NO. 05-19-01303-CV

In the Fifth Court of Appeals
at Dallas, Texas

Gail Corder Fischer ("A.W.E."),
Appellant

vs.

Clifford R. Fischer ("D.M.F.N.")
Appellee

On Appeal from the
254th Judicial District Court, Dallas County, Texas
(Special Judge Hon. Frances Harris and Hon. Ashley Wysocki)
Cause No. DF-18-11265

APPELLEE'S BRIEF IN RESPONSE TO APPELLANT'S REPLY BRIEF

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Record references used in this Brief

Clerk's Record	[Vol.]CR[p.#]
Petitioner's Exhibits	Px[#]
Respondent's Exhibits	Rx[#]
Joint Exhibits	Jx[#]
Reporter's Record	[Vol.]RR[#]
Supplemental Reporter's Record	Supp.RR[#]

Abbreviations Used in this Brief

Clifford R. Fischer	Cliff
Gail Corder Fischer	Gail
Clifford Fischer & Co., Fischer Management Services, Inc., and Fischer VM Holdings, Ltd., and their affiliates (sometimes referred to individually)	"The Fischer Companies" or "the Companies"
The Agreement to Convert Separate Property to Community Property and Other Post-Nuptial Contracts	The Conversion Agreement

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CLIFF'S RESPONSES TO ARGUMENTS IN GAIL'S REPLY BRIEF

1. Gail's Claim That Fischer Company Stock was Separate Property. On pp. 1-2 of Gail's Reply Brief she argues that the Trial Court could not order the Fischer Companies sold because they were separate property. Cliff originally owned the Fischer Companies as separate property, but the parties converted the Fischer Companies to community property excluding "any profits participation interest promised or awarded to Company employees in the past ...." [Jx1; 12RR19, Appellee's Brief, pp. 2-3] And the converted community property was subject to all debts, liabilities or obligations of the business. [Jx1, ¶ 4.1 & Schedule B] The Fischer Companies were part of the community estate. A court in a divorce is required to divide the community estate of the parties. Tex. Fam. Code § 7.001. Gail's argument is without merit.

2. The Post-Nuptial Agreement Does Not Provide For Sale of the Company. On p. 1-3 of Gail's Reply Brief she argues that the Conversion Agreement does not provide for a court-ordered sale of the Companies. Neither does it agree that there will not be a court-ordered sale. The exact manner in which the Court achieves a 50-50 division of the net community estate is not addressed by the Conversion Agreement. "The trial court has wide latitude to divide the marital estate in a manner that *the court* deems 'just and right.'" *LaFrensen v. LaFrensen*, 106

S.W.3d 876, 878 (Tex. App.--Dallas 2003, no pet.) (emphasis added). Tellingly, in the hearing on Gail's Motion for New Trial, Gail's attorney said: "And I agree neither Mr. Fischer nor Ms. Fischer should be required to work. We're not here trying to require anybody to work. We just want the company sold methodically.... *We agree to sell* but not to a highest bidder at a distressed price." (Emphasis added.) [10RR91-92] Gail's attorney suggested that the Companies be marketed, "then bring back whatever offers are made, if any, and let the Court then look at it." [10RR97] This is essentially what the Court ordered. See Paragraph 3 below. Additionally, Gail asked the Court to order a sale of the parties' Park Lane house by ordering it listed with an agent, and if not sold by 12-31-2019, for the agent to become a receiver to sell the property. [2RR26-27; 4RR26; Px5; 12RR260; Appellee's Brief p. 17] Gail cannot, at this point in the proceeding, argue that the Trial Court should not have ordered the Companies sold, when she told the Trial Court that she agreed to sell and when she encouraged the Court to order a sale of the parties' home.

