

Affirmed; Opinion Filed March 19, 2018.



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

No. 05-17-00537-CV

**IN THE MATTER OF THE MARRIAGE OF THINAKAR NADAR
AND VIJAYALAKSHMI NADAR**

**On Appeal from the 469th Judicial District Court
Collin County, Texas
Trial Court Cause No. 469-56609-2015**

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Myers

Vijayalakshmi Nadar (Wife) appeals the decree of divorce from Thinakar Nadar (Husband) following a trial before the court. Wife brings two issues on appeal contending (1) the trial court abused its discretion in granting the divorce on the basis of adultery because the evidence is legally and factually insufficient to support the granting of the divorce on the ground of Wife's adultery, and (2) the case should be remanded for new trial because the division of assets was based on the trial court's erroneous finding of adultery. We affirm the trial court's judgment.

BACKGROUND

Husband and Wife were married in India in 1996. They had one child, a daughter, born in 1997. Wife testified "our marriage collapsed within two months of our marriage. After that, . . . [t]here was no marriage possible at all." In 2003, Husband moved to the United States. Wife and the daughter joined him here in 2004. In 2006, Wife and the daughter returned to India where they

stayed until 2013. Wife testified their remaining in India was not voluntary but was the result of Husband canceling her visa and plane ticket. In 2013, the daughter wanted to return to the United States to attend college, and Husband agreed to help her. The daughter insisted that Wife come with her. Husband then purchased a home in Plano. However, in 2015, Husband filed a petition for divorce. The trial court granted the divorce on the ground of adultery and divided the marital estate.

STANDARD OF REVIEW

Wife appeals the finding of adultery and the division of property. We review both of these issues under an abuse-of-discretion standard. *In re Marriage of C.A.S.*, 405 S.W.3d 373, 382 (Tex. App.—Dallas 2013, no pet.). A trial court abuses its discretion when it acts “without reference to any guiding rules and principles; in other words, whether the act was arbitrary or unreasonable.” *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

We review a trial court’s findings of fact and conclusions of law for legal and factual sufficiency under the same standards as for reviewing evidence supporting a jury’s answer. *Moroch v. Collin*, 174 S.W.3d 849, 857 (Tex. App.—Dallas 2005, pet. denied). In a legal sufficiency review, we credit evidence that supports the trial court’s finding if a reasonable fact finder could, and we disregard contrary evidence unless a reasonable fact finder could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In a factual sufficiency review, we examine all the evidence in the record, both supporting and contrary to the trial court’s finding, and reverse only if the finding is so against the great weight of the evidence as to be clearly wrong and unjust. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam). The trial court is the sole judge of the credibility of the witnesses and is responsible for resolving conflicts in the evidence, weighing the evidence, and drawing reasonable inferences from basic facts to ultimate facts. *Wilson*, 168 S.W.3d at 819–21.

In family law cases, legal and factual sufficiency challenges do not constitute independent grounds for asserting error, but they are relevant factors in determining whether the trial court abused its discretion. *C.A.S.*, 405 S.W.3d at 383. To determine whether the trial court abused its discretion because the evidence is legally or factually insufficient to support the trial court’s decision, we consider whether the trial court (1) had sufficient evidence upon which to exercise its discretion, and (2) erred in its application of that discretion. *Moroch*, 174 S.W.3d at 857. We conduct the applicable sufficiency review when considering the first prong of the test. *Id.* We then determine whether, based on the elicited evidence, the trial court made a reasonable decision. *Id.* A trial court does not abuse its discretion if it bases its decision on conflicting evidence as long as there is some evidence of a substantive and probative character to support the decision. *In re S.N.Z.*, 421 S.W.3d 899, 911 (Tex. App.—Dallas 2014, pet. denied); *Moroch*, 174 S.W.3d at 857.

ADULTERY

In her first issue, Wife contends the evidence is legally and factually insufficient to support the trial court’s granting the divorce on the ground of adultery. 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). Adultery means the “voluntary sexual intercourse of a married person with one not the spouse.” *In re S.A.A.*, 279 S.W.3d 853, 856 (Tex. App.—Dallas 2009, no pet.); *see also Lawler v. Lawler*, 15 S.W.2d 684, 685 (Tex. Civ. App.—Waco 1929, no writ) (adultery in divorce proceedings “means voluntary sexual intercourse of a married person with one not the husband or wife of the offender”). Adultery is not limited to actions committed before the parties separated. *C.A.S.*, 405 S.W.3d at 383. Adultery can be shown by direct or circumstantial evidence. *Id.* However, there must be clear and positive proof, and mere suggestion and innuendo are insufficient. *Id.*

In this case, Husband presented evidence of two instances of adultery. The first instance was some time during 2007 to 2009 with a man named Satinder while Wife was living in India.

