COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

MARK ALAN BLAIR,		§	No. 08-19-00304-CV
	Appellant,	§	Appeal from the
v.		§	112th Judicial District Court
RITA GAIL BLAIR,		§	of Reagan County, Texas
	Appellee.	§	(TC#1870)

O P I N I O N

Following a bench trial, the trial court entered a Final Decree of Divorce that, among other things, characterized as community property a tract of land that Appellant Mark Alan Blair (Husband) had purchased prior to marriage. The decree awarded Appellee Rita Gail Blair (Wife) a one-half interest in the property. We agree with Husband that the trial court erred by improperly divesting Husband of his separate property. We therefore reverse the trial court's judgment and remand the matter to the trial court to make a new distribution of the parties' community property, taking into consideration the proper classification of the property in question, and to further rule on Wife's claim for reimbursement for the expenditures and assets that were utilized in making improvements to Husband's separate property from both her separate estate and the community's estate.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties were married on October 26, 2002, and separated on June 17, 2015. Shortly after their separation, Wife filed a petition for divorce and Husband responded by filing a counterpetition; both parties sought the divorce on the ground that the other's "cruel treatment" rendered the marriage "insupportable." No children were borne of the marriage, and the primary issue in the trial court, as well as on appeal, pertains to the proper characterization of certain real property that the Husband had purchased prior to the marriage.

A. The Carter Road Properties

On January 10, 2001, Husband used his separate property to purchase a 60-acre parcel of land located at 2531 Carter Road in Springtown, Texas for $120,000. Husband borrowed $20,000 from his parents as a down payment on the parcel, and in exchange provided them with approximately three acres of the land and financed the remaining balance with a third-party lender.

According to Husband's testimony at trial, the previous owner had a "life estate" in a farmhouse that was located on the parcel, and Husband, who was in the construction business, began constructing his own house on a separate area on the parcel. It is unclear, however, how much construction took place prior to the marriage. After the parties were married, Wife used her separate property to purchase a trailer that was moved onto the property for the couple to reside in while construction of the residence continued. Approximately eight months later, the previous owner moved out of the farmhouse, and the couple moved into the farmhouse--which they later rented out--while completing construction of the house. For six or seven years, both Husband and Wife contributed their physical labor to the construction of the house and made various purchases for the construction during that time. Once the house was completed, they used it as their primary residence until their separation.

In the interim, the parties ran into financial problems, and Husband was unable to make timely payments on the original mortgage on the property. Facing the possibility of foreclosure, Husband arranged to borrow $200,000 from a company owned by his parents, which he used to pay off the original mortgage on the house. The record reflects that both Husband and Wife signed a promissory note on or about May 23, 2007, in which they purported to borrow $200,000 from the parents' company. However, the record also contains a "warranty deed" dated the same day as the promissory note, signed by Husband and Wife as "grantors," conveying to the parents' company all but the one-acre parcel on which the parties' home was located, in exchange for $200,000.[1] According to Husband, his parents required the warranty deed as a condition of the loan so that they could sell the property if needed due to his father's declining health. At some point during the marriage, the remaining one-acre parcel on which the couple's house was located was redesignated as 2525 Carter Road (with the balance of the original tract designated as 2531 Carter Road).

With one exception in his trial testimony that we discuss below, Husband claimed that both 2531 and 2525 Carter Road were his separate properties, as he purchased the original 60-acre parcel with separate property funds prior to the marriage. At trial, Wife argued that the property had been transformed into community property because: (1) community funds and efforts went into making improvements on the property; (2) the property was refinanced with a loan taken out in the names of both parties during the marriage; and (3) both parties were named on a series of homestead exemptions that were filed with the local taxing authority.

