

DISMISS; and Opinion Filed February 5, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-14-00585-CV

IN THE INTEREST OF S.B.H., A CHILD

KHALA DHARMA, Appellant

V.

DERRICK J. HAHN, Appellee

**On Appeal from the 254th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-10-13791**

MEMORANDUM OPINION

Before Justices Fillmore, Myers, and Whitehill
Opinion by Justice Fillmore

The trial court rendered a final decree of divorce dissolving the marriage of appellant Khala Dharma and appellee Derrick J. Hahn, establishing custody of the parties' child, and dividing their property. In two issues, Dharma complains of the trial court's division of property and its failure to grant the divorce on the ground of adultery. Hahn responds that Dharma is estopped from appealing the property division because she accepted the benefits of the divorce decree. Hahn also argues the trial court acted within its discretion in granting the divorce on the ground of insupportability. Because we conclude that Dharma accepted the benefits of the divorce decree, we dismiss her appeal of the trial court's property division as moot. In all other respects, we affirm the trial court's judgment.

BACKGROUND

Dharma and Hahn were married in February 1999. Dharma is a medical doctor. Hahn is an attorney. During the marriage, the parties created two entities through which they practiced their respective professions. Female Specialty Care, Inc. (“FSC”) was created for Dharma’s anesthesiology, obstetrics, and gynecology practice. The Hahn Law Firm (“HLF”) was created for Hahn’s law practice. The parties also created Southwest Double D Ranch, LP (“SWDD”), a real estate partnership, in November 2000. SWDD’s general partner was Southwest Double D Management, LLC (“the LLC”), owned equally by Hahn and Dharma. The LLC owned 1% of SWDD; Dharma owned the remaining 99% as a limited partner. The parties contributed both separate and community property to SWDD during the marriage. SWDD was the parties’ largest asset.

In 2010, Hahn filed a petition for divorce. Dharma filed a counter-petition. In the course of the proceedings, SWDD, HLF, FSC, and Hahn’s son from a previous marriage were also made parties to the litigation. Disputed issues were tried before the court in 2012. Both Hahn and Dharma offered expert testimony regarding a proposed property division. Hahn’s expert testified that FSC’s value was \$742,000. Dharma’s experts originally concluded that FSC’s value was \$511,000, but later opined in a revised report that FSC’s value was \$59,000. Hahn’s expert valued a 99% interest in SWDD at \$2,240,000, and a 100% interest in the LLC at \$30,000. Dharma’s experts valued a 99% interest in SWDD at \$2,278,730, and a 100% interest in the LLC at \$23,017. Dharma’s experts also opined that Dharma’s separate property interest in SWDD was 85.92% of the 99% limited partnership interest.

At the end of the trial, on March 9, 2012, the trial court granted the divorce and took all of the custody¹ and property division issues under advisement. In a written decision dated June 5, 2012, the trial court divided the community property, confirmed each party's separate property, and resolved claims for breach of fiduciary duty, fraud, and waste. After additional hearings on the parties' post-trial motions, the trial court signed additional written decisions on March 27, 2013, June 3, 2013, and January 20, 2014. The trial court rendered a final decree of divorce on February 14, 2014.

In the final decree, the trial court's award to Dharma from the community included:

- a 100% interest in FSC;
- "100% of the community interest (14.08% interest in the limited partnership)" in SWDD, which the trial court valued at \$224,350.15;
- a 100% interest in the LLC, which the trial court valued at \$24,200.

Correspondingly, the trial court awarded Hahn:

- "a judgment of \$112,175.07 for a 7.04% interest (one-half of the community estate's 14.08% interest in the limited partnership)" in SWDD, and an equitable lien on SWDD until the entire judgment, plus interest, is paid in full, and
- a judgment of \$12,100.00 for Hahn's 50% community property interest in the LLC, secured by an equitable lien on the LLC.