Husband testified Wife lived with Satinder for two years. Wife testified as follows:

Q. Ma'am, in 2009 and 2008, you lived in India with a man named Satinder (phonetic), correct?

....

A. I did not live with anybody.

Q. Okay. During 2008 and 2009 did you not have a sexual relationship with a person named Satinder?

A. I had a friendship with him, yes.

....

Q. . . . There was some talk about a—back in 2007—back 2007 or 2008, a man that you had a relationship with. Did I understand that correctly?

A. 2008, yes, we were friends and then, yes, there was some intimacy, but it was not a full-blown affair the way he's trying to make out and that was not the reason the marriage broke up.

Q. Okay. So back then there was something?

A. Okay.

Q. . . . [Y]our husband found out about it very quickly; is that right?

A. He found out immediately because he was accessing my E-mails without my knowledge.

Q. All right. Did he file for a divorce when he found out about it?

A. No, he did not.

....

Q. . . . [T]his relationship in 2007 [sic], is that the only person that you ever had an intimate relationship with?

A. Yes.

Q. Okay. And did it cause the breakup of your marriage?

A. No. The marriage had broken up before that.

Wife contends her testimony shows only a friendship, or an “intimate relationship,” but that it is no evidence of sexual intercourse. We disagree. The English language contains many facially innocuous terms that are also euphemisms for sexual intercourse.¹ “Intimate” is one such euphemism. See *Intimate*, WEBSTER’S THIRD NEW INT’L DICTIONARY (1981) (defining the adjective “intimate” as “f. marked by or befitting a very close personal relationship : marked by or befitting a relationship of love, warm or ardent liking, deep friendship, or mutual cherishing,” and “h. engaged in or marked by sexual relations”). It appears frequently in Texas case law as a synonym for sex from the 1880s to the present day.² Wife admitted to having “some intimacy” and an “intimate relationship” with Satinder. Whether Wife meant only a “deep friendship” or “sexual relations” was a matter within the trial court’s role as the trier of fact to determine. See *id.* (definitions of “intimate”). That the trial court concluded Wife’s testimony of having some intimacy and an intimate relationship meant sexual relations was a matter within the discretion of the court.

The second asserted instance of adultery was in 2016 after Wife had returned to the United States. At that time, Wife and Husband shared a house. Wife lived in the upstairs rooms and Husband lived downstairs. Wife invited a man who was a runner on his way to a race to stay upstairs at the house. Husband was downstairs, and he testified he heard what sounded like Wife and the man having sex:

Q. Okay. Did you hear any noises between your wife and this runner in 2016 when you were in your marital residence in Plano?

A. Yes, I did hear.

¹ E.g., “being unfaithful,” “keeping company,” “sleeping together,” and “living together.” These phrases can connote either sexual or non-sexual relationships depending on the context and circumstances.

² See, e.g., *Houston v. State*, No. 02-17-00025-CR, 2018 WL 1095541, at *1 (Tex. App.—Fort Worth Mar. 1, 2018, no pet. h.) (“Their relationship developed into a friendship within a matter of days and into an intimate relationship within a couple of weeks. She eventually moved in with him.”); *Fleming v. State*, 455 S.W.3d 577, 580 (Tex. Crim. App. 2014) (“Appellant claims that in *Lawrence v. Texas*, the United States Supreme Court extended the Due Process Clause’s protection of liberty to the intimate choices of unmarried persons.”); *Sims v. State*, 18 S.W. 410, 411 (Tex. Ct. App. 1892) (“It is insisted by the appellant that the intimate relations between himself and the witness [appellant’s mistress] was tantamount to the relation of husband and wife.”); *Burkhard v. State*, 18 Tex. Ct. App. 599, 620 (1885) (“He was evidently impressed with the belief that his wife was unfaithful to him; that she had become criminally intimate with another man.”).

....