In the alternative, Wife brought a claim for reimbursement in the event that the trial court

[1] At trial, Husband acknowledged that despite granting his parents' company a deed to the property, he collected rent from tenants who occupied the farmhouse, and claimed the rent as income to the IRS. In addition, Husband acknowledged that he listed the property as an asset on a financial disclosure statement when applying for a loan from a third party.

characterized the Carter Road properties as Husband's separate property, asserting that both her separate estate and the community estate were entitled to be reimbursed for expenses and assets used to improve and benefit the property during the parties' marriage. Husband, however, argued at trial that her claim should be denied, asserting that Wife's separate estate had already been reimbursed for any expenses she contributed to the property's improvement, and that Wife had not presented sufficient evidence to support her claim that the community estate was entitled to any reimbursement.

B. The Final Decree and the Trial Court's Findings

Following trial, the court characterized both Carter Road properties as community property, giving each party a 50% interest in 2525 Carter Road, and awarding Husband a 100% interest in 2531 Carter Road. The trial court therefore did not address Wife's alternative claim for reimbursement for the improvements made to the property. In addition, the trial court divided numerous other items of both real and personal property belonging to the community, as well as the community's debts, and ordered each party to bear their own costs and attorney's fees. Husband thereafter filed a motion for new trial, which was overruled by operation of law, and this appeal followed.

II. ISSUES ON APPEAL

In Issue One, Husband contends that both Carter Road properties were his separate property, as they were purchased with separate property funds and that that the trial court erroneously divested him of his separate property when it awarded Wife 50% of the 2525 Carter Road property. In Issue Two, Husband contends that Wife failed to present sufficient evidence to support her claim for reimbursement. And in Issue Three, Husband contends that Wife failed to present sufficient evidence to support Wife's allegations that he engaged in adultery or drug

abuse.[2] Because we conclude that the trial court erred in characterizing the Carter Road properties as being community property, we agree with Husband that the trial court's judgment must be reversed to allow the trial court to make a new division of the parties' marital estate, and to consider Wife's reimbursement claim for the improvements and benefits she alleges were made to the properties from her separate estate and the community's estate. However, because the trial court made no finding of adultery or drug abuse, we find Husband's third issue to be irrelevant to our analysis.

III. Applicable Law and Standard of Review

We start with the long-standing principle that all property on hand at the dissolution of marriage is presumed to be community property. *See Long v. Long*, 234 S.W.3d 34, 37 (Tex.App.--El Paso 2007, pet. denied), *citing Tate v. Tate*, 55 S.W.3d 1, 4 (Tex.App.--El Paso 2000, no pet.); TEX.FAM.CODE ANN. § 3.003(a). However, this is a rebuttable presumption, and a spouse claiming assets as separate property may establish their separate character by clear and convincing evidence. *Id., citing* TEX.FAM.CODE ANN. § 3.003(b). 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. *See Viera v. Viera*, 331 S.W.3d 195, 206 (Tex.App.--El Paso 2011, no pet.), *citing* TEX.FAM.CODE ANN. § 101.007.

Generally, the characterization of property as separate or community is determined by its

[2] In his reply brief, Husband contends for the first time that "reversal is warranted" because the trial court made a "grossly disparate distribution of the parties' personal property" and because the trial court incorrectly awarded Wife various items he listed as his separate property in his inventory, including several guns and his personal jewelry. A party may not, however, raise new issues for the first time in a reply brief, and we therefore conclude that Husband did not properly preserve these issues for our review. *See, e.g., Watret v. Watret*, 623 S.W.3d 555, 563-64 (Tex.App.--El Paso 2021, no pet.) (recognizing that Rule 38.3 of the Texas Rules of Appellate Procedure restricts reply briefs to addressing only matters raised in appellee's brief and may not be utilized to present a new issue to the court).