Hahn also was awarded the family homestead in Combine, Texas, and forty additional acres of real property in Combine. Hahn's expert valued these properties at \$1,130,000 and \$160,000, respectively.²

The trial court also ordered that "the community estate is entitled to reimbursement from [Dharma's] separate estate in the total amount of \$802,404.00 and that [Hahn] is entitled to a

¹ None of the trial court's rulings relating to the parties' child are challenged in this appeal.

² On both properties awarded to Hahn, the trial court imposed "an encumbrance of owelty of partition against the entirety of the property to secure the payment of the debt resulting from the award." The decree identifies these debts as \$160,113 owed by Hahn to Dharma resulting from the award of the homestead, and \$86,863 owed by Hahn to Dharma resulting from the award of the forty acres.

judgment of \$401,202.00 which is one-half of the total amount of \$802,404.00.” The trial court granted Hahn an equitable lien on SWDD to secure this judgment.

The decree confirmed as Dharma’s separate property an 85.92% interest in SWDD, described as “85.92% of the 99% interest of the limited partnership.” The court found the value of the 85.92% separate property interest in SWDD to be \$1,593,396.00 “after the community cash contributions are removed from [SWDD] and restored to the community estate.”

The decree also reflects the trial court’s division of the parties’ numerous retirement accounts, annuities, bank accounts, insurance policies, motor vehicles, airplanes, and other personal property. In addition, the trial court confirmed the parties’ separate property and resolved the claims for breach of fiduciary duty, fraud, waste, and conspiracy asserted by Dharma, FSC, and SWDD against Hahn and his son.

Neither party requested findings of fact and conclusions of law regarding the trial court’s property division, and the trial court made none.

In a post-trial hearing, Hahn offered evidence that in 2013, Dharma sold at least 85% of her interest in FSC in exchange for forgiveness of a \$90,000 debt. Hahn also offered evidence that in January 2014, Dharma encumbered property owned by SWDD to secure several promissory notes by which SWDD borrowed over \$500,000 from Dharma’s sisters.

Dharma timely filed her motion for new trial, which was heard and denied by the trial court. This appeal followed.

DISCUSSION

A. Property division

In her first issue Dharma contends that the trial court’s judgment erroneously divested her of “between \$890,269.48 and \$1,118,594 of her separate property.” She makes four specific complaints. Two of the complaints relate to the trial court’s rulings regarding the parties’

interests in SWDD. The other two complaints relate to the trial court's treatment of an annuity and the forty acres of real property in Combine. Hahn responds that Dharma's appeal should be dismissed under the acceptance of benefits doctrine.

Under the acceptance of benefits doctrine, a party "cannot treat a judgment as both right and wrong, and if he has voluntarily accepted the benefits of a judgment, he cannot afterward prosecute an appeal therefrom." *Tex. State Bank v. Amaro*, 87 S.W.3d 538, 544 (Tex. 2002) (quoting *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002, 1004 (1950)) (op. on reh'g). The doctrine commonly arises in divorce cases when a former spouse accepts certain assets awarded in the judgment and seeks to appeal the remainder of the judgment. *In re M.A.H.*, 365 S.W.3d 814, 818 (Tex. App.—Dallas 2012, no pet.). When the doctrine applies, an appeal is rendered moot, and the proper disposition is dismissal. *Harlow Land Co., Ltd. v. City of Melissa*, 314 S.W.3d 713, 716–17 (Tex. App.—Dallas 2010, no pet.).

Two narrow exceptions permit an appellant to avoid the acceptance of benefits doctrine. *F.M.G.W. v. D.S.W.*, 402 S.W.3d 329, 332 (Tex. App.—El Paso 2013, no pet.). The doctrine does not apply when: (1) acceptance of the benefits is the result of financial duress or other economic circumstances; or (2) the reversal of the judgment on the grounds appealed cannot possibly affect an appellant's right to the benefits accepted under the judgment. *Id.*

The appellee bears the burden of proving the appellant is estopped from challenging the judgment by appeal. *In re M.A.H.*, 365 S.W.3d at 818. The appellant has the burden of establishing the applicability of an exception to the doctrine. *F.M.G.W.*, 402 S.W.3d at 332.