Q. Okay. Did you hear indications that they were having sex?

A. That's how it sounded to me.

Wife testified she did not have sex with the man:

Q. Okay. And while this man was in the marital residence in 2016 and while your daughter was there and while my client [Husband] was there, you and this man had sexual relations upstairs?

A. No, we did not.

....

Q. Did you have an intimate relationship with that man?

A. No, I did not.

Q. Did you ever have sexual relations with this man?

A. No, no.

The trial court's finding of adultery is supported by Wife's admission of having an intimate relationship with Satinder and by Husband's testimony that he heard sounds indicating Wife and the runner were having sex.

Wife asserts that the testimony about adultery constituted trial by ambush and should not be considered. Wife concedes Husband's live petition alleged adultery as a ground for divorce, but she asserts the petition failed to identify the person with whom she allegedly committed adultery. The record does not show that Wife specially excepted to Husband's petition or that she objected to the evidence at trial based on the failure to identify the other person. Therefore, she has waived these complaints. *See* TEX. R. CIV. P. 90 ("Every defect, omission or fault in a pleading either of form or of substance, which is not specifically pointed out by exception in writing and brought to the attention of the judge . . . in a non-jury case, before the judgment is signed, shall be deemed to have been waived by the party seeking reversal on such account"); TEX. R. APP. P. 33.1(a) ("As a prerequisite to presenting a complaint for appellate review, the record must show

that (1) the complaint was made known to the trial court by a timely request, objection, or motion”).

Wife also argues the proceeding constituted trial by ambush because Husband failed to produce to Wife before trial any evidence of an affair as required by the Texas Rules of Civil Procedure. However, Wife does not explain what rules entitled her to such information. The record on appeal does not show Wife requested before trial that Husband disclose this information. *See, e.g.*, TEX. R. CIV. P. 194.2 (request for disclosure); 197.1 (interrogatories); 198.1 (request for admissions); 199.5 (oral depositions). Moreover, Wife did not object to the admission of the evidence due to Husband’s failure to comply with discovery rules. *See* TEX. R. APP. P. 33.1(a). We conclude Wife has failed to preserve any error from the admission of the evidence and, even if preserved, has failed to establish that the trial court erred by admitting the evidence.

Wife also argues the evidence admitted was insufficient. She relies first on *In re S.A.A.*, 279 S.W.3d 853 (Tex. App.—Dallas 2009, no pet.). In that case, the divorce decree granted the divorce on the ground of “mutual” adultery. The husband asserted on appeal there was no evidence to support the finding that he committed adultery. The only evidence of the husband having sexual intercourse while married “was her conjecture that [the husband] was ‘seeing’ another unidentified woman. No proof was offered, and [the husband] denied the accusation.” *Id.* at 856. We concluded this testimony failed to constitute sufficient proof to support a finding of adultery. *Id.*³ In this case, however, there is more evidence than Husband’s mere conjecture that Wife was “seeing” other men. Husband presented evidence of Wife’s adultery through his testimony that he heard sounds consistent with her and the runner having sex and through Wife’s testimony that she

³ We also concluded the trial court erred by entering the finding of “mutual” adultery because the wife did not plead adultery and the issue was not tried by consent. *S.A.A.*, 279 S.W.3d at 856.

was in an intimate relationship with Satinder. This evidence is not the mere conjecture present in S.A.A.

Wife also cites *Dzierwa v. Cerda*, No. 04-13-00407-CV, 2014 WL 3843950 (Tex. App.—San Antonio 2014, no pet.). In that case, the wife accused the husband of adultery. The only evidence of his adultery was the wife’s testimony that she “kn[e]w that he was seeing another women” [sic] and that she “believe[d] he was having an affair with that woman.” *Id.* at *3. She also testified she had proof of his adultery in some e-mails, but she did not produce the e-mails and did not testify about their contents. *Id.* The court of appeals concluded the evidence “does not rise above the level of mere suggestion or innuendo that [the husband] committed adultery.” *Id.* In this case, however, we have more than Husband’s mere statement that Wife was seeing another man. He testified he heard what sounded to him like her having sex with the runner, and she admitted to having an intimate relationship with Satinder.