character at inception, often referred to as the "inception of title" doctrine. *Viera*, 331 S.W.3d at 206; *see also Long*, 234 S.W.3d at 37, 39. Both the Texas Constitution and the Texas Family Code define separate property as property owned before marriage, or acquired during marriage by gift, devise, or descent. TEX.FAM.CODE ANN. § 3.002 (under the inception of title doctrine, property owned before marriage, or acquired during marriage by gift, devise or descent, is separate property); TEX. CONST. ART. XVI, § 15 ("All property, both real and personal, of a spouse owned or claimed before marriage, and that was acquired afterward by gift, devise or descent, shall be the separate property of that spouse . . . ."). It is therefore unconstitutional for a trial court to divest a party of their separate property by awarding any portion of it to the other party in a divorce proceeding. *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 141 (Tex. 1977); *see also Zagorski v. Zagorski*, 116 S.W.3d 309, 316 (Tex.App.--Houston [14th Dist.] 2003, pet. denied). Unlike other situations in which a trial court has mischaracterized property in a divorce proceeding, improperly divesting a party of their interest in separate property is reversible error as a matter of law without the need to conduct a harm analysis.[3] *See Rivas v. Rivas*, 452 S.W.3d 49, 55 (Tex.App.--El Paso 2014, no pet.), *citing Eggemeyer*, 554 S.W.2d at 140; *see also Rivera v. Hernandez*, 441 S.W.3d 413, 426 (Tex.App.--El Paso 2014, pet. denied).

IV. THE PROPER CHARACTERIZATION OF THE CARTER ROAD PROPERTIES

A. The Carter Road Properties Were Husband's Separate Property

The uncontroverted evidence at trial demonstrated that Husband purchased the 60-acre parcel located at 2531 Carter Road prior to the marriage with his separate property funds.

[3] The converse, however, is not true. When a trial court mischaracterizes community property as a spouse's separate property no divestiture has occurred, and we conduct a harm analysis to determine if the mischaracterization caused the trial court to abuse its discretion in its division of the community estate. *See Attaguile v. Attaguile*, 584 S.W.3d 163, 176-77 (Tex.App.--El Paso 2018, no pet.), *citing Rivera v. Hernandez*, 441 S.W.3d 413, 425-26 (Tex.App.--El Paso 2014, pet. denied); *Long v. Long*, 234 S.W.3d 34, 37 (Tex.App.--El Paso 2007, pet. denied).

Accordingly, under the inception of title doctrine, any interest that Husband had remaining on that parcel (that was not transferred to his parents' company) was his separate property. Additionally, contrary to Wife's position at trial, none of the events that occurred during the marriage transformed the property into a community asset. First, although the undisputed evidence established that improvements were made to the Carter Road property during the course of the marriage, it is well-established that any improvements made to a spouse's separate property during marriage, including the construction of a residence or other buildings thereon, are considered the spouse's separate property, and the community receives no "right, title or interest in or to the land." *See Burton v. Bell*, 380 S.W.2d 561, 565 (Tex. 1964); *see also Kite v. Kite*, No. 01-08-00643-CV, 2010 WL 1053014, at *2-4 (Tex.App.--Houston [1st Dist.] Mar. 11, 2010, no pet.) (mem. op.) (marital residence that was built on husband's separate property was his separate property), *citing Leighton v. Leighton*, 921 S.W.2d 365, 367 (Tex.App.--Houston [1st Dist.] 1996, no writ) (any improvements made on separate property, including residence, even if made with community funds, are considered separate property of land owner); *see also Perez v. Perez*, No. 13-96-049-CV, 1997 WL 1507337, at *2 (Tex.App.--Corpus Christi June 26, 1997, no writ) (house that was built on a spouse's separate property during course of marriage was properly characterized as the spouse's separate property). As the Texas Supreme Court has explained, this is so because the "improvements become attached to the soil, and cannot, in the nature of things, be divisible in specie when one of the joint owners has no interest in the land upon which they have been erected." *Burton*, 380 S.W.2d at 561.

