Reversed and Remanded in Part; Affirmed in Part; and Memorandum Opinion filed July 6, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-01038-CV

IN THE MATTER OF THE MARRIAGE OF CAROLYN CLARK KENNEDY AND DONALD RAY CLARK, SR. AND IN THE INTEREST OF DONLD RAY CLARK, JR.

On Appeal from the 311th District Court
Harris County, Texas
Trial Court Cause No. 2012-30642

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

This appeal is brought by appellants Donald Ray Clark, Sr., and his son, Donald Ray Clark, Jr., complaining of a judgment entered in favor of appellee Carolyn Clark Kennedy. We affirm in part and reverse and remand in part.

FACTUAL AND PROCEDURAL BACKGROUND

Donald Sr. had four children, including Donald Jr., and they resided at 2511 7th Street, Galena Park, Texas. In May 1992, the Galena Park property was leased from Gideon L. Sanders, as lessor, to Donald Sr., as lessee, for a period of seven years, ending May 16, 1999. Following completion of the lease agreement, Sanders executed a quit-claim deed in favor of Donald Jr. on January 12, 2000. The record reflects Donald Jr. was sixteen at that time.

Carolyn and Donald Sr. were married in 1996. Carolyn and her three children moved into the Galena Park home. The underlying petition for divorce was filed by Carolyn on May 14, 2012. In the divorce, Carolyn claimed the Galena Park property as community property. Donald Sr. denied that characterization.

A bench trial was held on December 12, 2013. The trial court awarded title to the Galena Park property to Donald Sr. and set a lien against it for $15,000 to be paid to Carolyn. Donald Sr. and Carolyn were unable to obtain a loan on the Galena Park property. The trial court then granted Carolyn's motion for new trial.

Trial was set for May 18, 2015. Carolyn filed a Fourth Amended Petition and Donald Jr. then filed special exceptions and a counter-claim for trespass to try title. On the day of trial, the trial court ordered mediation. The next day, Carolyn and Donald Sr. reached a mediated settlement agreement ("MSA"). A hearing was held to enter judgment but Donald Jr. had not signed the MSA. The trial court declined to enter judgment on the MSA and trial was again set for June 22, 2015.

On June 10, 2015, Donald Sr. and Donald Jr. filed a motion for judgment on the MSA. A hearing was held on June 22, 2015, and judgment was entered after Donald Jr. signed the MSA. A bench trial immediately ensued on the ownership/character of the Galena Park property. On July 24, 2015, the trial court ruled the Galena Park property was owned by the community estate and Donald Jr. take nothing. The trial court ordered the property sold and the proceeds divided as community property. A final decree of

divorce was signed September 11, 2015. From that judgment, Donald Sr. and Donald Jr. (collectively "appellants") appeal raising eight issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appellants' first issue claims the trial court erred in failing to file written findings of fact and conclusions of law. Appellants timely filed a Request for Findings of Fact and Conclusions of Law on September 28, 2015. *See* Tex. R. Civ. P. 296. Appellants do not assert, and the record does not reflect, a notice of past due findings of fact and conclusions of law was filed. *See* Tex. R. Civ. P. 297. Accordingly, appellants' complaint is waived and issue one is overruled. *See Curtis v. Comm'n for Lawyer Discipline,* 20 S.W.3d 227, 232 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (citing *Las Vegas Pecan & Cattle Co. v. Zavala Cty.*, 682 S.W.2d 254, 255–56 (Tex. 1984)).

JUDGMENT ON THE MSA

In his second issue, appellants contend the trial court erred in failing to enter judgment on the MSA. The MSA does not address the Galena Park property. Incorporated into the MSA is the December 12, 2013, judgment with all references to the Galena Park property blacked out.

Appellants assert, as they did in the trial court, the Galena Park property was intentionally omitted because the parties agreed it was not marital property. Appellee, on the other hand, represented to the trial court that it was absent because an agreement could not be reached in mediation. The hearing record reflects the dispute was argued to the trial court.[1] The trial court ruled as follows:

> THE COURT: It's scratched out, Counsel. I don't know how you could possibly interpret that to mean that the property is addressed. If the property were addressed, it would address the property. It would spell it

[1] The MSA expressly provides that if a dispute arises with regard to its interpretation "prior to entry of the final order, then the parties agree to arbitrate such dispute with . . . the Mediator who facilitated this settlement, within 10 days of any party's written request to arbitrate such dispute." (Emphasis in the original.). The record does not reflects either party requested arbitration.

> out. It would tell me what — what the intent of the parties were. It would say that the parties are acknowledging it's — the individuals' separate property. It would say something. It's [sic] scratches it out, which means it doesn't say anything. So, that's what you-all are trying.

The trial court proceeded to conduct a bench trial on the ownership/characterization of the Galena Park property. As noted above, the trial court found it was community property and ordered its sale and a division of the proceeds between Carolyn and Donald Sr. Otherwise, judgment was entered in accordance with the MSA.