Wife also asserts the evidence of her adultery is insufficient because it is unsupported by the type of evidence contained in this Court’s opinion in *In re Marriage of C.A.S.*, 405 S.W.3d 373 (Tex. App.—Dallas 2013, no pet.). In that case, the wife “found a woman’s underwear and suitcase in the master bedroom of the marital home,” and “a private investigator filmed [the husband and the other woman] kissing and hugging at an airport.” *Id.* at 383. The husband and the other woman also spent some weekends together, took several trips together, and the husband bought her several expensive gifts. *Id.* We found the evidence in that case was legally and factually sufficient to support the finding that the husband committed adultery. *Id.* at 383–84. However, we did not say that those facts were necessary for a spouse to prove adultery. Although the evidence in this case is different from that in *C.A.S.*, Husband’s testimony that he heard what sounded like Wife having sex with the runner and Wife’s testimony that she had an intimate relationship with Satinder was clear and positive proof and not mere suggestion or innuendo.

Although circumstantial evidence provides the basis for the adultery finding, the finding can be based on circumstantial evidence. *C.A.S.*, 405 S.W.3d at 383. *Cf. Newberry v. Newberry*, 351 S.W.3d 552, 556 (Tex. App.—El Paso 2011, no pet.) (adultery finding supported by wife’s testimony her husband told her that while at a party, “he went into a room with his high school sweetheart, Liza, and stayed in there with her with the doors closed and lights off for more than twenty minutes”). We conclude the trial court had sufficient evidence before it to determine whether the divorce should be granted on the ground of adultery, and the trial court’s decision to grant the divorce on that ground was reasonable. Therefore, the trial court did not abuse its discretion by granting the divorce on the ground of Wife’s adultery. We overrule appellant’s first issue.

PROPERTY DIVISION

In her second issue, Wife contends the trial court abused its discretion in the division of property.⁴ Wife appears to assert that the trial court made a disproportionate award of the marital property to Husband based on its incorrect determination that the divorce should be granted on the ground of adultery. Wife argues, “But for the adultery finding, the Trial Court would have likely made a more equal division of the assets” As discussed above, the trial court did not abuse its discretion by granting the divorce on the ground of adultery. As discussed below, the trial court did not abuse its discretion in the division of the marital estate.

The Family Code requires that the court “order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.” FAM. § 7.001 (West 2006). The trial court has wide discretion in dividing the community property, and the court of appeals does not disturb that division absent an

⁴ Wife’s stated issue was: “Whether this case should be remanded for new trial because the Trial court’s entire judgment—including division of assets between Mr. and Mrs. Nadar—was based on the Trial Court’s erroneous finding of adultery.”

abuse of discretion. *See Murff v. Murff*, 615 S.W.2d 697, 698–99 (Tex. 1981). When exercising its broad discretion to divide the community property, the trial court may consider many factors, including the nature of the property, the relative earning capacity and business opportunities of the parties, the parties’ relative financial condition and obligations, the parties’ education, the size of the separate estates, the age, health, and physical conditions of the parties, fault in the breakup of the marriage, the benefit the innocent spouse would have received had the marriage continued, and the probable need for future support. *Id.* at 699; *Slicker v. Slicker*, 464 S.W.3d 850, 858 (Tex. App.—Dallas 2015, no pet.). The party complaining of the division of the community estate has the burden of showing from the evidence in the record that the trial court’s division of the community estate was so unjust and unfair as to constitute an abuse of discretion. *Slicker*, 464 S.W.3d at 858.

The trial court divided the marital estate as follows:

Husband	Wife
Plano house net value: \$118,455 (Fair market value of \$500,000 Mortgage balance of \$381,545)	Mumbai flat net value: \$310,000 (Fair market value of \$310,000 Mortgage balance of \$0)
Honda Accord net value: \$10,000 (Fair market value: \$10,000 Lien balance: \$0)	Nissan Rogue net value: \$7,480 (Fair market value: \$18,000 Lien balance: \$10,520)
Cash accounts: \$2,852 ⁵	Cash accounts: \$0
Credit Card debt: \$5,190	Credit Card accounts: \$0
Fifty percent of stock: \$10,500	Fifty percent of stock: \$10,500
Plano house furnishings: No value stated	Mumbai flat furnishings: No value stated
Clothing, jewelry, and personal effects: No value stated	Clothing, jewelry, and personal effects: No value stated
	Contents of safety deposit box: No value stated

⁵ The trial court did not make express findings of fact and conclusions of law of the parties’ cash accounts and credit card debt. However, the court stated in the findings of fact that it adopted the values set forth in Petitioner’s Exhibit P7. That exhibit included values for Husband’s cash accounts and his credit card debt. Wife testified she had no cash and no credit cards.