In addition, the fact that the parties refinanced the property with a loan from Husband's parents during the marriage did not transform the property into a community asset. *See, e.g.*, *Howe v. Howe*, 551 S.W.3d 236, 255-56 (Tex.App.--El Paso 2018, no pet.) (where couple

borrowed funds to pay off mortgage on a house that was spouse's separate property, this did not transform house into community property); *In the Matter of the Marriage of Jordan*, 264 S.W.3d 850, 856 (Tex.App.--Waco 2008, no pet.) (fact that home that was spouse's separate property was refinanced during marriage did not alter its character); *Langston v. Langston*, 82 S.W.3d 686, 687-88 (Tex.App.--Eastland 2002, no pet.) (reversing where trial court ruled that a community property interest in real estate was created by the execution of a note evidencing a loan on the property); *Rivera*, 441 S.W.3d at 420 (the fact that husband and wife borrowed funds during marriage for which the real estate served as collateral had no effect on its characterization). In addition, the fact that the parties may have used community funds to reduce the principal amount of Husband's loans on the Carter Road properties during the marriage did not transform the property into community property. *See Attaguile v. Attaguile*, 584 S.W.3d 163, 176 (Tex.App.--El Paso 2018, no pet.) (recognizing that payments from one estate to reduce a loan on another estate's property does not transform the nature of the property, and instead only creates a potential claim for reimbursement).

Nor was the property transformed into community property by the fact that both spouses signed a homestead designation on the residence, as under Texas law, a homestead may be either community property or the separate property of one spouse; and because homestead rights are not dependent on ownership, a person is permitted to hold homestead rights in her spouse's separate property.[4] *See Rivera*, 441 S.W.3d at 420, *citing* TEX.FAM.CODE ANN. § 5.001; *see also Denmon v. Atlas Leasing, L.L.C.*, 285 S.W.3d 591, 595 (Tex.App.--Dallas 2009, no pet.).

In short, none of these actions transformed the Carter Road properties into a community

[4] Nothing in the record suggests that Husband ever put Wife's name on the title to the property, or that he otherwise intended to make a gift of the property to Wife, nor does Wife claim that any such gift was intended. *See generally Long*, 234 S.W.3d at 38-40 (discussing elements required to support a finding that a gift was intended).

asset, and the properties remained Husband's separate property, despite the improvements or benefits that were made to the property during the marriage. The flipside of this rule, however, is that to the extent that the community estate or Wife's separate property estate contributed to the improvements made to the property, or contributed to reducing the debt on the property, Wife was entitled to have the trial court consider her equitable claim for reimbursement for those contributions. *See* TEX.FAM.CODE ANN. § 3.402 (a)(3), (d) (a claim for reimbursement incudes the reduction of the principle amount of a debt secured by a lien on property owned before marriage, to the extent the debt existed at the time of marriage, and for funds expended by a marital estate for improvements to another marital estate); *see also Vallone v. Vallone*, 644 S.W.2d 455, 458-60 (Tex. 1982) (discussing equitable nature of claim for reimbursement that "obtains when the community estate in some way improves the separate estate of one of the spouses (or vice versa)."); *Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex. 1985) (where community expended funds to build a home on wife's separate property, community could bring equitable claim to be reimbursed for the amount that the expenditures enhanced the value of the property); *Burton*, 380 S.W.2d at 565 (wife who paid for improvements of husband's separate property was "relegated to her claim for reimbursement of her own money which she spent making such improvements to the extent that the value of [the property] was enhanced); *Perez*, 1997 WL 1507337, at *1 (recognizing spouse's right to bring equitable claim for reimbursement for community funds expended on construction of house on other spouse's separate property).

We therefore conclude that Husband is correct in contending that the Carter Road properties should have been characterized as his separate property.

