate for his alleged waste of community assets. In her petition for divorce, Patricia alleged a cause of action against Frank for breach of fiduciary duty. However, as the Texas Supreme Court affirmed in *Schlueter v. Schlueter*, 975

S.W.2d 584 (Tex. 1998), a claim for the improper depletion of the community estate may not be brought as an independent cause of action, but instead is to be resolved by the trial court as part of the just and right division of the estate. *See id.* at 588. Patricia's claim was based, in part, on Frank's alleged waste of community funds either for his own benefit or for the benefit of others, including paramours. When such a wrong is found to exist, the trial court may either consider it as justification for an unequal division of the community estate, or the court may award a money judgment in order to achieve an equitable division of the estate. *See id.* As with any property division, our review is limited to determining whether the trial court clearly abused its discretion. *See Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987).

At trial, Patricia asserted that the community was entitled to reimbursement of approximately $932,000.00 for various acts of alleged waste by Frank.[7] Of this sum, approximately $292,000.00 was attributed to Frank's relationship with his girlfriend, Susan Downs. In response, Frank stipulated to spending approximately $21,000.00 of community funds on Downs but otherwise contested Patricia's claims of waste. In numerous findings of fact, the trial court found that, other than the stipulated $21,000.00, Frank did not waste any

[7] Patricia's brief states that she sought reimbursement of approximately $995,000.00. According to Patricia's September 2, 1997 Amended Trial Inventory and Appraisement, Patricia's waste allegations were broken down as follows:

- $86,214.64 given directly to Susan Downs;
- $41,518.19 spent on Downs;
- $949.61 spent on long-distance phone calls to Downs;
- $34,666.60 in unaccounted cash withdrawals from ATMs;
- $75,233.66, constituting one-half of funds spent on rent, utilities and food while Frank was living with Downs;
- $300,000.00 for Frank's failure to gain employment from 1992 to 1997;
- $203,843.26 for unaccounted checks drawn on the Horizon Polymers account;
- $79,860.20 spent on hunting and fishing expenses;
- $13,997.56 spent to be with Downs while she lived in Rhode Island;
- $8,597.07 spent on liquor;
- $73,729.16 spent on travel with Downs;
- $3,599.03 for credit card finance charges incurred because of expenditures on Downs; and
- $9,824.22 spent on boating equipment and accessories.

community funds.[8] Moreover, the court found that Frank's $21,000.00 expenditure was offset

[8] The trial court made the following findings of fact relating to Patricia's various claims of waste:

17) The Court finds that there was no wasting of community funds by Husband by giving funds directly to Susan Downs over and above the $21,000.00 stipulated by Husband;

18) The Court finds that there was no wasting by Husband of community funds by giving or spending community funds on Susan Downs;

19) The Court finds that there was no wasting by Husband of community funds by expenditure on long distance telephone calls to Susan Downs;

20) The Court finds that Husband did withdraw, periodically, cash monies from ATM machines however, the Court does not find that the withdrawals constituted any wasting of community funds;

21) The Court does not find that Husband wasted community funds by sharing some living expenses with Susan Downs;

22) The Court finds that there was no wasting of community funds as a result of the failure by Husband to be employed from September 1, 1992 through February 28, 1995. The Court finds that Husband was involved in pursuit of various business enterprises during said period of time and further finds that the failure of Husband to be employed was for a legitimate reason;

23) The Court does not find that any valid claim exists for reimbursement to the community estate nor for waste as a result of Husband taking cash monies from Horizon Polymers. The Court does find that the cash taken from Horizon Polymers was substantiated by Husband and the evidence shows that it was for legitimate business reasons;

24) The Court finds that Husband spent money on hunting and fishing however, does not find that any of said funds were wasted by Husband;

25) The Court finds that there was no wasting of community funds by Husband by spending money on or for the benefit of Susan Downs in Rhode Island;

26) The Court finds that there was no wasting by Husband of community funds by expenditure on liquor;

27) The Court finds that there was no wasting by Husband of community funds spent by Husband in traveling with Susan Downs;

28) The Court finds that there was no wasting by Husband as a result of using community funds to pay finance charges on credit cards;

29) The Court finds that there was no wasting by Husband by spending community funds in purchasing boating equipment and accessories;

. . .

39) The Court further finds that there is either no evidence or legally insufficient evidence to support any claim made by Wife that Husband wasted any community funds except for the $21,000.00 hereinabove referred to and stipulated by Husband as having been spent on his girlfriend, Susan Downs. The Court denies all claims for reimbursement to the community estate as a result of wasting of funds by Husband for the reason that this Court finds

by the "considerable sums of money" spent by Patricia on attorney's fees and CPA fees in the divorce proceedings. Thus, the trial court concluded that the community estate was not entitled to reimbursement.