3. <u>The Court Ordered the Companies Sold For the Highest Offer.</u> Gail argues that the Court should not have ordered the Companies sold for the highest offer. Reply Brief, pp. 3-4. She complains that the highest offer could differ from the three appraisals testified to by the parties's two experts and a third independent expert. The Supreme Court has defined "market value" "in terms of what the land would

bring in a transaction between a willing seller and a willing buyer," *City of Austin v. Cannizzo*, 267 S.W.2d 808, 812 (Tex. 1954), or the "amount that a willing buyer would actually pay to a willing seller," *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 183 (Tex. 2001). The Trial Court ordered that the Fischer Companies be sold for market value–as determined by the market rather than as estimated by three appraisers whose valuations came in at $30,494,700 [Rx53, 13RR296], or $50,522,000. [Px17, 12RR510], or $74,220,000 [Px12, 12RR323]. An independent Director valued the Companies at 3 to 3.5 times EBITDA, which applied to the numbers produced a value of $18 to $21 million. [7RR98-99; Rx 107, Rx 108; Appellee's Brief, p. 42] Gail characterizes the selling mechanism as a "distressed sale." There was no expert testimony suggesting that an orderly sale would be a distressed sale, so this is an unsubstantiated claim by Gail. Additionally, the Court ordered that the companies contract with MHT Partners to develop a offering memorandum and a marketing plan to ensure maximum effective competition between qualified buyers; identifying, screening and selecting prospective purchasers; coordinating due diligence investigations; evaluating offers; advising on strategies and tactics; and more. [CR2846-2854] The Court further provided that the Company should pursue the highest offer from qualified buyers. If either party has a problem with the sale process, they can return to court to ask for appropriate relief, including the appointment of a receiver. [CR

2775-2776] Gail is imagining a problem that does not exist, and if a problem does develop she can return to Court to have her opinions heard by a neutral party. This is exactly what Gail's attorney said Gail wanted in the Motion for New Trial hearing. See Paragraph 2 above. The sale process ordered by the Court was not an abuse of discretion. Apart from that, Gail can show no harm, since the sale process has not yet occurred and she has recourse to the court if she doesn't like where it leads.

4. Account Balances. Gail complains about error in valuing accounts as of the date of trial as opposed to an unspecified date prior to trial. Reply Brief, pp. 12-14. With regard to the Independent Bank accounts and two brokerage accounts complained about in Appellant's Brief at pp. 41-42, the Trial Court used balances reflected in the evidence put forth in trial. Other numbers are alleged in Gail's Appellant's Brief, but Gail does not point to evidence that the account balances at the time of trial were other than what the evidence at trial showed. The same is true of Crow Holdings and Pershing/Cros/BNY accounts, mentioned at pp. 32 of Appellant's Brief. The Trial Court divided the community estate based on the account balances proved at trial. The Court was required to use the account balances that were supported by evidence. Any complaint about prior expenditures are not a question of current balances at the time of trial; instead they are a question of reconstituting the community estate for fraud or waste committed at an

earlier time. Gail did not plead or prove that Cliff committed fraud or waste of community assets nor did she ask the Court to reconstitute the community estate pursuant to Tex. Fam. Code § 7.009. Gail is trying to present a unpled and unproved fraud or waste claim under the guise of a valuation dispute over ascertainable account balances, which it patently is not.

5. Change of Control Bonuses. Gail argues that the existence of change-of-control bonuses does not support a decision to sell the Companies because Cliff unilaterally agreed to these bonuses after the parties separated without her knowledge and approval. Reply Brief, pp. 5-6. The record shows otherwise. Gail admitted that she knew about the bonuses for years. She even directed the Companies' lawyer to add her name to Ted Uzelac's agreements. [Rx96, 13RR790 & 797; 4RR121-123; Appellee's Brief pp. 11-12] She also admitted that she was involved in finalizing Chris Joyner's agreement. [4RR101-104; Rx87 & Rx89; 13RR775-777; Appellee's Brief p. 12] She admitted that she was aware of Larry Teel's agreement before she signed the Conversion Agreement, which was subject to any profit-sharing agreements that had been promised. [4RR101-104, 118; Rx83, Rx87 & Rx89, 13RR763, 768 & 775; Appellee's Brief pp. 12-13] Gail also admitted that she knew about Jeff Kernochan's agreement before she signed the Conversion Agreement. [4RR84; Rx83, 13RR763; Appellee's Brief pp. 13-14] Gail's argument is spurious. Additionally, the impact of the bonus agreements on

the value of the community estate's interest was a valid factor for the Trial Court to consider, if in fact it was considered. We don't know because we have no findings of fact.