B. Husband was not Judicially Estopped from Claiming 2525 Carter Road as his Separate Property

Wife does not dispute the merits of Husband's arguments regarding the proper

characterization of the Carter Road properties, but instead relies on the theory that Husband should be "judicially estopped" from arguing that 2525 Carter Road was not community property based on the following excerpt from his trial testimony:

> Q. (By Mr. Johnson) Now, you do agree that 300 North Main and 2525 are community properties?
>
> A. Negative -- oh, 2525?
>
> Q. Yes, sir.
>
> A. Yes, sir.
>
> A. And 300 Main Street.
>
> Q. Okay. The only one where you're -- where you're contested community property labeled on it is the 2531?
>
> A. Yes, sir.
>
> Q. All right.[5]

Wife contends that Husband's sworn testimony demonstrates that he took the position in the trial court that 2525 was community property, and that he is thereby "prohibited by principles of judicial estoppel" from changing this position on appeal. We disagree. The doctrine of judicial estoppel--which is often confused with the doctrine of judicial admissions--is not applicable here. Judicial estoppel bars a party who has successfully maintained a position in a *prior* judicial proceeding from later adopting an inconsistent position in a subsequent proceeding. *See Graves v. Tomlinson*, 329 S.W.3d 128, 138 (Tex.App.--Houston [14th Dist.] 2010, pet. denied); *see also Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 6 (Tex. 2008) (recognizing that the "doctrine of judicial estoppel precludes a party from adopting a position inconsistent with one that it maintained successfully in an earlier proceeding."), *quoting*, 2 Roy W. McDonald & Elaine G. Carlson, *Texas Civil Practice* § 9.51 (2d ed. 2003) (internal quotation

[5] We note that in the trial court both parties agreed that 300 North Main was community property.

marks omitted); *see also Peterson, Goldman & Villani, Inc. v. Ancor Holdings, L.P.*, 420 S.W.3d 281, 285 (Tex.App.--El Paso 2013, pet. denied) (same). In other words, it does not apply when a party takes a contradictory position in the *same* proceeding. *See Graves*, 329 S.W.3d at 137; *Pleasant Glade Assembly of God*, 264 S.W.3d at 6, 8 (recognizing that the doctrine of judicial estoppel does not apply to contradictory positions taken in the same proceeding). And in turn, "[a]n appeal in the same case is not a 'subsequent action' to which judicial estoppel applies." *See Graves*, 329 S.W.3d 128, 138. Accordingly, because Wife is contending that Husband is taking an inconsistent position on appeal from the one he took in the trial court, we conclude that the doctrine of judicial estoppel does not apply to this situation.

C. Husband did not Make a Judicial Admission that the Property Belonged to the Community

Moreover, even if we were to broadly construe Wife's argument as relying on the doctrine of judicial admissions--rather than the doctrine of judicial estoppel--we would not find that Husband made a judicial admission in the trial court that precluded him from arguing on appeal that 2525 Carter Road is his separate property. In contrast to the doctrine of judicial estoppel, the doctrine of judicial admissions applies when a party takes contradictory positions in the same proceeding, rather than in separate proceedings. *See Pleasant Glade Assembly of God*, 264 S.W.3d at 6 ("Contradictory positions taken in the same proceeding may raise issues of judicial admission but do not invoke the doctrine of judicial estoppel."). A judicial admission is a formal waiver of proof, typically found in pleadings or stipulations, which dispenses with the production of evidence on an issue and bars the admitting party from disputing it. *See In re Dillard Dep't Stores, Inc.*, 181 S.W.3d 370, 376 (Tex.App.--El Paso 2005, no pet.); *see also Texas Tax Sols., LLC v. City of El Paso*, 593 S.W.3d 903, 910 (Tex.App.--El Paso 2019, no pet.) ("A judicial admission not only relieves the opposing party of any burden to introduce evidence of the fact

admitted, it also bars the admitting party from disputing it"); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) ("A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact."). In contrast, a "party's testimonial declarations which are contrary to his position are quasi-admissions." *See Mendoza v. Fid. & Guar. Ins. Underwriters, Inc*., 606 S.W.2d 692, 694 (Tex. 1980); *see also Phillips v. Phillips*, 296 S.W.3d 656, 668 (Tex.App.--El Paso 2009, pet. denied) (recognizing distinction between true judicial admissions, which are formal waivers or proof usually found in pleadings or the stipulations of the parties, and a quasi-judicial admission, consisting of statements made by a party or his attorney during the course of a judicial proceeding). In general, quasi-admissions are "merely some evidence, and they are not conclusive upon the admitter." *Mendoza*, 606 S.W.2d at 694. Instead, the weight to be given such admissions is decided by the trier of fact. *Id.*; *see also Hennigan v. I.P. Petroleum Co., Inc.*, 858 S.W.2d 371, 372 (Tex. 1993) (explaining same distinction between true judicial admissions and quasi-judicial admissions).