Patricia's principal argument is that the trial court improperly shifted the burden onto her to prove that her use of community funds to develop her waste claims was not unfair to Frank. Patricia contends that Frank had the burden of proving that his disposition of community funds was not unfair to her rights, citing *Givens v. Girard Life Insurance Co. of America*, 480 S.W.2d 421 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). In *Givens*, the court held that the purchase of a life insurance policy with community funds for the benefit of an unrelated person is constructively fraudulent. As a result, the burden was on the beneficiary to justify the use of community funds. *Id*. at 426. The court noted, however, that the allegedly defrauded spouse must first establish her prima facie case by "proof that life insurance was purchased with community funds for the benefit of an unrelated person." *Id*. Thus, before the burden shifts to Frank, Patricia must first establish the amount of community funds that Frank either gave to or spent for the benefit of Downs.

At trial, Frank (1) admitted to giving $8,861.54 directly to Susan (Patricia claimed he had given her $86,214.64); (2) stipulated to having spent approximately $7,000.00 in expenses for Susan's benefit (compared to $41,518.19 claimed by Patricia); and (3) admitted to "likely" having spent $4,853.74 while in Susan's company (versus Patricia's claim of $13,997.56). Frank denied the remainder of these claims, as well as Patricia's entire claim that he spent $75,233.68 for Susan's benefit on rent, utilities, and food.[9] Based on the conflicting evidence,

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> that there is either no evidence or insufficient evidence to support any such claims by Wife[.]

[9] The $292,000 Patricia claims was "attributable" to Frank's relationship with Downs also includes claims for Frank's long-distance telephone calls and funds spent by Frank to travel with Downs. These expenditures may more properly be characterized as for Frank's own benefit, rather than for the benefit of another.

it was well within the trial court's discretion to conclude that, aside from the stipulated $21,000.00, there was no wasting of community funds by Frank for the benefit of Susan Downs.

The trial court was also within its discretion in deciding to offset the $21,000.00 that Frank admittedly gave to Downs against the increased community funds spent by Patricia during the trial. Patricia's claim for waste is to be resolved by the trial court in the context of its just and right division of the community estate. *Schlueter*, 975 S.W.2d at 588. Patricia has not demonstrated that the trial court's failure to reimburse the community the stipulated $21,000.00 resulted in an inequitable division of the estate. We may not disturb the trial court's division absent a clear abuse of discretion. *Stafford*, 726 S.W.2d at 16.

The remainder of Patricia's claims concern community funds that Frank allegedly spent for his own benefit. In the absence of fraud on the other spouse's rights, a spouse has the right to control and dispose of community property subject to his or her sole management. *Massey v. Massey*, 807 S.W.2d 391, 401 (Tex. App.—Houston [1st Dist.] 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993). The property subject to a spouse's sole management includes all property that spouse would have owned if single, including personal earnings. *See* TEX. FAM. CODE ANN. § 3.102(a) (Vernon 1998). Frank testified that he was the community's sole wage-earner, even after the parties separated. Although the managing spouse has the burden to show that his disposition of community property was "fair," *Massey*, 807 S.W.2d at 402, at trial, Frank responded to each of Patricia's claims of waste, either by asserting that the claimed expenditure was for the community's benefit or by providing some justification for the expense. As the finder of fact, the trial court was in the best position to determine credibility and to weigh the considerable evidence presented by both parties on these claims. We cannot conclude that the trial court abused its discretion in finding that Frank did not waste community funds. Patricia's fourth issue is overruled.

MICHAEL GAIDES' ESTATE

The Gaides' youngest son, Michael, died shortly after Patricia filed her petition for divorce. Throughout the divorce proceedings, Michael's estate was the subject of litigation pending in a Harris County probate court. In her fifth issue, Patricia contends that the trial court erred in ordering the division of Michael's estate without deference to the probate court's jurisdiction.

In its Final Decree of Divorce, the trial court awarded both parties:

> An undivided one-half (½) interest in and to all assets, existing or to be received in the future, and whether real property or personal property, including funds, that comprise or will compromise [sic] the Estate of Michael F. Gaides, also include [sic], but not to be limited to any and all receivables due to Patricia A. Gaides and/or Frank Carl Gaides and/or the estate of Michael F. Gaides and/or any business entity in which either or both parties or the estate of Michael F. Gaides have or have had an ownership interest[.]