Hahn established that Dharma sold FSC and encumbered SWDD's assets. At a post-trial hearing, Hahn introduced evidence that in January, 2014, Dharma signed four deeds of trust on behalf of SWDD as borrower, securing loans from her sisters in an aggregate amount exceeding \$500,000. Hahn also introduced evidence that in two transactions in 2013, Dharma sold FSC in

exchange for forgiveness of a \$90,000 debt. Dharma does not contest that these transactions occurred.

The record reflects that these transactions did not affect all of the property awarded to Dharma under the decree. In addition to FSC and SWDD, the decree awarded Dharma over \$1 million in life insurance policies, annuities, and retirement funds, as well as over \$20,000 in several bank accounts. Nonetheless, she sold an asset worth as much as \$742,000 in return for forgiveness of a debt. And she encumbered the largest single asset awarded to her, valued at over \$2 million, to secure loans exceeding \$500,000. Although Hahn's 7.04% interest in SWDD was comparatively small, the decree granted him judgments exceeding \$100,000 for his interest, secured by equitable liens on SWDD. On this record, Dharma exercised control over substantial assets she received in the trial court's property division. *See Morgan v. Morgan*, 725 S.W.2d 485, 487 (Tex. App.—Austin 1987, no writ) (“Having accepted the fruits of the decree, appellant is estopped to prosecute this appeal.”). We conclude Hahn has met his burden of establishing that Dharma accepted the benefits of the divorce decree. *See, e.g., Tomsu v. Tomsu*, 381 S.W.3d 715, 717 (Tex. App.—Beaumont 2012, no pet.) (husband accepted benefits of divorce decree by depositing check in his account that in absence of decree would have been community property, and by depositing check from wife into his account); *see also Morgan*, 725 S.W.2d at 486 (appellant accepted benefits by cashing insurance policy worth \$97,343.00 awarded him in divorce decree and using proceeds to purchase new office).

Next we consider whether Dharma has met her burden to establish an exception to the doctrine. She argues that the “entitlement exception” applies: that reversal of the judgment could not possibly affect her right to the benefits she accepted under the judgment. *See In re L.T.*, No. 05-12-01560-CV, 2014 WL 2527486, at *3 (Tex. App.—Dallas June 3, 2014, no pet.) (mem. op.) (discussing exception). Under this exception, as long as Dharma accepts only

benefits which Hahn concedes, or is bound to concede, are due Dharma under the decree, Dharma “is not estopped to prosecute an appeal which involves only [her] right to further recovery.” *Carle*, 234 S.W.2d at 1004. The entitlement exception is narrow, and rests upon whether (1) a reversal of the judgment could possibly affect Dharma’s right to the benefits accepted by her under the judgment, and (2) Hahn would be compelled to concede in a new trial that Dharma has a right to retain the benefits regardless of the outcome of the litigation. *See In re L.T.*, 2014 WL 2527486, at *3 (citing *Carle*, 234 S.W.2d at 1004, and *Waite v. Waite*, 150 S.W.3d 797, 807 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)). For the exception to apply, Dharma’s right to the benefits accepted must be unquestionable. *See id.* (citing *Leedy v. Leedy*, 399 S.W.3d 335, 341 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (op. on reh’g)).

