Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00536-CV

JO ANN FLORES, Appellant

V.

J.D. FLORES, JR., Appellee

On Appeal from the County Court No. 2
Galveston County, Texas
Trial Court Cause No. 98-FD-0463

O P I N I O N

Jo Ann Flores worked for Sears and held shares of Sears stock in her retirement plan prior to her marriage to J.D. Flores. During the marriage, her retirement account statement reflected an addition of shares of Allstate and Dean Witter. The couple filed for divorce, and the court treated the Dean Witter and Allstate shares as community property, despite some testimony that those shares were a spinoff of the Sears shares. In this appeal, we determine whether the evidence was factually sufficient to support the judgment. We affirm.

Background

Jo Ann and J.R. Flores were married in 1993. Jo Ann had worked for Sears since about 1975 and owned Sears stock prior to marriage. During the marriage, Jo Ann's retirement account statements from Sears reflected an addition of shares of Allstate and Dean Witter stock (sometimes referred to as "the stock").

In 1998, the couple filed for divorce. During discovery, J.R. filed an inventory and appraisement listing the Allstate and Dean Witter stock as community property. Jo Ann never filed her inventory. Jo Ann also failed to respond to other discovery matters in proper fashion. Prior to trial, which was to the bench, the court ruled that Jo Ann would be barred from introducing any documents supporting her separate property claim. Jo Ann does not challenge that ruling on appeal. Nonetheless, at trial, J.R. introduced parts of Jo Ann's Sears statements, and both of them testified about the stock. Though the statements are incomplete, approximately 84 shares of Dean Witter appeared in the 1993 statement and 276 shares of Allstate appeared in the 1995 statement. In vague fashion, Jo Ann testified that "Sears purchased" the Allstate and Dean Witter stock for her, and that those shares were distributed to her as "stock dividends" from a "spin-off" of Sears stock. Jo Ann did not elaborate on the implication of Sears "purchas[ing]" the stock for her, nor her characterization or meaning of the terms "stock dividends" or "spin-off."[1] J.R. testified that he had read and heard on the news that the stock came from "a divestiture" by Sears of those companies. Prior to announcing its judgment, the court stated that, although it appeared Jo Ann's accounts went through some transformations over the years, it did not have enough evidence to determine what exactly happened. The court then found the disputed shares were community property.

Discussion

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[1] J.R. objected to Jo Ann's testimony about how she acquired the stock because she did not have personal knowledge of the character of the transactions. The court sustained the objection but did not strike the testimony; therefore, to the extent it is probative, we may consider it on review. *See Parallax Corp. N.V. v. City of El Paso*, 910 S.W.2d 86, 90 (Tex. App.—El Paso 1995, writ denied) (merely urging an objection to testimony already given, absent motion to strike, is insufficient to prevent an appellate court's consideration of that testimony in a sufficiency review).

Jo Ann states "[t]his appeal presents the evidence for factual sufficiency review." In a factual sufficiency review, we view all of the evidence in favor of, and contrary to, the challenged finding and sustain the challenge only if we conclude that the finding is so against the overwhelming weight of the evidence as to be clearly wrong and unjust. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996).

As a general rule, property possessed by either spouse during, or upon dissolution of marriage is presumed to be community property, and a spouse must present clear and convincing evidence to establish that such property is separate property. TEX. FAM. CODE ANN. § 5.02. Clear and convincing evidence is the degree of proof that will produce in the mind of the trier of fact a firm belief or conviction about the allegations sought to be established. *Id*. at § 11.15(c); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994). To overcome this presumption, the spouse claiming property as separate property must trace and clearly identify the property claimed to be separate. *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975); *McElwee v. McElwee*, 911 S.W.2d 182, 189 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. *Hilliard v. Hilliard*, 725 S.W.2d 722, 723 (Tex. App.—Dallas 1985, no writ).

In addition to Jo Ann's and J.R.'s testimony, Jo Ann points to the significant amount of activity in the Sears account. Specifically, she shows that the cost basis for the Sears stock was lowered, which, she surmises, was to reflect the addition of the Dean Witter and Allstate stock. She states, "obviously, something took place" for Sears to have severely depreciated the cost basis to the Sears stock. From this, she essentially contends we can infer that the Dean Witter and Allstate stock was a mutation of the Sears stock.[2]

Jo Ann's counsel's efforts on appeal to extrapolate from and make sense of the partial statements are admirable but nonetheless fall short, because the underlying evidence

[2] It does not appear the trial court was provided an explanation of the various account statements that it could use in rendering her decision.

supporting Jo Ann's claim was incomplete, confusing, equivocal, and contradictory. For example, she made vague hearsay allusions to the stock as resulting from spinoffs and divestitures. But from the record we cannot clearly ascertain the true legal characterization of the transactions which gave rise to the Allstate and Dean Witter stock,[3] *a fortiori* the implications of the transactions for these parties under Texas marital property law. Nor are we provided a clear picture tracing Allstate and Dean Witter stock from the date of divorce back to whatever Sears stock Jo Ann owned at the date of the marriage. Further muddling the record is that some years' statements were not introduced at trial. Thus there were extended periods of missing activity in the account. In the partial statements that were introduced, there were many impenetrable transactions, numbers, and abbreviations that remained unexplained. Finally, the statements showed that the Sears stock paid dividends, which were community property, and were commingled with the alleged separate property, but were unaccounted for and unexplained at trial. Though we all might justifiably conclude that "obviously, something took place," this amorphous conclusion does not supplant Jo Ann's legal burden to prove by clear and convincing evidence – in a manner which can reasonably be ascertained by the court – that the Allstate and Dean Witter stock, as it existed in the account at the time of divorce, was her separate property.

Lastly, if we were to reverse and remand for a new trial, it would not be because Jo Ann's evidence was strong; to the contrary, in light of her heavy burden, the evidence was very weak. In our review, we look at all the evidence in the record, not what *might have been* in the record. Though the evidence might favor Jo Ann if she were given a chance to make her case a second time, we do not perceive a factual sufficiency review as one in which we order a new trial because the case might be better presented on remand. This is especially so where the trial court barred Jo Ann from presenting any evidence on her separate property claim due to her or her lawyer's discovery abuse. In that connection, if we were to order a new trial, we would, in essence, be unjustifiably reversing the trial court's unchallenged order excluding the

[3] There are a myriad of ways to show Allstate and Dean Witter were once part of Sears. None were provided to the trial court or to us.

necessary evidence in the first place.[4]

Accordingly, we overrule appellant's factual sufficiency issue. The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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[4] Jo Ann asserts that her case was poorly presented because of failings by trial counsel. J.R. disputes this and points out that Jo Ann went through many lawyers in this case and that the reasons for the lack of evidence were the result of Jo Ann being a difficult and uncooperative client. In any event, the responsibility for the sanctions order lies with Jo Ann's side and there is nothing to indicate that the discovery problems were caused by J.R.