6. No Findings of Fact or Conclusions of Law. Gail claims that Cliff argued that findings of fact and conclusions of law were not requested. This is not inaccurate. Cliff argued that we have no findings and conclusions in this case, so "the trial court is presumed to have found facts in favor of its order if there is any probative evidence to support the order." *Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986); Appellee's Brief p. 34. Gail points to the Decree of Divorce as containing findings and conclusions. [Responsive Brief, p. 6] The Decree of Divorce itself does not constitute Rule 297 findings of fact and conclusions of law. Rule 299a expressly states that "[F]indings of fact shall not be recited in a judgment." In *Frommer v. Frommer*, 981 S.W.2d 811, 814 (Tex. App.--Houston [1st Dist.] 1998, pet. dism'd), the Court held that, "[w]hile the propriety of findings of fact and conclusions of law in judgments was once a matter of debate, in 1990 the Texas Supreme Court ended the debate once and for all." As a consequence, recitations contained in the decree are not considered to be Rule 297 findings. *Accord*, *Guridi v. Waller*, 98 S.W.3d 315, 317 (Tex. App.-- Houston [1st Dist.] 2003, no pet.); *Gonzalez v. Gonzalez*, No. 13-02-202-CV at *2 (Tex. App.--Corpus Christi July 18, 2003, no pet.) (memo. op.) ("Findings of fact recited in the judgment may not

be considered on appeal", and "[i]n the absence of findings of fact or conclusions of law, the trial court is presumed to have found facts to support its order if there is any probative evidence to support the order"). In this case, the Trial Court is presumed to have found facts in favor of its Decree if there is any probative evidence to support the Decree. There is abundant evidence supporting the Trial Court's Decree, as described in Appellee's Brief.

7. The Trial Court Did Not Divide Each Asset Equally. On pp. 7-8 Gail complains that the Trial Court did not give due regard to the rights of each party by awarding some asset to Gail and others to Cliff. Gail goes on to present factors she considers important, like that fact that G&C Capital Investments, LLC was named after both Gail and Cliff. Reply Brief p. 8. Gail also claims that the Trial Court arbitrarily awarded all of the Pershing/Crow/BYN brokerage account to Cliff and none to her. Gail appears to call anything she doesn't like "arbitrary." In actuality, the Trial Court was properly exercising its broad discretion in dividing the community estate.

8. Expenditures on the Ranch. On pp. 9-10 of her Reply Brief, Gail complains that the Trial Court did not add to the appraised value of the Ranch money that had been expended on construction, renovation, and equipment. However, Cliff made repairs to mitigate severe flood damage to a dam at the Ranch. [6RR59] Cliff also had a swimming pool and putting green constructed on the Ranch. These repairs

and improvements were included in the appraised value of the Ranch. [5RR55-59]. Gail was bound to the appraised value reached through the appraisal process described in the Conversion Agreement, and she actually listed that appraised value in her Sworn Inventory. Reply Brief, p. 10. This listing was a judicial admission by Gail that binds her on appeal. *Taylor v. Taylor*, No. 2-05-435-CV *2 n. 4 (Tex. App.–Fort Worth Aug. 31, 2007, pet. denied) (mem. op.) ("Appellate courts have given preclusive effect to admissions made in sworn inventories and appraisements filed with the trial court"); *Dutton v. Dutton*, 18 S.W.3d 849, 852 (Tex. App.--Eastland 2000, pet. denied) ("Jess filed a sworn inventory and appraisement listing the property as community property. That statement met the criteria set forth in *Griffin* and *Carr*, and it constituted a judicial admission"); *Tschirhart v. Tschirhart*, 876 S.W.2d 507, 509 n. 1 (Tex. App.--Austin 1994, no writ) ("Like pleadings, . . . , inventories may constitute judicial admissions"). To award Gail a money judgment above and beyond the appraised value of the land would amount to double recovery. Additionally, Gail's Proposed Division asked the Court to award the Ranch to Cliff at a value of $4,875,000. [Px8, 12RR274, line 7] This is exactly what the Court did. [13RR850] Gail's appellate complaint is precluded by waiver and by the doctrine of invited error. "[A] party cannot complain on appeal that the trial court took a specific action that the complaining party requested, a doctrine commonly referred to as 'the invited error' doctrine."