Any reference to the Galena Park property was removed from the prior judgment which was then incorporated into the MSA without any explanation for its omission. The record before this court contains no evidence of the reason for the removal other than the parties' differing accounts.[2] "An abuse of discretion does not exist if the trial court bases its decision on conflicting evidence and some evidence reasonably supports the trial court's decision. *See Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978)." *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 57 (Tex. 1998). We conclude the trial court could have properly determined the wholesale omission of the Galena Park property from the MSA left its disposition to be resolved by the trial court. In all other respects, judgment on the MSA was entered. Accordingly, issue two is overruled.

REQUEST FOR A JURY TRIAL

Appellants' third issue argues the trial court erred by refusing their request for a jury trial. The record reflects a jury trial was requested by appellants in 2012. Subsequently, appellants waived that request and proceeded to trial before the bench on December 12, 2013. A jury trial was again waived as part of the MSA. In their brief, appellants' assert that in a pre-trial bench conference on June 22, 2015, they asked for a jury trial and advised the trial court the jury fee had been paid. However, appellants concede their request was not recorded by the reporter and the record does not contain an

[2] An e-mail exchange with the mediator is attached to appellant's brief but is not in the appellate record and does not reflect it was filed in the trial court. We note, however, that it does not establish the parties' intent as to the omission of the Galena Park property from the MSA.

objection to the reporter's failure. *Nabelek v. Dist. Attorney of Harris Cty*., 290 S.W.3d 222, 231 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (failing to object to reporter's failure to record waives issues for review that rely on evidence found in reporter's record). Accordingly, nothing is preserved for our review *See* Tex. R. App. P. 33.1(a). Issue three is overruled.

CHARACTERIZATION OF THE GALENA PARK PROPERTY

Appellants' fourth issue contends the trial court mischaracterized the Galena Park property as community property because the quit-claim deed vested title to the Galena Park property in Donald Jr. Before addressing this argument we set forth the relevant evidence before the trial court.

The Evidence

The record reflects that the first page of the contract has printed, as Lessee, "DONALD RAY CLARK JR." However, it is signed "Donald Ray Clark Sr." and "JR." is scratched out and something else written in. On the left-hand side of the signature line is printed "The acknowledgement of Donald Ray Clark." Thus the contract contains the names of both Donald Jr. and Donald Sr. but the only signature, and thus the only person bound by the lease agreement, is that of Donald Sr. He testified that he entered into a lease agreement with Gideon Sanders for the Galena Park property. The lease agreement is dated May 7, 1992, began May 16, 1992, and ended May 16, 1999.

The quit-claim deed executed by Sanders on January 12, 2000, quit-claims "unto the said Donald Ray Clark, Jr., his heirs and assigns, all my right, title and interest in and to . . ." the Galena Park property. Donald Sr. testified it was intended for the title to be in Donald Jr.'s name, and Donald Jr. is the owner. Donald Sr. conceded the lease does not state that he signed it as a representative of Donald Jr. According to Donald Sr., he was only paying rent to Sanders, title to the property was in Sanders' name, and his son became the owner in 2000 upon execution of the quit-claim deed. Donald Sr. testified that he is not asking the court to award the property to him. Donald Jr. testified that he is

the owner of the Galena Park property and that he was asking the court to award the property to him.

On September 29, 2001, Donald Sr. and Carolyn executed a General Warranty Deed for the Galena Park property. The deed represents that "Donald Ray Clark . . . as Independent Executrix of the Estate herein-after called Grantor . . ." Donald Sr. denied the purpose of the deed was to correct title in his name rather than Donald Jr.'s. According to Donald Sr., the General Warranty Deed was executed to obtain a loan, not to correct title. He stated that he now understood the deed was fraudulent in that it represented he was the executrix of Donald Jr.'s estate. Donald Sr. testified the loan was for $39,000,[3] the Galena Park property was used as collateral, and he and Carolyn split the money. None of the money was given to Donald Jr. The loan was fully paid back by the beginning of 2015.

On October 10, 2005, Donald Sr. and Carolyn executed a home equity loan on the Galena Park property for $37,999.90. Then on December 16, 2011, Donald Sr., Donald Jr. and Carolyn executed a tax lien deed of trust on the Galena Park property. Donald Sr. testified the tax lien was taken to pay delinquent taxes on the home and he was still paying it back.

Carolyn testified that she was asking the court to award her the house. Alternatively, she was requesting the house be sold. Carolyn knew the taxes were an existing debt against the home. Carolyn testified that Donald Sr. was renting the home. When asked if she knew the ownership transferred to Donald Jr. in 2000, Carolyn replied, "Not to my knowledge."