Thus, the net value of the marital estate awarded to Husband was \$136,617, and the net value awarded to Wife was \$327,980. The record shows Wife received \$191,363 more of the net value of the marital estate than Husband. Besides the division of the marital estate, the trial court ordered Husband to pay spousal support to Wife in the amount of \$1,200 per month for twenty-four months, which equals \$28,800. Wife asserts the division of property is not just and right for several reasons.

Wife first argues the trial court did not account for Husband's transfer of marital assets to friends and family in India. Wife presented documentary evidence that from 2012 to 2015, Husband transferred \$131,571 "to others in India." She estimated Husband sent to India a total of \$368,028 without her knowledge from 2004 to the day of trial. Husband testified that the money he sent to India was to support his family, including paying for his mother's surgeries. He also testified he provided money for Wife's family and friends, although Wife denied that he did so. If Wife were correct that this spending was a fraud on the community, an award to Wife of half that amount would be \$184,014. Even with that correction to the marital estate, Wife received \$7,349 more of the marital estate than Husband.

Wife also argues the trial court "failed to account for the significant community debts incurred as a direct result of Mr. Nadar's actions, including car loans, credit card bills, personal loans related to the flat in India, and others." The trial court accounted for the car loan on the Nissan Rogue awarded to Wife—the court ordered Wife to pay it. There is no evidence of any other car loan. The court also accounted for Husband's credit card bills by ordering Husband to pay "any and all debts, liabilities, and credit cards in husband's name." As for the "personal loans related to the flat in India," Wife testified she borrowed \$7,500 from her mother to pay for repairs to the flat when Husband failed to have the flat repaired. However, Wife presented no documentation that she actually borrowed the money from her mother to repair the flat and that

the debt is outstanding. The trial court, as the judge of the credibility of the witnesses, was not required to believe Wife's testimony. Wife does not explain what the community debts from "others" were.

Next, Wife asserts the trial court erred by awarding her the Mumbai flat and for including it in the marital estate when she had transferred it to their daughter. Wife presented no documentary evidence that she transferred the flat. The trial court was not required to believe her testimony that she did so.

Wife also argues the trial court "inappropriately valued the flat in India at \$300,000 [sic]." The court actually valued the flat at \$310,000. Wife testified they purchased the flat for \$60,000 and that it is now worth \$220,000. Wife did not provide any explanation for her testimony of its current value. Husband testified, "I got some valuation done by some property valuation there, and with the—today's valuation, it could be up to three hundred and six thousand dollar value." Petitioner's exhibit P-7 was admitted as a summary of Husband's testimony, and it showed the flat had a value of \$310,000. Wife argues there was no evidence to support the value of the flat other than the parties' own testimony. However, their testimony was some evidence. *See Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996) ("A property owner is qualified to testify to the market value of his property."). The trial court resolved the conflicting evidence as to the flat's value and determined it was \$310,000, a value that was supported by the evidence.

Finally, Wife asserts the trial court's division of the marital assets "failed to take into account the cost Ms. Nadar will have to renew her education, credentials, and training in order find suitable employment to support herself, which Ms. Nadar must now do as a direct result of her age and dutiful attention to her daughter as a stay-at-home mother for two decades." However, the trial court awarded Wife spousal maintenance, which is intended to account for those factors. *See* FAM. § 8.052(1), (2), (3), (4), (5), (9) (West Supp. 2017). Moreover, Wife presented no evidence

of the actual costs she will have to obtain suitable employment. Accordingly, Wife has not shown the trial court abused its discretion.

After considering all the evidence concerning the division of the marital estate, Wife has not shown the trial court's division of the property was not just and right. Even when accounting for Husband's sending money to friends and family in India, the evidence shows Wife received more than half the net value of the marital estate. We conclude she has not shown the trial court abused its discretion in the division of the marital estate. We overrule Wife's second issue.

CONCLUSION

We affirm the trial court's judgment.

/Lana Myers/
LANA MYERS
JUSTICE

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

JUDGMENT

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Trial Court Cause No. 469-56609-2015.
Opinion delivered by Justice Myers.
Justices Lang-Miers and Boatright
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Thinakar Nadar recover his costs of this appeal from appellant Vijayalakshmi Nadar.

Judgment entered this 19th day of March, 2018.