The main thrust of Patricia's fifth issue deals with claims for reimbursement from Michael's estate for the following: (1) funds Patricia allegedly advanced from her separate estate for an emu farm owned by Michael; (2) expenses allegedly due to Professional Healthcare Services, a company owned by Patricia; and (3) other expenses allegedly due to the community estate. In the divorce decree, the trial court purported to divide these claims equally between Frank and Patricia. Patricia asserts that these claims are matters incident to Michael's estate, and therefore the trial court usurped the authority of the probate court handling that estate. We disagree.

Under the Texas Probate Code, a statutory probate court has the power to hear "all matters incident to an estate." TEX. PROB. CODE ANN. § 5(e) (Vernon Supp. 2000). The Probate Code also provides that where the probate court's jurisdiction is concurrent with that of a district court, "any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court." *Id*. § 5A(b). We initially note that, contrary to Patricia's argument, these two provisions do not divest the district courts

of jurisdiction to hear matters incident to an estate. *See Pullen v. Swanson*, 667 S.W.2d 359, 364 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Instead, as we stated in *Pullen*, Section 5A(b) of the Probate Code expresses "a policy of judicial self-restraint that once the jurisdiction of the statutory probate court has attached and that jurisdiction is adequate to grant the requested relief, the District Court should refrain from exercising its concurrent jurisdiction." *Id.*; *see also Green v. Watson*, 860 S.W.2d 238, 243 (Tex. App.—Austin 1993, no writ) (concluding that the Probate Code "give[s] the statutory probate courts . . . *dominant*, rather than exclusive, jurisdiction over matters incident to the estate once probate proceedings have been filed"). Patricia has failed to provide any explanation why it was error for the trial court to exercise its own jurisdiction.

Moreover, we conclude that the trial court's division of the proceeds from these reimbursement claims is not a matter "incident to the estate" under Section 5A(b) of the Probate Code. Patricia's argument is analogous to one rejected by the Austin Court of Appeals in *Falderbaum v. Lowe*, 964 S.W.2d 744 (Tex. App.—Austin 1998, no writ). In *Falderbaum*, the plaintiff had acquired a sizable default judgment. After discovering that the judgment debtor was an heir to an estate being administered by a Harris County probate court, the plaintiff filed a writ of garnishment in Travis County district court against the administratrix of the estate. On appeal from an order finding her in violation of the writ, the administratrix argued that because the garnishment action pertained to the distribution of funds from the estate, it was incident to the estate, and the district court should have refrained from exercising jurisdiction. The appellate court disagreed, finding that the writ of garnishment action was not a matter "incident to the estate." *Id.* at 747. The court concluded that a writ of garnishment "does not control when or how to distribute funds, nor how much should be distributed. It is rather a judicial order specifying *where* the funds should be directed once the amount due to the beneficiaries of the estate has been determined." *Id.*

Likewise, the divorce decree in this case does not decide the validity of any reimbursement claim, nor how much should be reimbursed. Rather, it directs that any claim

brought by Frank and/or Patricia, once it has been approved and paid, should be considered community property subject to an equal division between them. Accordingly, we find no error in the trial court's division of reimbursement claims against Michael's estate.[10]

CONCLUSION

A trial court is given wide discretion with respect to its duty to divide the community estate in a manner it deems just and right. In this case, the trial court heard eleven days of detailed testimony regarding property accumulated over thirty years of marriage. We find no basis for concluding the trial court abused its discretion in dividing the community estate. The trial court did not err in finding that Patricia Gaides failed to establish by clear and convincing evidence that the assets about which she complains were her separate property, nor did it err by exercising jurisdiction over reimbursement claims against the estate of the parties' son, Michael. We overrule all of Patricia's issues and affirm the judgment of the trial court.

/s/ J. Harvey Hudson
Justice

[10] Although we disagree with Patricia's argument regarding her claims for reimbursement from Michael's estate, the trial court's decree arguably goes further by purporting to divide "all assets, existing or to be received in the future, . . . that comprise or will [comprise] the Estate of Michael F. Gaides." This language seemingly constitutes a determination of how the estate itself should be distributed, which is a matter within the dominant jurisdiction of the probate court. In this case, however, the parties agree and the trial court found that Frank and Patricia are the sole beneficiaries of Michael's estate. We therefore conclude that even if the trial court somehow erred by exercising jurisdiction over matters within the probate court's dominant jurisdiction, any such error was harmless.

Judgment rendered and Opinion filed May 3, 2001.

Panel consists of Senior Chief Justice Murphy, Former Justice Amidei, and Justice Hudson.[*]

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[*] Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.