Dharma contends she has established the exception for both the sale of FSC and the encumbrance of SWDD. Regarding the sale of FSC, Dharma argues FSC could be awarded only to her because by law, only a medical doctor may own a medical practice. She contends FSC has “no value” to Hahn because he is not a medical doctor. *See Flynn Bros., Inc. v. First Med. Assocs.*, 715 S.W.2d 782, 785 (Tex. App.—Dallas 1986, writ ref’d n.r.e.) (when corporation comprised of lay persons employs licensed physicians to treat patients and corporation receives fee, corporation is unlawfully engaged in practice of medicine). A physician “commits a prohibited practice” if she “directly or indirectly aids or abets the practice of medicine by a person, partnership, association, or corporation that is not licensed to practice medicine by the [Texas Medical Board].” TEX. OCC. CODE ANN. § 164.052(a)(17) (West Supp. 2015). The purpose of this statutory prohibition “is to preserve the vitally important doctor-patient relationship and prevent possible abuses resulting from lay control of corporations employing licensed physicians to practice medicine.” *Gupta v. E. Idaho Tumor Inst.*, 140 S.W.3d 747, 751 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

But it does not follow that in making a just and right division of community property in a divorce, a trial court is precluded from any ruling other than awarding one hundred percent of the community interest in a medical practice to the spouse-physician. In *Eikenhorst v. Eikenhorst*, for example, the husband-physician argued that the trial court erred by awarding the non-physician-wife some \$48,000 in cash from the bank accounts of his professional association when dividing the community estate. 746 S.W.2d 882, 887 (Tex. App.—Houston [1st Dist.] 1988, no writ). The court recognized that “shares of professional associations are transferable only to persons who are licensed to practice the same type of profession for which the professional association was formed.” *Id.* (citing *McKnight v. McKnight*, 543 S.W.2d 863 (Tex. 1976)). But the court explained, “[b]ecause [wife] could not be awarded shares in a professional association in which she had a community interest, we hold that it was not improper for the trial court to award [wife] her community interest from the cash assets of the professional medical association in which her physician husband was the sole shareholder.” *Id.* And a court may make orders regarding the business operations of a professional association as long as all matters concerning the practice of medicine are handled by a licensed physician. *See Fite v. Emtel, Inc.*, No. 01-07-00273-CV, 2008 WL 4427676, at *7 (Tex. App.—Houston [1st Dist.] Oct. 2, 2008, pet. denied) (mem. op. on reh’g) (trial court’s appointment of receiver for professional association of physicians did not violate Texas Medical Practice Act where order addressed only control of association’s business operations); *see also McCoy v. Fempartners, Inc.*, No. 14-14-00754-CV, 2015 WL 9311526, at *9 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet. h.) (management and administration of nonmedical operations for professional association did not constitute control over association’s medical practice in violation Texas Medical Practice Act).

By her sale of FSC to obtain forgiveness of a debt, Dharma has exercised control over property in which Hahn had a community interest, precluding the trial court from making any disposition of it on remand. While only Dharma could own FSC, she was not “unquestionably” entitled to all of FSC’s assets. *See In re L.T.*, 2014 WL 2527486, at *3. These assets are now expended and unavailable for consideration on remand.

Regarding the encumbrance of SWDD, Dharma contends that the majority of SWDD is her separate property which cannot be awarded to Hahn if the judgment is reversed. She contends Hahn has already been awarded a money judgment to compensate him for his 7.04% interest in SWDD; the encumbrances are “much less than SWDD’s overall value”; she cannot be divested of her 84.92% separate property interest; and there are sufficient other assets to compensate Hahn for his community interest in SWDD. Therefore, she argues, her encumbrances of SWDD properties “would not necessarily or practically effect a new division of the community estate on remand.” She also contends that the trial court stated its intent to award the parties relatively equal shares of the community estate, a proportion neither party has challenged. Dharma concludes that when the separate property she claims in this appeal is properly characterized, confirmed, and removed from the community estate to be divided, she will be awarded more of the community estate to obtain an equal share, not less.