However, a quasi-admission will be treated as a judicial admission if: "(1) the declaration was made during the course of a judicial proceeding; (2) the statement is contrary to an essential fact embraced in the declarant's theory of recovery or defense; (3) the statement is deliberate, clear, and unequivocal; (4) giving conclusive effect to the declaration will be consistent with public policy; and (5) the statement is not destructive of the opposing party's theory of recovery." *Phillips*, 296 S.W.3d at 668; *see also In re Dillard Dep't Stores, Inc.*, 181 S.W.3d at 376; *Texas Tax Sols., LLC.*, 593 S.W.3d at 910. Importantly, if it appears that a party's statement was not deliberate, and was instead made as the result of a mistake it will not rise to the level of a judicial admission. *See Mendoza*, 606 S.W.2d at 695 (concluding that party's opinion testimony was not

so clear and unequivocal as to constitute a judicial admission where the "possibility of a mistake has not been eliminated."); *U.S. Fid. & Guar. Co. v. Carr*, 242 S.W.2d 224, 228-30 (Tex.App.--San Antonio 1951, writ ref'd) (court declined to categorize testimony as a judicial admission where the "hypothesis of mistake was not eliminated."); *In re Dillard Dep't Stores, Inc.*, 181 S.W.3d at 376 (statements made by a party or counsel in the course of judicial proceedings, which are not based on personal knowledge or are made by mistake or based upon a mistaken belief of the facts are not considered judicial admissions). Further, statements made in response to confusing or poorly-worded questions may not be considered judicial admissions. *See Villarreal v. Guerra*, 446 S.W.3d 404, 412 (Tex.App.--San Antonio 2014, pet. denied) (party's statements at trial did not qualify as judicial admissions where they were not deliberate, clear, and unequivocal, and were made in part in response to questions that were "poorly-phrased and confusing"); *Hennigan*, 858 S.W.2d at 372 (concluding that party did not make a judicial admission in her deposition testimony, where she claimed she was confused in responding to deposition questions).

Here, we cannot eliminate the possibility that Husband's testimony to the effect that 2525 Carter Road was community property was made as the result of either mistake or confusion. As set forth above, the above-referenced excerpt from Husband's testimony began with Wife's attorney asking Husband a compound question regarding whether he "agreed" that two separate properties, including 300 North Main (another house that both parties had earlier agreed was community property) and 2525 Carter Road were community property.[6] Clearly confused by the question, Husband initially responded in the negative, but after asking for clarification, he seemingly agreed with Wife's attorney that he believed both properties were community property,

[6] Compound questions can be inherently confusing to witnesses and to the trier of fact. *See, e.g., Hodge v. Ellis*, 268 S.W.2d 275, 290 (Tex.App.--Fort Worth 1954), *judgment aff'd in part, rev'd in part on other grounds*, 277 S.W.2d 900 (Tex. 1955) (recognizing that a question that combines two or more distinct inquiries is likely to be confusing to the witness and misleading to the jury).

and he also agreed with opposing counsel's statement that he was only claiming 2531 Carter Road as his separate property. As explained above, however, 2531 Carter Road originally encompassed the parcel located at 2525 Carter Road, and we cannot eliminate the possibility that Husband may have been confused when he claimed that 2531 Carter Road was his only separate property. Moreover, later in his testimony, Husband clarified that he was claiming both Carter Road properties as his separate property, as reflected in his previously-filed Inventory and Appraisement. As well, in closing arguments, Husband's attorney asserted that both properties should be characterized as his separate property. And finally, Husband maintained that 2525 Carter Road should be characterized as his separate property in his proposed findings of fact and conclusions of law. In short, Husband was otherwise consistent in maintaining his position that both Carter Road properties were his separate property, thereby suggesting that the brief and isolated excerpt from his testimony in which he stated otherwise resulted from a mistake or confusion. We therefore decline to find that Husband made a judicial admission that 2525 Carter Road was community property.