Carolyn testified improvements were made to the home and Donald Sr. agreed that improvements were made during the marriage. According to Carolyn, she contributed at least $27,000. She stated that she had personal funds in the amount of $34,000 as an inheritance from her mother, and $20,000 from her ex-husband. Carolyn's testimony

[3] Donald Sr. also agreed the loan was for $39,500.

reveals that some, if not all, of the improvements were made before the marriage. The record does not reflect what improvements were made after the quit-claim deed was executed. Carolyn admitted that she never tried to obtain reimbursement from Sanders. The record does not reflect she sought reimbursement from Donald Jr. before the divorce suit was filed.

Carolyn recalled signing the General Warranty Deed. She said its purpose was the "statement that the house is mine and his." Carolyn denied the purpose was to get a loan. Carolyn further denied the deed was fraudulent although she admitted Donald Jr. was not dead, nor did she believe him to be dead.

Analysis

In reviewing whether the trial court erred in finding the Galena Park property was community property, we first determine if the trial court's finding is supported by clear and convincing evidence. *See Sharma v. Routh*, 302 S.W.3d 355, 360 (Tex. App.—Houston [14th Dist.] 2009, no pet.). If the trial court erred, we must next decide whether the error probably caused the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a)(1). "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 J.F.C.*, 96 S.W.3d 256, 264 (Tex. 2002). When the trial court has acted as factfinder, it determines the credibility of the evidence and the witnesses, the weight to give their testimony, and whether to accept or reject all or any part of their testimony. *Villalpando v. Villalpando,* 480 S.W.3d 801, 806 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

The record reflects that neither Donald Sr. nor Carolyn ever took title to the Galena Park property. Title transferred from Sanders to Donald Jr. through the quit-claim deed. *See F.J. Harrison & Co. v. Boring & Kennard*, 44 Tex. 255, 261–62 (1875) ("A quit claim or deed of release of all one's right, title, and interest purports to convey and does convey no more than the present interest of the grantor. . . ."). A year later, Donald Sr. and Carolyn executed the General Warranty Deed, without the signatures of either

Sanders or Donald Jr. Carolyn contends the deed was filed "to put the public on notice that [the property] was owned by him and Carolyn." In order to place the public on notice that they owned the property, however, there must be some evidence that they acquired ownership — there is none. We are aware of no authority that the filing of a deed by two parties who do not have title to real property will divest title from the title holder of record. The record does not reflect that Donald Sr. and Carolyn ever sought to quiet title or reform the deed.[4]

The fact that Donald Jr. was sixteen at the time of execution of the quit-claim deed was not a basis for the trial court to find the Galena Park property was community property.[5] Texas law does not restrict the ability of minors under the age of eighteen to own property. *See Johnson v. Morton*, 67 S.W. 790 (Tex. Civ. App. 1902) (minors granted property in a deed); *see also Milner v. McDaniel*, 36 S.W. 2d 992, 993 (Tex. 1931) (minor can take title to the homestead property unburdened by the claims of creditors of the decedent's estate except those specified by the Texas Constitution and Statute); *see generally Snyder v. Allstate Ins. Co.*, 485 S.W. 2d. 769 (Tex. 1972) (title of car in the name of the minor and the minor considered owner of car). Moreover, even if a minor were unable to take title to real property in Texas, the title would have remained in Sanders' name — it would not have transferred to Donald Sr. and/or Carolyn.

For these reasons, we conclude the trial court abused its discretion in characterizing the Galena Park property as community property. Appellants' fourth issue

[4] Quiet-title and deed-reformation claims are subject to a four-year statute of limitations. *Cosgrove v. Cade*, 468 S.W.3d 32, 35 (Tex. 2015) (deed reformation); *Poag v. Flories*, 317 S.W.3d 820, 825 (Tex. App.–Fort Worth 2010, pet. denied) (quiet title). Limitations, however, is an affirmative defense that is waived if not pleaded. *See* Tex. R. Civ. P. 94 (listing statute of limitations as affirmative defense that party "shall set forth affirmatively"); *Frazier v. Havens*, 102 S.W.3d 406, 411 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("A party waives the affirmative defense of statute of limitations if it is not pleaded or tried by consent.").

[5] Carolyn does not contend on appeal that Donald Jr. could not own the property because he was a minor.

is sustained. Because appellants' remaining issues would afford no greater relief, we do not address them.[6]

CONCLUSION

We reverse the judgment of the trial court that the Galena Park property was owned by the community estate and ordering it be sold and the proceeds divided as community property. We remand this cause to the trial court for consideration of Carolyn's other grounds for relief and Donald Jr.'s cross-claim. In all other respects, the judgment of the trial court is affirmed.

/s/ John Donovan
Justice

Panel consists of Justices Christopher, Jamison and Donovan.

[6] Issue five claims the trial court violated the inception of title rule while issue six argues the trial court intentionally interfered with a contract in ruling the property was community property. Appellants' seventh issue argues the trial court abused its discretion "in her obvious presumption" that Donald Jr. could not own the Galena Park property because he was a minor at the time of the lease agreement. In their eighth and final issue, appellants assert the trial court awarded a disproportionate amount of the community property to appellee.