But Dharma’s burden is to establish her “unquestionable” right to the benefits she accepted under the decree, not to establish that the trial court on remand could make a just and right division of the remaining community property. *See Leedy*, 399 S.W.3d at 341; *In re L.T.*, 2014 WL 2527486, at *3. In *White v. White*, the wife argued the trial court could re-divide the marital estate to award her a fair and equitable share without divesting her of the benefits she accepted under the divorce decree. No. 14-14-00593-CV, 2016 WL 93694, at *4 (Tex. App.—

Houston [14th Dist.] Jan. 7, 2016, no pet. h.) (substitute mem. op.). The court rejected this argument, explaining:

This argument misses the mark and misconstrues the [entitlement] exception.

The exception identified by *Carle* does not focus on whether the trial court could award additional assets to the appellant on remand without divesting assets previously awarded. Rather, the exception applies only if the appellant could not possibly be divested on remand of those assets already awarded. *See Carle*, 234 S.W.2d at 1004; *Waite*, 150 S.W.3d at 807 (“The Texas Supreme Court explained that a party who accepts benefits that are undeniably his—so much that the opposing party would concede on another trial that the benefits are his—does not waive the right to appeal.”).

Id. And Hahn is not bound to concede that all of SWDD’s assets were Dharma’s to encumber. Hahn claimed, and his expert testified, that substantial assets of SWDD were contributed to SWDD by the community. The divorce decree grants Hahn an equitable lien on SWDD in recognition of the community’s interests. Two of the characterizations of property Dharma challenges on appeal relate to SWDD and arise from the trial court’s rulings based on evidence Hahn offered at trial. Dharma’s own experts concluded that Hahn had an interest in SWDD. On this record, Hahn is not compelled to concede in a new trial that Dharma has a right to encumber SWDD regardless of the outcome of the litigation. *See In re L.T.*, 2014 WL 2527486, at *3.

Even if Dharma prevails on her contention that approximately \$1 million of her separate property was mischaracterized as community, the trial court on remand is not required to award her the same benefits she has accepted under the decree.³ The trial court may consider the addition of \$1 million to Dharma’s separate estate in making its just and right division and make different awards of the community estate. *See Murff v. Murff*, 615 S.W.2d 696, 698 (Tex. 1981) (“size of separate estates” is one of factors trial court may consider in making just and right

³ If we concluded the trial court mischaracterized separate property as community property, we would be required to reverse the judgment and remand the cause. *See Vasudevan v. Vasudevan*, No. 14-14-00765-CV, 2015 WL 4774569, at *1 (Tex. App.—Houston [14th Dist.] Aug. 13, 2015, no pet.) (mem. op.) (if trial court mischaracterizes separate property as community property, error is by definition harmful, and court of appeals must reverse and remand).

division). And on retrial the court might find it necessary to make completely different dispositions and divisions of community assets given Dharma's assertion of control over FSC and SWDD. We cannot conclude that it is unquestionable that, if this case was reversed, Dharma would be entitled to receive more of the marital estate than was awarded to her in the divorce decree, or to receive the assets over which she has asserted control. *See In re L.T.*, 2014 WL 2527486, at *4.

Because the acceptance of benefits doctrine applies, Dharma's challenge to the trial court's property division is moot, and the proper disposition is dismissal of that portion of her appeal. *See Harlow Land Co. Ltd.*, 314 S.W.3d at 716. We dismiss Dharma's first issue as moot. *See Tomsu*, 381 S.W.3d at 717 (dismissing portion of appeal challenging property division where appellant accepted benefits of decree).

B. Grounds for Divorce

In her operative counter-petition, Dharma specifically pleaded Hahn's adultery as a ground for divorce. At trial, Hahn admitted committing adultery. The divorce decree, however, recites only insupportability as the ground for dissolving the marriage. In her second issue, Dharma contends the trial court abused its discretion by not granting the divorce on the ground of adultery. She seeks remand "so that the trial court can factor adultery into a new just and right division of the marital estate."