D. The Need for a New Division of the Marital Estate

Having found that the trial court mischaracterized the Carter Road properties as community property and erroneously divested Husband of his interest in 2525 Carter Road by awarding a 50% interest to Wife, we are required to reverse and remand the entire matter to the trial court for a retrial on the division of the marital estate. *See Rivas*, 452 S.W.3d at 55, 57; *see also Jacobs v. Jacobs*, 687 S.W.2d 731, 733 (Tex. 1985). ("[o]nce reversible error affecting the 'just and right' division of the community estate is found, the court of appeals must remand the entire community estate for a new division."); *In re Marriage of Case*, 28 S.W.3d 154, 161 (Tex.App.--Texarkana 2000, no pet.) (when a court mischaracterizes separate property as community property, and the

mischaracterized property has value that would have affected the trial court's just and right division, the appellate court must remand the entire community estate to the trial court for a just and right division of the properly characterized community property).

Husband's Issue One is sustained.

V. WIFE'S UNRESOLVED CLAIM FOR REIMBURSEMENT

In his second issue on appeal, Husband contends that there was insufficient evidence to support the Wife's claims for reimbursement for the contributions her separate estate and the community estate made to improve and benefit the Carter Road properties. In particular, Husband asserts that the undisputed evidence demonstrates that Wife had already been reimbursed for any such contributions, or in the alternative, that she failed to meet her burden of establishing the amount of the contributions, as required to support her claim for reimbursement. In response, Wife correctly points out that the trial court did not address the issue of reimbursement, as the trial court characterized the Carter Road properties as community property and divided the properties accordingly, thereby making it unnecessary for the court to address her claim for reimbursement. However, because we have found that the properties should have been characterized as Husband's separate property, Wife's claim for reimbursement must necessarily be decided, albeit not in this court.

A claim for reimbursement is purely an equitable claim and requires a court to look at all facts and circumstances to determine what is fair, just, and equitable in resolving the claim. *Kimsey v. Kimsey*, 965 S.W.2d 690, 700 (Tex.App.--El Paso 1998, pet. denied), *citing Penick v. Penick*, 783 S.W.2d 194, 197, 198 (Tex. 1988); *see also Richardson v. Richardson*, 424 S.W.3d 691, 700 (Tex.App.--El Paso 2014, no pet.). And because resolving a claim for reimbursement is "not just a balancing of the ledgers between competing marital estates," a trial court has broad

discretion in applying equitable principles to value such a claim. *Kimsey*, 965 S.W.2d at 700-701; *see also Richardson*, 424 S.W.3d at 700 (recognizing that a trial court's discretion in evaluating a reimbursement claim is as broad as the discretion exercised by a trial court in making a just and proper division of the community estate).

Accordingly, to the extent that Husband is asking us to make a ruling on Wife's claim for reimbursement for the first time on appeal, we decline to do so, and we instead leave it to the trial court to resolve Wife's claim for reimbursement on remand.

Husband's Issue Two is Overruled.