Tittizer v. Union Gas Corp., 171 S.W.3d 857, 862 (Tex. 2005). Gail cannot assert error in failing to award her a judgment for the cost of construction or improvements because that would be a waste claim and she did not plead or prove a claim for waste. See Appellee's Brief, pp. 52-53.

9. The High Peak Account. Gail argues that the Trial Court was arbitrary and did not give due regard the rights of the parties when it divided the High Peak Account 50-50. The Trial Court was bound to divide the net community estate 50-50, but it was not bound to divide each asset 50-50, nor was it bound by either party's recommendations, even where those recommendations overlap. Additionally, Gail can show no harm where the Court divides a community property asset 50-50, which cannot possibly disadvantage either spouse.

10. The Fees Awarded to the Companies. Gail joined the Fischer Companies as parties to the divorce. She contested the validity of the profits participation agreements. The Companies filed a counterclaim for declaratory judgment that the profits participation agreements, including annual bonuses and change-of-control bonuses, with four key employees were valid obligations of the Companies. Before trial, all parties agreed that the question of attorneys' fees would be submitted to the Court by affidavit. [Supp.RR49] On the second day of trial, Gail threw in the towel and stipulated that the agreements were enforceable. [4RR6-15] See App. 1. She even agreed to a declaratory judgment

to that effect. [4RR77] See Agreed Judgment, App. 2. Gail agreed for a second time that the question of the Companies recovering attorneys' fees would be decided based on affidavits to be filed. [4RR10-11] The Declaratory Judgment reserved the issue of attorney's fees "for a future determination." [Agreed Judgment, p.2, App. 2] Fees were awarded to the Companies in the Divorce Decree. [CR2777-78] The Companies' fees are recoverable under the Texas Declaratory Judgments Act. Tex. Civ. Prac. & Rem. Code § 37.009. The award of fees under the TDJA is reviewed under an abuse of discretion standard. *Oake v. Collin Cty.*, 692 S.W.2d 454, 455 (Tex. 1985). Gail joined the Companies into the divorce, tried to nullify the key employees' contracts, forced the Companies to hire a lawyer, generally denied the Companies' counter-claim, and then gave up on the second day of trial. The Court acted well within its discretion to award the Companies a judgment against Gail for their attorneys' fees. Gail's suggestion that Cliff should be required to pay half of the Companies' fees when he did not sue them and they did not sue him has no merit. The award of fees was based on a provision in the Civil Practice and Remedies Code that permits a party to recover fees from the person they sue and who sues them. Cliff neither sued, nor was sued by the Companies, and there was no basis to make him pay half of the Companies' fees incurred in defending against Gail's meritless claims that she abandoned during trial.

PRAYER

Gail Fischer has not shown preserved error, much less reversible error. Clifford Fischer prays that the Final Decree of Divorce be in all things affirmed, and for general relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this document was produced on a computer using Corel WordPerfect X8, and contains 2,563 words, as determined by the computer software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(i)(3). I also certify that the total aggregate of all includable words in both of Appellee's briefs is 17,477 of the 27,000 words allowed.

/s/ *Richard R. Orsinger*

CERTIFICATE OF SERVICE

I certify that a true copy of this Appellee's Brief in Response to Appellant's Reply Brief was served in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure on each party's lead counsel as follows:

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APPENDIX

App. 1	In-court stipulation resolving Declaratory Judgment claims (June 25, 2019)
App. 2	Agreed Judgment regarding Declaratory Judgment claims (June 25, 2019)