Both parties pleaded insupportability as a ground for divorce. Dharma pleaded it as an alternative ground, and Hahn pleaded it as one of two grounds. The family code provides that on the petition of either party to a marriage, "the court may grant a divorce without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation." TEX. FAM. CODE ANN. § 6.001 (West 2006).

There was evidence in the record to support a finding of insupportability in accordance with section 6.001. In the course of the five-day trial, the court heard testimony from both parties, their family members, experts, and other witnesses about “discord or conflict of personalities” between the parties reflecting their intractable disagreement on critical issues regarding their child, their home, their families, the management of their businesses, and their competency as professionals. So many disputes had arisen between the parties that SWDD and FSC were represented by separate counsel at trial after they were joined as parties to the divorce. In addition, Hahn specifically testified that the marriage had become insupportable. The trial court had discretion to find insupportability based on the legally and factually sufficient supporting evidence. *See id.*; *see also In re A.B.P.*, 291 S.W.3d 91, 95 (Tex. App.—Dallas 2009, no pet.) (discussing sufficiency standards of review in family law cases).

There was also evidence in the record to support a finding of adultery, most notably Hahn’s own admission. A trial court “may grant a divorce in favor of one spouse if the other spouse has committed adultery.” TEX. FAM. CODE ANN. § 6.003 (West 2006); *see also In re Marriage of C.A.S. and D.P.S.*, 405 S.W.3d 373, 383–84 (Tex. App.—Dallas 2013, no pet.) (trial court did not abuse its discretion by granting divorce on fault grounds where evidence was both legally and factually sufficient to support trial court’s finding that husband committed adultery).

Section 6.003, like section 6.001, is discretionary, using the term “may grant.” *See* TEX. GOV’T CODE ANN. § 311.016 (West 2013) (word “may” in statutory provision “creates discretionary authority or grants permission or a power”). Because there was evidence of both adultery and insupportability, the trial court could have chosen either of these grounds in deciding whether to grant a divorce. *See Baker v. Baker*, 469 S.W.3d 269, 280 (Tex. App.—Houston [14th Dist.] 2015, no pet.). In *Baker*, there was evidence of both cruelty and insupportability. *Id.* The court explained that “[t]he trial court could have concluded that the

marriage should have been dissolved on the basis of cruelty, but it did not.” *Id.* The trial court did not abuse its discretion by granting the divorce “solely on the basis of insupportability” where there was legally and factually sufficient evidence to support the finding. *Id.*; *see also In re A.B.P.*, 291 S.W.3d at 95.

Similarly, we conclude the trial court did not abuse its discretion by granting the divorce solely on the basis of insupportability. *See Baker*, 469 S.W.3d at 280; *see also Applewhite v. Applewhite*, No. 02-12-00445-CV, 2014 WL 787828, at *1–2 (Tex. App.—Fort Worth Feb. 27, 2014, no pet.) (mem. op.) (where record supported findings of both insupportability and adultery, trial court did not abuse discretion by finding insupportability, or “by not instead finding, or by not additionally finding, adultery as ground for the divorce”). We overrule Dharma’s second issue.

CONCLUSION

We dismiss as moot the portion of Dharma’s appeal challenging the trial court’s property division. We overrule Dharma’s second issue. In all other respects, we affirm the trial court’s judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IN THE INTEREST OF S.B.H., A CHILD,

KHALA DHARMA, Appellant

No. 05-14-00585-CV V.

DERRICK J. HAHN, Appellee

On Appeal from the 254th Judicial District
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Trial Court Cause No. DF-10-13791.

Opinion delivered by Justice Fillmore;

Justices Myers and Whitehill participating.

In accordance with this Court's opinion of this date, the portion of this appeal challenging the trial court's division of property is **DISMISSED** as moot. In all other respects, the trial court's judgment is **AFFIRMED**.

It is **ORDERED** that appellee Derrick J. Hahn recover his costs of this appeal from appellant Khala Dharma.

Judgment entered this 5th day of February, 2016.