VI. WIFE'S CLAIMS OF ADULTERY AND DRUG USE

In Issue Three, Husband contends that there was insufficient evidence to support Wife's claim that Husband was at "fault" in the dissolution of the marriage, and in particular, he argues that there was insufficient evidence to support her claim that he was guilty of any "cruel treatment," adultery, or drug abuse. Wife's petition sought a divorce on the ground that the marriage had become "insupportable" due to Husband's "cruel treatment," but she did not seek the divorce on the grounds of either adultery or drug abuse. And while Wife testified at trial that Husband had engaged in adultery and drug use, there is no indication that the trial court took her testimony into consideration in granting the divorce, or in making its division of the parties' property. To the contrary, the trial court stated in its judgment that it was granting the divorce on the grounds of "insupportability," without making a finding that either party was at fault in the breakup of the marriage, and without making any findings of cruel treatment, adultery or drug use. Nor was the trial court required to make any such finding of fault on the part of either party, as Texas law recognizes the concept of a no-fault divorce and allows a trial court to grant a divorce on the basis of "insupportability," as the trial court herein did. *See* TEX.FAM.CODE ANN. § 6.001 (statutory

ground for no-fault divorce); *see also Newberry v. Newberry*, 351 S.W.3d 552, 557 (Tex.App.--El Paso 2011, no pet.) (recognizing the concept of no-fault divorces in Texas).

Accordingly, because the trial court did not make any findings of fault in its decree of divorce, Husband's argument that the trial court erred in this regard is without merit.

Husband's Issue Three is overruled.

VII. WIFE'S REQUEST FOR SANCTIONS

Finally, we consider Wife's "motion" seeking to impose sanctions for Husband's filing of a frivolous appeal. Wife relies on Rule 52.11 of the Texas Rules of Appellate Procedure for the issuance of sanctions. That Rule, however, only applies to original proceedings filed in the courts of appeal and in the supreme court, and does not apply to cases, such as this, when a party is appealing from a trial court's judgment. TEX.R.APP.P. 52.11 (providing that a court may on motion of a party or on its own motion, impose sanctions on a party who is not acting in good faith by filing an original petition that is groundless, filed for purposes of delay, or contains factual misstatements or misleading information). Instead, Rule 45 governs situations in which a party has filed a frivolous appeal, and provides that if a court of appeals determines that an "appeal is frivolous, it may--on motion of any party or on its own initiative, after notice and a reasonable opportunity for response--award each prevailing party just damages." TEX.R.APP.P. 45.

Even if we were to broadly construe Wife's motion to be a request for damages under Rule 45, we would not find that any such damages were warranted, as we have sustained Husband's first issue, and therefore, his appeal cannot be considered frivolous.[7] *See Woody v. Woody*, 429

[7] Wife also contends that Husband engaged in various pleading and discovery violations in the trial court that would warrant the imposition of sanctions against him. Wife, however, cites no authority for the proposition that an appellate court may impose sanctions for violations occurring in the trial court for the first time on appeal, nor are we aware of any. To the contrary, Wife should have addressed those violations to the trial court in the first instance. *See generally* TEX.R.CIV.P. 215.1 (motions for sanctions based on discovery abuses must be addressed to the court in

S.W.3d 792, 800 (Tex.App.--Houston [14th Dist.] 2014, no pet.) (rejecting wife's claim that appeal was frivolous, where court of appeals sustained one of husband's issues, thereby necessitating a reversal of a portion of the trial court's judgment and remand for further proceedings).

We therefore deny Wife's motion.

VIII. CONCLUSION

Although we sustain the trial court's dissolution of the parties' marriage on the grounds of insupportability, we conclude that the trial court erred in characterizing the Carter Road properties as being community property. We therefore reverse the trial court's judgment with regard to its property division, and we remand to the trial court for a retrial to allow the trial court to make a new division of the parties' marital estate, taking into consideration the proper characterization of the properties, and to further consider Wife's claims for reimbursement.

JEFF ALLEY, Justice

November 19, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.

which the matter is pending); *see also In re A.W.P.*, 200 S.W.3d 242, 246 (Tex.App.--Dallas 2006, no pet.) (motions seeking sanctions for filing frivolous trial court pleadings must be addressed by the trial court in the first instance, and such sanctions may not be requested for the first time in court of appeals).